

# NOTE

## An Ineffective State of Justice: Barriers to Ineffective-Assistance-of-Counsel Claims in State and Federal Courts

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### TABLE OF CONTENTS

INTRODUCTION . . . . .	185
I. HISTORICAL BACKGROUND OF FEDERAL HABEAS CORPUS . . . . .	188
A. EQUITABLE HISTORY AND PRE- <i>MARTINEZ</i> DEVELOPMENTS . . . . .	188
B. AN EQUITABLE EXCEPTION: <i>MARTINEZ</i> AND <i>TREVINO</i> . . . . .	192
C. GUTTING <i>MARTINEZ-TREVINO</i> : <i>SHINN V. RAMIREZ</i> . . . . .	196
II. STATE POSTCONVICTION RELIEF . . . . .	198
A. HISTORY OF HABEAS AND POSTCONVICTION RELIEF AT THE STATE LEVEL . . . . .	199
B. STATE RESPONSES TO <i>MARTINEZ</i> AND <i>TREVINO</i> . . . . .	202
1. Right to Postconviction Counsel . . . . .	202
2. Equitable Exceptions to State Procedural Defaults . . . . .	207
C. EVIDENTIARY HEARINGS IN STATE POSTCONVICTION PROCEEDINGS . . . . .	211
III. HOW PETITIONERS AND LITIGATORS CAN RESPOND . . . . .	213
A. OPTIONS IN STATE COURT . . . . .	214
B. OPTIONS IN FEDERAL COURT . . . . .	216
CONCLUSION . . . . .	218

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## INTRODUCTION

Criminal trials are probably the most high-stakes events that occur in courtrooms across the United States.<sup>1</sup> Despite their importance, however, errors are inevitable.<sup>2</sup> Although many errors can be corrected on appeal, one of the most difficult errors to overcome is ineffective assistance of counsel.<sup>3</sup> The difficulty of obtaining relief on ineffective-assistance-of-trial-counsel (IATC) claims is twofold. First, IATC claims are subject to a demanding standard of review. Under *Strickland v. Washington*, proving constitutionally ineffective assistance of counsel requires showing both that counsel's performance was deficient and that that deficient performance actually prejudiced the defendant.<sup>4</sup> However, "[j]udicial scrutiny of counsel's performance must be highly deferential" to eliminate concerns of hindsight bias and to account for the possibility that the purportedly deficient performance was actually strategic.<sup>5</sup> Second, many states have procedural systems which discourage or even forbid raising these claims on appeal, requiring instead that they be brought in state postconviction proceedings.<sup>6</sup> These proceedings are inherently more difficult than appeals because there is no federal constitutional right to counsel,<sup>7</sup> meaning that there is also no guarantee of effective assistance.<sup>8</sup> Thus, when attorneys in these postconviction proceedings make errors themselves,<sup>9</sup> remedies may be limited or nonexistent.

State courts handle many more criminal cases<sup>10</sup> and appeals<sup>11</sup> than federal courts. Therefore, the majority of people who seek to raise IATC claims are almost certainly doing so as a result of a conviction in a state court. Prisoners convicted in state

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1. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) ("[T]he trial of a criminal case in state court [is] a decisive and portentous event.").

2. See NICOLE L. WATERS ET AL., BUREAU OF JUST. STAT., U.S. DOJ, NJC 248874, CRIMINAL APPEALS IN STATE COURTS 2 (2015) (explaining that state appellate courts' *raison d'être* is "to detect and correct errors in trial court decisions").

3. See *id.* at 6 fig. 3. This figure displays the reversal rates for the top ten issues raised on appeals in state courts. Only "[r]elevancy/prejudicial evidence" at 2.9% ranked lower than "[i]neffective assistance" at 3.6%; however, the data for relevancy should be "[i]nterpret[ed] with caution" due to the statistical outcomes. *Id.* Therefore, it's possible that ineffective assistance of counsel is actually the least likely category of error to be reversed in state courts.

4. 466 U.S. 668, 687 (1984).

5. *Id.* at 689.

6. See *infra* notes 58–80 and accompanying text.

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

8. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

9. "Incompetent habeas corpus representation occurs all too frequently in death-penalty appeals—especially in Southern states, which are less than eager to spend public funds to ensure adequate representation to indigent inmates." Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 348 (2003). As Hammel's comment implies, ineffective assistance is often a product of underfunding of public defenders and related organizations. See generally Braden Daniels, *The Unconstitutionality of Underfunded Public Defender Systems*, 3 HELMS SCH. GOV'T UNDERGRAD. L. REV. (2024).

10. Compare S. Gibson et al., *Welcome to CSP STAT*, CT. STAT. PROJECT (Oct. 2024) <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal> [<https://perma.cc/5LF8-UUKN>] (showing 15.61 million new criminal cases in 2022), with *Federal Judicial Caseload Statistics 2022*, U.S. COURTS, <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2022>

court may raise these IATC claims in the state courts directly. These claims are typically raised through collateral postconviction motions or proceedings, but some states require IATC claims to be brought on appeal.<sup>12</sup> Because the U.S. Constitution provides a right to effective assistance of trial counsel,<sup>13</sup> many of these claims may also be brought in federal courts via a writ of habeas corpus.<sup>14</sup> Habeas corpus is also available as a remedy for those in federal custody,<sup>15</sup> but this Note will focus on federal habeas as a remedy for people in state custody. This Note uses the term “habeas” to refer to the federal-court proceedings under 28 U.S.C. § 2254, and the term “postconviction” to refer to state-court proceedings. In theory, both habeas and postconviction relief exist as “a bulwark against convictions that violate ‘fundamental fairness.’”<sup>16</sup>

The federal judiciary therefore plays an important role in supervising the states by ensuring that convictions are not obtained in violation of federal constitutional requirements. This role is limited, however, by principles generally requiring would-be habeas petitioners in federal court to first raise any issues in state court.<sup>17</sup> For the purposes of this Note, the most significant exception to this requirement is the *Martinez–Trevino* exception. Under this exception, petitioners who received ineffective assistance of counsel both at trial and during state postconviction proceedings may be able to raise a claim in federal court even if it was not properly raised in the state system.<sup>18</sup> This exception is potentially applicable to convictions obtained in a majority of states,<sup>19</sup> and thus provides a “federal

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[<https://perma.cc/CKC6-SEP3>] (last visited Sept. 29, 2024) (showing 71,111 new criminal cases in the federal system in 2022).

11. Compare WATERS ET AL., *supra* note 2, at 1 (estimating 69,348 criminal appeals filed in state courts in 2010), with U.S. COURTS, JUDICIAL BUSINESS at 8 (2010), [https://www.uscourts.gov/sites/default/files/federaljudicialcaseloadstatistics2010judicialbusiness\\_0.pdf](https://www.uscourts.gov/sites/default/files/federaljudicialcaseloadstatistics2010judicialbusiness_0.pdf) [<https://perma.cc/3EUP-8N48>] (calculating 13,065 appeals commenced in the federal courts of appeal between March of 2009 and March of 2010).

12. For an analysis of the different methods used by states to handle IATC claims, see *infra* notes 56–80 and accompanying text.

13. U.S. CONST. amend. VI (providing the right to counsel at criminal trials); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

14. See 28 U.S.C. § 2254(a). Although *Strickland v. Washington* provides the minimum standard for the effectiveness of counsel under the U.S. Constitution, states are free to impose additional requirements above and beyond the *Strickland* standard as a matter of state law to govern attorney effectiveness. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (discussing this standard for police activity, closely connected with constitutional criminal procedure). Because § 2254 does not provide relief for petitioners who allege only a violation of state law, it is conceivable that some IATC claims—those alleging IATC where counsel exceeded the *Strickland* standard but failed to meet a hypothetical higher state standard—could be addressed only in state courts.

15. See 28 U.S.C. § 2241(c)(1)–(3); see also 28 U.S.C. § 2255(a) (providing people in federal custody with the opportunity to move the sentencing court to set aside, vacate, or correct their sentence).

16. *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

17. See 28 U.S.C. § 2254(b)(1)(A). *But see* § 2254(b)(1)(B) (providing two statutory exceptions to exhaustion).

18. See *infra* Section I.B.

19. See *infra* Section I.B.

safety valve”<sup>20</sup> for those who have suffered through two rounds of ineffective assistance of counsel.

However, the Supreme Court dealt a major blow to people seeking federal habeas relief from state convictions tainted by IATC in its 2022 decision of *Shinn v. Ramirez*.<sup>21</sup> This decision severely limited the availability of evidentiary hearings for petitioners with IATC claims even when the *Martinez–Trevino* exception applies.<sup>22</sup> Essentially, this means that many IATC claims might be able to be filed in federal court via habeas, but those federal courts will in many cases be prevented from hearing any evidence of those claims.

In Part I, this Note will provide a historical background of postconviction remedies at the federal level. This background will open with a brief history of habeas before *Martinez* followed by an in-depth analysis of how *Martinez* and *Trevino* changed the federal habeas landscape across the states. This Part will conclude with a discussion of the background and impact of *Shinn*. In Part II, this Note will examine the history of postconviction remedies in state courts and survey the ways state courts have reacted to the developments in the federal system. Finally, Part III of this Note will conclude with options and suggestions for defense attorneys in trial, appellate, postconviction, and habeas proceedings in both state and federal courts to maximize their chances of success in advocating for their clients.

## I. HISTORICAL BACKGROUND OF FEDERAL HABEAS CORPUS

### A. EQUITABLE HISTORY AND PRE-MARTINEZ DEVELOPMENTS

The concept of a civil suit challenging unlawful confinement—commonly called habeas corpus—has ancient roots.<sup>23</sup> “In the United States . . . the concept has become practically synonymous with additional layers of review of criminal convictions.”<sup>24</sup> Some form of collateral postconviction review for state prisoners exists at both the federal and state level. In the federal system, 28 U.S.C. § 2254 permits federal courts to grant relief to those in state custody “in violation of the Constitution or laws or treaties of the United States.”<sup>25</sup>

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20. *Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013).

21. 596 U.S. 366, 371 (2022) (concluding that the equitable rule announced in *Martinez* does not permit “a federal court to dispense with § 2254(e)(2)’s narrow limits because a prisoner’s state postconviction counsel negligently failed to develop the state-court record”); see also *infra* notes 84–97 and accompanying text.

22. See *infra* Section I.C.

23. See AMANDA L. TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 7–9 (2021) (highlighting that habeas corpus can be traced back as far as the early seventeenth century). Although a full discussion of the history of habeas corpus generally and collateral postconviction relief specifically is outside the scope of this Note, Tyler provides a comprehensive and thorough history of the writ, including a comparison of its history in the United States with its development in England after U.S. independence.

24. *Id.* at 7. However, the term “habeas” is also used in many other contexts in the U.S. legal system. See *id.* at 92.

25. 28 U.S.C. § 2254(a); see also 28 U.S.C. § 2241(c)(3).

The growth from these ancient roots, however, has been pruned significantly in the past fifty years. After the Supreme Court's 1972, nine-opinion, fractured decision in *Furman v. Georgia*, which focused on the constitutionality of the death penalty,<sup>26</sup> there was some backlash in support of the death penalty and the political climate became more hostile to collateral review of death sentences, leading to "new judicial and statutory restrictions on habeas corpus."<sup>27</sup> The Supreme Court typically justifies these restrictions by reference to "the principles of comity, finality, and federalism."<sup>28</sup> However, as Erica Hashimoto has pointed out, these principles could be used to justify "virtually *any* limitation" on—or even the "complete elimination" of—habeas in federal courts.<sup>29</sup> These restrictions may also be rooted in a background belief among the Justices of the Supreme Court that petitioners seeking habeas relief are "morally unworthy."<sup>30</sup>

In 1977, the Supreme Court decided *Wainwright v. Sykes*, which resolved the "somewhat tortuous efforts to deal with" the issue of habeas cases which were presented to federal courts after state courts had resolved the case on an adequate and "independent state *procedural* ground."<sup>31</sup> By adopting the cause-and-prejudice

26. 408 U.S. 238 (1972). In *Furman*, "at least two of" the Justices, Justice Brennan and Justice Marshall, "concluded that the . . . death penalty is constitutionally impermissible in all circumstances." *Id.* at 306 (Stewart, J., concurring); *see also id.* at 305 (Brennan, J., concurring) ("The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes."); *id.* at 370 (Marshall, J., concurring) ("To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey.").

27. Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1742–43 (2022).

28. *Williams v. Taylor*, 529 U.S. 420, 436 (2000). The Supreme Court started using this language specifically in reference to Congress's purpose in passing the Antiterrorism and Effective Death Penalty Act (AEDPA), discussed *infra* notes 41–45 and accompanying text. For a detailed legislative history of AEDPA along with a criticism that its "purpose" has been misinterpreted, see Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 458–80 (2007).

29. Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 141 (2014); *see also Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J., concurring) ("A State determination of the historical facts . . . may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made. *To be sure, these considerations argue equally against hearing the claims at all long after the facts took place.*" (emphasis added)).

30. *See Brown*, 344 U.S. at 498 (Frankfurter, J., concurring). To the extent that one would regard criminal defendants as "morally unworthy" of constitutional protections, one would seem to misunderstand the background principles and original intent of the Constitution. No fewer than *nine* independent parts of the Constitution and its first amendments exist specifically to protect those suspected, accused, or even *convicted* of wrongdoing. *See* U.S. CONST. art. I, § 3, cls. 6–7 (establishing procedural two-thirds conviction requirements and substantive penalty limitations for impeachment); U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing *ex post facto* laws and bills of attainder); U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from passing *ex post facto* laws and bills of attainder); U.S. CONST. art. II, § 2, cl. 1 (authorizing the President to grant pardons for those convicted of federal crimes); U.S. CONST. art. III, § 2, cl. 3 (requiring a jury trial and proper venue for criminal trials); U.S. CONST. art. III, § 3, cl. 1 (establishing evidentiary requirements for a conviction of treason); U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); U.S. CONST. amends. V–VI (establishing numerous protections for criminal trials); U.S. CONST. amend. VIII (providing substantive limits to permissible bail and postconviction punishments).

31. 433 U.S. 72, 82 (1977) (emphasis added).

standard from two earlier habeas cases<sup>32</sup> and refusing to reach the merits of petitioner<sup>33</sup> John Sykes's claim, the *Sykes* Court effectively established that failure to follow any procedural rule in raising a federal claim in state court would prevent a petitioner from asserting that claim in federal court, "absent a showing of *cause* for the noncompliance and some showing of actual *prejudice* resulting from the alleged constitutional violation."<sup>34</sup> Claims which could not demonstrate "cause" and "prejudice" after procedural violations would thus be considered procedurally defaulted. Then-Associate Justice Rehnquist rationalized the decision as one which would prevent "sandbagging" by defense attorneys and would make "the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road.'"<sup>35</sup> In dissent, Justice Brennan argued that "the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel," rather than strategic gamesmanship or "sandbagging."<sup>36</sup>

By 1986, the Court squarely addressed the attorney-created procedural defaults that Justice Brennan had worried about. In *Murray v. Carrier*, the Court held that "ignorant or inadvertent attorney error" in failing to present a federal claim to a state tribunal does not constitute "cause" to excuse procedural default of that claim in federal habeas court, unless that ignorance or inadvertence was so severe as to constitute deficient performance under *Strickland*.<sup>37</sup> This ruling was reaffirmed several years later in *Coleman v. Thompson*.<sup>38</sup> Both decisions provided justification based on principles of agency law: because the lawyer was the defendant's (or petitioner's) agent, any error attributable to the lawyer was vicariously attributable to the principal. However, a state's obligation to provide constitutionally effective counsel conversely meant that errors of a constitutional magnitude were attributable to the state instead.<sup>39</sup>

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32. See *Davis v. United States*, 411 U.S. 233, 242, 245 (1973); *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

33. From a procedural-posture standpoint, John Sykes was the respondent, not the petitioner, in this Supreme Court case. *Sykes*, 433 U.S. at 74. This Note uses the term "petitioner" as a reference to the person seeking postconviction or habeas relief, not as the party petitioning an appeals court to overrule the decision of a lower court.

34. *Id.* at 84 (emphasis added); see also *id.* at 87–91.

35. *Id.* at 89–90. But see *id.* at 103 n.5 (Brennan, J., dissenting) (discussing the absurdity of this argument).

36. *Id.* at 104 (Brennan, J., dissenting).

37. 477 U.S. 478, 486–88 (1986).

38. 501 U.S. 722, 753 (1991).

39. See *Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 753–54. A state's constitutional obligation to provide effective counsel to defendants was famously articulated in a federal habeas case from a petitioner in state custody. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963). Importantly, the constitutional right to counsel is guaranteed only at some points in the criminal process. There is no federal constitutional right to counsel in habeas proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Interestingly, the Court's holding that deficient performance short of the *Strickland* standard is attributable to the petitioner whereas deficient performance that satisfies *Strickland* is attributable to the state implies that counsel required by the Sixth Amendment acts as an agent for "coprincipals." See RESTATEMENT (THIRD) OF AGENCY § 3.16 (A.L.I. 2006). Apparently, this implication has not yet been deeply explored. However, some scholarly writing has focused particularly on how agency principles

Congress shared the Supreme Court's skeptical stance towards the perceived abuse of habeas by petitioners sentenced to death.<sup>40</sup> In 1996, Congress passed one of the most prominent statutory restrictions on habeas, the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>41</sup> codified in part at 28 U.S.C. § 2254. AEDPA incorporated many of the Supreme Court's judicially created restrictions while introducing some of its own.<sup>42</sup> Several of the § 2254 requirements are relevant to this Note. First, petitioners seeking federal habeas must have "exhausted the remedies available in the courts of the State."<sup>43</sup> Second, federal courts are exceptionally limited in review of factual issues: factfinding from the state's courts "shall be presumed to be correct,"<sup>44</sup> and federal courts are forbidden from holding an evidentiary hearing "[i]f the applicant has failed to develop the factual

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and habeas doctrines intersect. *E.g.*, Emily Klineberg, Note, *Dropping the Interpretive Ball: The Supreme Court's Missed Reading of "Applicant" and the Rule of Attribution in Shinn v. Ramirez*, 28 BERKELEY J. CRIM. L. 119, 131–35, 137–51 (2024).

40. "The authors of [the Antiterrorism and Effective Death Penalty Act] sought to address the rampant 'abuse of the writ,' the notion that prisoners were filing repeated specious petitions which operated to overwhelm the federal courts." Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 4 (2016).

41. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

42. *See* Garrett & Phillips, *supra* note 27, at 1743.

43. 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement was not newly introduced in AEDPA. *See* Sykes, 433 U.S. at 80 & n.7 (identifying the first articulation of the requirement in an 1886 U.S. Supreme Court case, and quoting very similar language from § 2254 effective at that time); *see also* Hashimoto, *supra* note 29, at 151 & n.70 (identifying habeas exhaustion cases between 1892 and 1935).

44. § 2254(e)(1). This deference as to factual findings is relatively uncontroversial, as it largely accords with traditional appellate practice. *See generally* John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409, 411–13 (1981). Although federal habeas actions are not actually "appeals," they could consist of review of both the factual and legal decisions of a lower court and are analogous to appeals in important ways. *But see* Fay v. Noia, 372 U.S. 391, 429–30 (1963) (discussing key differences between appellate review and federal habeas review related to deference), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

However, the Supreme Court has decided that § 2254(d)(1) requires deference to a state court's *legal* findings as well. Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 402–13 (2000) (O'Connor, J., writing for the Court except as to the footnote); *see also* Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (limiting reversals under § 2254(d)(1) to cases where the state court was "more than incorrect or erroneous"); Harrington v. Richter, 562 U.S. 86, 101–02 (2011) (explaining that an unreasonable application of clearly established federal law is one with which no "fairminded jurist[]" would agree). This level of deference is arguably not required by the text of AEDPA. *See Terry Williams*, 529 U.S. at 374–90, (Stevens, J., writing "an opinion"—essentially dissenting) (discussing other interpretations of the phrases "contrary to" and "unreasonable application of").

The continued validity of such legal deference is called into question by the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, which eliminated judicially created deference to executive-branch interpretations of certain legal issues. *See generally* 603 U.S. 369 (2024). The *Loper Bright* majority grounded its reasoning on statutory interpretation and legislative history. *Id.* at 384–407. In concurrence, Justice Thomas also opined that legal deference to agency interpretations of law violated the Constitution. *Id.* at 413 (Thomas, J., concurring). Both the constitutional and statutory-interpretation justifications would also support overturning the Court's creation of extraordinary legal deference in *Terry Williams*.

A full analysis of this issue would involve a comparison between the legislative histories of both the Administrative Procedure Act, which was at issue in *Loper Bright*, and AEDPA. Although such an analysis is outside the scope of this Note, these arguments will be useful for habeas practitioners to keep in mind in efforts to effect habeas reform via Supreme Court litigation.

basis of a claim in State court proceedings,” with some exceptions.<sup>45</sup> Importantly, evidentiary hearings are *only* relevant to procedurally defaulted claims, as the Supreme Court has decided that claims resolved on the merits in state court must be evaluated solely using the state-court record.<sup>46</sup>

#### B. AN EQUITABLE EXCEPTION: *MARTINEZ* AND *TREVINO*

The Supreme Court walked back one of *Coleman*’s restrictions in the 2012 case *Martinez v. Ryan*.<sup>47</sup> Although the Court stopped short of declaring a constitutional right to postconviction counsel in “initial-review collateral proceedings,”<sup>48</sup> it held that constitutionally ineffective assistance of postconviction counsel (IAPCC) could serve as “cause” to excuse procedural default of an IATC claim if that IATC claim could not have been brought in a direct appeal under state law.<sup>49</sup> The following year, in *Trevino v. Thaler*, the Court extended the *Martinez* exception to include states which technically permitted IATC claims to be raised on direct appeal but made it “virtually impossible” to do so effectively.<sup>50</sup> This Note will refer to the exception created by these holdings as the *Martinez–Trevino* exception.

*Martinez* and *Trevino*, “in essence, created a federal safety valve to allow for a third level of review—exclusively federal—if the subject claim involved a trial default, and initial collateral review counsel did not recognize it.”<sup>51</sup> “*Martinez* constitute[d] a remarkable—if ‘limited,’—development in the Court’s equitable jurisprudence.”<sup>52</sup> This equitable development was remarkable because it broke through the formalism and rigidity of the agency relationship critical to other decisions,<sup>53</sup> recognizing instead that petitioners needed an opportunity to have IATC claims heard even when their postconviction counsel—their agent—had fumbled appropriate presentation of the claim.<sup>54</sup> The Supreme Court made clear that its holdings should be interpreted as equitable instead of constitutional: “The

45. § 2254(e)(2).

46. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

47. *See* 566 U.S. 1, 8–9 (2012).

48. Referring to a question left open in *Coleman* of whether there was a constitutional right to counsel in these so-called “initial-review collateral proceedings,” Justice Kennedy wrote: “This is not the case, however, to resolve whether that [right] exists as a constitutional matter.” *Id.* at 9.

49. *Id.*

50. 569 U.S. 413, 423 (2013) (quoting *Robinson v. State*, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000)).

51. *Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013).

52. *Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012) (citation omitted) (quoting *Martinez*, 566 U.S. at 15); *see also infra* notes 167–69 and accompanying text.

53. *See supra* notes 37–39 and accompanying text.

54. Equity jurisprudence was, to a significant extent, “developed by and through [the Court of] Chancery” in England. Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 253 (1996). Some factors which contributed to the development of equity include “antagonism to the rigidity of the common law,” and “ideas about the function of conscience in determining equitable rules.” *Id.* Because the *Martinez* decision was antagonistic toward the common-law concept of procedural default and apparently appealed to conscience to give an opportunity to petitioners who had suffered both IATC and IAPCC, it stands as a beacon of equitable jurisprudence.

rules for when a prisoner may establish cause to excuse a procedural default . . . reflect an equitable judgment . . . ”<sup>55</sup>

Dissenting in *Trevino*, Chief Justice Roberts predicted an “endless” amount of “state-by-state litigation” to determine where the exception applied.<sup>56</sup> That prediction has been correct so far: in the decade since *Martinez* and *Trevino*, most “statutory postconviction states”<sup>57</sup> have had their system for raising IATC claims analyzed by federal courts in such state-by-state litigation.

The exception applies in half of all statutory postconviction states. For petitioners in eight states, *Martinez* applies directly because state law or procedure requires IATC claims to be brought in state collateral proceedings.<sup>58</sup> For 18 states, the majority of categorized states, *Martinez* applies through *Trevino* because the state’s system makes it “virtually impossible” to raise IATC claims on direct appeal.<sup>59</sup> In at

55. *Martinez v. Ryan*, 566 U.S. 1, 13 (2012). Habeas has a long equitable tradition. See generally Hashimoto, *supra* note 29.

56. *Trevino v. Thaler*, 569 U.S. 413, 433 (2013) (Roberts, C.J., dissenting). Given that all lawyers, including habeas attorneys, should generally make all nonfrivolous arguments on behalf of their clients, see MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (A.B.A. 2024), it’s not clear why there would be any less litigation if *Trevino* had come out the other way. Presumably, habeas attorneys would still be taking every claim they could as far as possible.

57. In this Note, the term “statutory postconviction state” refers to all 50 U.S. states and the U.S. territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. See 48 U.S.C. §§ 864, 1424-2, 1623, 1824 (providing jurisdiction for the courts of the United States over the aforementioned territories). This term essentially encompasses all jurisdictions from which a person confined by that jurisdiction could seek relief under 28 U.S.C. § 2254 after pursuing intra-jurisdictional remedies. American Samoa is not analyzed at all in this Note because it “is not part of a federal judicial district.” *Hueter v. Kruse*, 576 F. Supp. 3d 743, 755 (D. Haw. 2021). But see *Eldridge v. Howard*, 70 F.4th 543, 559 (9th Cir. 2023) (Bumatay, J., dissenting) (showing that Congress included American Samoa by name in one definition of the term “State” in AEDPA). This Note does not include the District of Columbia within the definition of a statutory postconviction state, because the D.C. courts have not conclusively determined whether the District is a “state” for the purposes of federal habeas under § 2254. Compare *Maddox v. Elzie*, 238 F.3d 437, 442 (D.C. Cir. 2001) (“[T]he question whether a D.C. prisoner should be treated as a State prisoner for purposes of § 2254 is an open question in this circuit.”), with *Banks v. Smith*, 377 F. Supp. 2d 92, 94–95 (D.D.C. 2005) (collecting cases, and concluding that D.C. prisoners are state prisoners in some circumstances for federal habeas).

58. *Martinez v. Ryan*, 566 U.S. 1, 4 (2012) (Arizona); *Franklin v. Hawley*, 879 F.3d 307, 312 (8th Cir. 2018) (Missouri); *Leeds v. Russell*, 75 F.4th 1009, 1015 (9th Cir. 2023) (Nevada); *Oien v. Pringle*, No. 18-cv-197, 2020 WL 12957397, at \*12 (D.N.D. Oct. 9, 2020) (North Dakota); *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (Oregon); *Cox v. Horn*, 757 F.3d 113, 124 n.8 (3d Cir. 2014) (Pennsylvania); *Stokes v. Stirling*, 10 F.4th 236, 244 (4th Cir. 2021) (South Carolina), *aff’d on remand*, 64 F.4th 131 (4th Cir. 2023); *Fowler v. Joyner*, 753 F.3d 446, 462 (4th Cir. 2014) (Virginia).

59. *Sasser v. Hobbs*, 735 F.3d 833, 852–53 (8th Cir. 2013) (Arkansas); *Michaels v. Davis*, 51 F.4th 904, 929 (9th Cir. 2022) (California); *Smith v. Chapdelaine*, 774 F. App’x 468, 474 n.3 (10th Cir. 2019) (Colorado); *Reddick v. Sec’y, Dep’t of Corr.*, No. 10-cv-00213, 2014 WL 1364494, at \*3–4 (N.D. Fla. Apr. 7, 2014) (Florida); *Veenstra v. Smith*, No. 11-cv-00632, 2014 WL 1270626, at \*11 (D. Idaho Mar. 26, 2014) (Idaho); *Brown v. Brown*, 847 F.3d 502, 517 (7th Cir. 2017) (Indiana); *Harms v. Cline*, 27 F. Supp. 3d 1173, 1185–86 (D. Kan. 2014) (Kansas); *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015) (Kentucky); *Coleman v. Goodwin*, 833 F.3d 537, 540 (5th Cir. 2016) (Louisiana); *Austin v. Bohrer*, No. JRR-22-461, 2024 WL 2273587, at \*14 (D. Md. May 20, 2024) (Maryland); *Killsontop v. Guyer*, No. CV 17-111, 2019 WL 5103115, at \*3 (D. Mont. Oct. 11, 2019) (Montana); *Rosa v. Slaughter*, No. 20-4686, 2023 WL 2754707, at \*35 (D.N.J. Mar. 31, 2023) (New Jersey); *Musacco v. Franco*, No. 14-683, 2016 WL 10100731, at \*3 (D.N.M. Aug. 3, 2016) (New Mexico); *Piper v. South Dakota*, No. 20-CV-05074, 2024 WL 1348502, at \*17 (D.S.D. Mar. 29, 2024) (South Dakota); *Sutton*

least one statutory postconviction state, a court decided that the exception applies without specifically identifying whether *Martinez* or *Trevino* required the exception.<sup>60</sup> However, federal courts have identified nine states where *Martinez* does not apply at all because the states' systems favor raising IATC claims on direct appeal;<sup>61</sup> the exception does not apply in the District of Columbia for the same reason.<sup>62</sup>

Federal courts have rejected a categorical statewide decision in Ohio and North Carolina because those states bifurcate the appropriate procedure for IATC claims. "Ohio law provides for two kinds of [IATC] claims: [IATC] claims that do not depend on evidence outside the record must be brought on direct appeal, while claims that rely on evidence outside the record are raised in post-conviction petitions."<sup>63</sup> Accordingly, the Sixth Circuit has held that "*Martinez* and *Trevino* can apply in an Ohio case," but do not "generally" apply to all Ohio cases.<sup>64</sup> The Fourth Circuit has similarly decided that North Carolina has a mixed system where some petitioners with IATC claims can take advantage of the *Marinez–Trevino* exception while others cannot.<sup>65</sup>

The remaining 16 statutory postconviction states<sup>66</sup> have not yet had their systems decisively categorized,<sup>67</sup> but federal courts have hinted how they might rule for several of them. The exception would likely apply in Georgia,<sup>68</sup> Maine,<sup>69</sup>

v. Carpenter, 745 F.3d 787, 792 (6th Cir. 2014) (Tennessee); Trevino v. Thaler, 569 U.S. 413, 417 (2013) (Texas); Woods v. Sinclair, 764 F.3d 1109, 1137 (9th Cir. 2014) (Washington); Lind v. Ballard, 2022 WL 1063518, at \*9 n.11 (S.D.W. Va. Apr. 8, 2022) (West Virginia).

60. See Ramírez-Lorenzo v. Rivera-Juanatey, No. 17-1752, 2020 WL 13922981, at \*5 (D.P.R. July 13, 2020) (explaining that *Martinez* and *Trevino* discuss the procedures and complexity of bringing IATC claims on direct appeal, but failing to identify whether Puerto Rico *actually* or *effectively* requires IATC claims to be brought via postconviction motion).

61. Crutchfield v. Dennison, 910 F.3d 968, 971 (7th Cir. 2018) (Illinois); Halstead v. McKinney, No. C14-3023, 2014 WL 5849214, at \*7–8 (N.D. Iowa Nov. 12, 2014), *report and recommendation adopted by* No. C14-3023, 2014 WL 7339217 (N.D. Iowa Dec. 23, 2014) (Iowa); Lee v. Corsini, 777 F.3d 46, 61 (1st Cir. 2015) (Massachusetts); Bell v. Howes, 701 F. App'x 408, 413 (6th Cir. 2017) (Michigan); Ward v. Smith, No. 14-cv-4946, 2016 WL 8732633, at \*10 (D. Minn. Jan. 29, 2016) (Minnesota); Santana v. Capri, No. 15 Civ. 2818, 2017 WL 3447885, at \*11 (S.D.N.Y. Aug. 10, 2017) (New York); Fairchild v. Trammell, 784 F.3d 702, 723 (10th Cir. 2015) (Oklahoma); Finlayson v. Utah, 6 F.4th 1235, 1243–44 (10th Cir. 2021) (Utah); Nash v. Hepp, 740 F.3d 1075, 1079 (7th Cir. 2014) (Wisconsin).

62. Johnson v. Wilson, 72 F. Supp. 3d 327, 329–30 (D.D.C. 2014).

63. Mammone v. Jenkins, 49 F.4th 1026, 1048 (6th Cir. 2022).

64. *Id.*

65. Fowler v. Joyner, 753 F.3d 446, 462–63 (4th Cir. 2014).

66. Alabama, Alaska, Connecticut, Delaware, Georgia, Guam, Hawaii, Maine, Mississippi, Nebraska, New Hampshire, Northern Mariana Islands, Rhode Island, U.S. Virgin Islands, Vermont, and Wyoming.

67. This is not to say that federal courts have not been presented with the issue. Several states, such as Mississippi and Nebraska, have discussed the issue several times without a decision. See *infra* notes 70, 72.

68. Hittson v. GDCP Warden, 759 F.3d 1210, 1262 (11th Cir. 2014) ("[Petitioner] asserts that, under Georgia law, there is no meaningful opportunity to litigate ineffectiveness on direct appeal. *While that may be true*, we leave that question for another day . . . ." (internal quotation marks omitted) (emphasis added) (citation omitted)).

69. See Tucker v. Maine, No. 14-cv-00065, 2014 WL 3740993, at \*5–8 (D. Me. July 29, 2014). The Tucker court engages in a lengthy analysis and discussion about the applicability of *Martinez* to the

Mississippi,<sup>70</sup> and Vermont,<sup>71</sup> and likely would not apply in Nebraska<sup>72</sup> or Wyoming.<sup>73</sup> The Northern Mariana Islands is likely a bifurcated system like Ohio and North Carolina.<sup>74</sup> Three states have commented on the issue themselves,<sup>75</sup> though a state court's ruling on this federal constitutional issue obviously would not be binding on the federal judiciary.<sup>76</sup> Two of these undecided states, Alabama<sup>77</sup> and Alaska,<sup>78</sup> have received conflicting decisions from federal district

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petitioner's claims without any discussion of the language from *Martinez* that the exception applies "when a State *requires* a prisoner to raise an [IATC] claim in a collateral proceeding" and without actually discussing the requirements on IATC claims imposed by the state of Maine. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (emphasis added).

70. Several district courts have assumed without deciding that the exception applies in Mississippi. *E.g.*, *Rivera-Guadiana v. King*, No. 12cv395, 2014 WL 6951067, at \*5 (S.D. Miss. Dec. 8, 2014); *Griffith v. Byrd*, No. 14-cv-187, 2016 WL 4249960, at \*5 (S.D. Miss. June 29, 2016); *Bradley v. Shaw*, No. 18-cv-196, 2022 WL 908932, at \*4 (S.D. Miss. Mar. 28, 2022). The *Bradley* court expressed doubt that Mississippi's system would qualify "because the Mississippi Supreme Court has recognized that while [IATC] claims can be addressed on direct appeal, such claims are more appropriately brought during postconviction proceedings." 2022 WL 908932, at \*4 n.1 (citing *Williams v. State*, 228 So. 3d 949, 952 (Miss. Ct. App. Mar. 7, 2017)). However, most federal courts which evaluate systems like Mississippi's—where IATC claims are preferred in state postconviction actions—find that the system satisfies *Trevino*. *See supra* note 59 and accompanying text. As of September 2024, federal courts have still refrained from deciding whether the exception applies. *See Moore v. Portillo*, No. 21-CV-459, 2024 WL 4203498, at \*8 n.5 (S.D. Miss. Sept. 16, 2024).

71. In recent years, two decisions have been issued in the District of Vermont conducting a *Martinez* analysis of a petitioner's claims without absolutely concluding that *Martinez* or *Trevino* apply in Vermont. *See Fellows v. Baker*, No. 20-cv-139, 2021 WL 4200875, at \*14–15 (D. Vt. Mar. 10, 2021); *Carpenter v. Vt. Dep't of Corr.*, No. 21-cv-111, 2022 WL 3636863, at \*9 (D. Vt. July 27, 2022).

72. In the footnotes of many of his cases, Senior Judge Richard G. Kopf has said that he does not believe that the exception applies in Nebraska. *E.g.*, *Henderson v. Frakes*, No. 19CV3022, 2020 WL 3639701, at \*13 n.5 (D. Neb. July 6, 2020). He is almost certainly correct. *See State v. Jacob*, No. S-11-439, 2013 Neb. LEXIS 184, at \*30 (Neb. July 10, 2013) ("Nebraska . . . requires claims of ineffective assistance of counsel to be raised on direct appeal . . .").

73. *See Hawes v. Pacheco*, No. 17-CV-52, 2019 WL 11254539, at \*4 (D. Wyo. July 16, 2019). The *Hawes* court clearly rejected direct applicability of *Martinez* but somewhat skeptically assumed *Trevino* might apply. *Id.* at \*5 ("[T]he Wyoming Supreme Court will entertain claims of [IATC] on direct review. Further, even assuming Wyoming's court structure *somehow* forces defendants to wait until post-conviction proceedings to raise [IATC] claims . . ." (emphasis added)).

74. *See Yu Qun v. Attao*, 18-cv-00028, 2019 WL 8755116, at \*4 (N. Mar. I. Jan. 3, 2019) ("CNMI law allows for ineffective assistance of counsel claims to be brought by collateral attack, or, less commonly, on direct appeal.").

75. *See Green v. State*, 238 A.3d 160, 175 (Del. 2020); *Johnson v. State*, 395 P.3d 1246, 1261 (Idaho 2017) ("*Martinez* applies in Idaho."); *Jacob*, 2013 Neb. LEXIS 184, at \*30.

76. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

77. *Compare Brown v. Thomas*, No. 11-CV-3578, 2013 WL 5934648, at \*2 (N.D. Ala. Nov. 5, 2013) (applying *Trevino* because the individual petitioner's circumstances warranted it despite acknowledging that Alabama allows claims of IATC on direct appeal), *with Curry v. Wright*, No. 20-cv-591, 2024 WL 1138033, at \*2 (S.D. Ala. Mar. 14, 2024) (explaining that Alabama's system does not effectively foreclose IATC claims and pointing out that petitioner could have raised her IATC claim on direct appeal). Although the *Brown* court expressed sympathy for the petitioner in its ruling, the *Curry* court's analysis hews more closely to the Supreme Court's direction to analyze "the State's judicial system." *Shinn v. Ramirez*, 596 U.S. 366, 380 (2022) (citing *Trevino v. Thaler*, 569 U.S. 413, 428 (2013)). However, considering that the *Martinez–Trevino* exception is an equitable exception, one could make a strong argument that the *Brown* court's decision better reflects the law's ultimate goal of justice.

78. *Compare Allen v. Milburn*, No. 08-cv-00039, 2022 WL 3701639, at \*7–11 (D. Alaska Aug. 26, 2022) (recognizing that the State conceded that the petitioner had satisfied two elements of the *Martinez*

courts. However, because subsequent Supreme Court cases “gut[ted] *Martinez*’s and *Trevino*’s core reasoning,”<sup>79</sup> it’s unclear whether federal courts will have any incentive to decide whether any currently uncategorized state’s system should fall within the exception.<sup>80</sup>

C. GUTTING *MARTINEZ–TREVINO*: *SHINN V. RAMIREZ*

The narrowness of the *Martinez–Trevino* exception was reinforced by the Supreme Court in *Davila v. Davis* in 2017.<sup>81</sup> In that case, the Court declined to extend the exception to ineffective-assistance-of-*appellate*-counsel claims that were defaulted by ineffective postconviction counsel.<sup>82</sup> Although this holding prevented further expansion of the exception, it did not diminish its scope where it was applicable.

The greatest blow to the *Martinez–Trevino* exception, however, came in May of 2022. In *Shinn v. Ramirez*, the Supreme Court held that petitioners seeking to use the *Martinez–Trevino* exception to have their procedurally defaulted IATC claim heard by a federal court could not introduce any additional evidence beyond the state-court record to support their claim.<sup>83</sup> Essentially, the Court refused to permit the *Martinez–Trevino* exception to overcome the strict requirements of 28 U.S.C. § 2254(e)(2).<sup>84</sup> The Court based its decision on its belief that “[t]here is an even higher bar for excusing a prisoner’s failure to develop the state-court record” than for excusing postconviction counsel’s failure to bring the IATC claim in state court at all.<sup>85</sup> This logic leads to the somewhat confusing result that federal courts are permitted to look past state postconviction counsel’s

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exception and conducting a multi-page analysis to determine whether petitioner had satisfied two others), *with* *Welton v. Gilligan*, No. 15-cv-00149-SLG, 2018 WL 6492595, at \*5 (D. Alaska Dec. 10, 2018) (holding that *Martinez* does not apply in Alaska because the Alaska Supreme Court established an alternate method for hearing procedurally defaulted IATC claims).

79. *Shinn*, 596 U.S. at 392 (Sotomayor, J., dissenting); *see also infra* Section I.C.

80. However, at least six cases discussing applicability of the exception were decided after the Supreme Court’s May 2022 decision in *Shinn*. *Austin v. Bohrer*, No. JRR-22-461, 2024 WL 2273587, at \*14 (D. Md. May 20, 2024); *Piper v. South Dakota*, No. 20-CV-05074, 2024 WL 1348502, at \*17 (D.S. D. Mar. 29, 2024); *Rosa v. Slaughter*, No. 20-4686, 2023 WL 2754707, at \*35 (D.N.J. Mar. 31, 2023); *Leeds v. Russell*, 75 F.4th 1009, 1016–17, 1022–23 (9th Cir. 2023); *Menzies v. Powell*, 52 F.4th 1178, 1208 (10th Cir. 2022); *Michaels v. Davis*, 51 F.4th 904, 929 (9th Cir. 2022).

81. *See* 582 U.S. 521, 529–30 (2017).

82. *Id.* at 529.

83. 596 U.S. 366, 371 (2022).

84. *See id.* Section 2254(e)(2) forbids a federal court from holding an evidentiary hearing unless “the claim relies on” either a “new rule of constitutional law, made retroactive . . . that was previously unavailable,” 28 U.S.C. § 2254(e)(2)(A)(i), or “a factual predicate that could not have been previously discovered through the exercise of due diligence.” § 2254(e)(2)(A)(ii). In addition to passing that disjunctive test, the applicant must also show that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” § 2254(e)(2)(B). In *Edwards v. Vannoy*, the Supreme Court made the test in § 2254(e)(2)(A)(i) even harder to achieve by deciding that so-called watershed procedural rules would never be retroactively applicable. 593 U.S. 255, 271–72 (2021).

85. *Shinn*, 596 U.S. at 381.

failure to bring an IATC claim, but may not be able to actually listen to any evidence to support that claim.

This is particularly perplexing when one considers the reason that IATC claims alone are accessible through the *Martinez–Trevino* exception: evidence of ineffective assistance is often uniquely unavailable compared with other kinds of claims. For example, in *Trevino* itself, the trial transcript necessary for the petitioner’s IATC claim was not available until seven months after sentencing, but state postconviction counsel was appointed only six months after sentencing.<sup>86</sup> Therefore, at least some of the evidence that postconviction counsel would need to demonstrate IATC was literally unavailable on the date that counsel was appointed. Moreover, for states which bifurcate the required procedure for IATC claims like Ohio and North Carolina, the *Martinez–Trevino* exception only applies to those “claims that rely on evidence *outside the record*,” i.e., the class of cases where a collateral evidentiary hearing would be *required*.<sup>87</sup> Yet paradoxically, *Shinn* would deny a federal-court evidentiary hearing in those cases even when that outside-the-record evidence was not included in the state-court record due to the IAPCC, which justified hearing the claim under the *Martinez–Trevino* exception in the first place. Therefore, while *Shinn* may significantly curtail the exception in most states, it effectively eliminates it from Ohio and North Carolina.

The decision in *Shinn* was controversial, but perhaps not unexpected. *Shinn*’s proponents contend that the decision “reinforced the primacy of states’ proceedings in federal habeas cases.”<sup>88</sup> *Shinn*’s detractors, including Justice Sotomayor, point out that the case “all but overrules” *Martinez* and *Trevino*.<sup>89</sup> Other critics have claimed that this is part of a recent “trend of hollowing out past precedents without expressly overruling them.”<sup>90</sup> Although *Shinn*’s holding was surprising to many, there were some lower courts already enforcing *Shinn*-style evidentiary prohibitions years before the Supreme Court decided the issue.<sup>91</sup> In fact, many of the arguments central to Justice Thomas’s majority opinion in *Shinn* were discussed by Judge Collins in dissent when the case was at the Ninth Circuit.<sup>92</sup>

Lower federal courts have largely complied with the text and spirit of *Shinn*,<sup>93</sup> though there has been some reluctance. For example, in 2022, a panel of the Sixth Circuit discussed “compelling” evidence of a defaulted claim that William Rogers’s trial counsel provided ineffective assistance during the trial’s guilt

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86. *Trevino v. Thaler*, 569 U.S. 413, 418 (2013).

87. *Mammone v. Jenkins*, 49 F.4th 1026, 1048 (6th Cir. 2022) (emphasis added). For more information on these bifurcated systems, see *supra* notes 63–65 and accompanying text.

88. *Creech v. State*, 543 P.3d 494, 498 (Idaho 2024).

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

90. *Habeas Corpus — Ineffective Assistance of Counsel — Procedural Default — Shinn v. Ramirez*, 136 HARV. L. REV. 400, 409 (2022) (citation modified).

91. See, e.g., *Rhines v. Young*, No. 00-CV-05020, 2016 WL 614665, at \*7–10 (D.S.D. Feb. 16, 2016).

92. See generally *Ramirez v. Shinn*, 971 F.3d 1116 (9th Cir. 2020) (Collins, J., dissenting).

93. See, e.g., *Black v. Falkenrath*, 93 F.4th 1107, 1109–10 (8th Cir. 2024).

phase; however, in light of *Shinn*, the panel did not “make any conclusions” about the admissibility of the evidence or the substance of the defaulted IATC claim, and further stated that there was “no need for the district court, on remand, to decide what evidence it [could] consider.”<sup>94</sup> The panel explained that because resentencing in state court was required for a *non-defaulted* claim regarding the trial’s penalty phase, there was no need for it or the district court to “consider [the *Shinn*] issues” upon remand;<sup>95</sup> this was essentially a wink from the court for the petitioner to introduce that “compelling” evidence in the state resentencing proceeding so that it could be considered in subsequent federal habeas proceedings as part of the state-court record. However, this decision did not stand for long: ten months later, the en banc Sixth Circuit rejected the non-defaulted claims and explicitly invoked *Shinn* to deny admission of any new evidence.<sup>96</sup> A Third Circuit panel was also unenthusiastic about *Shinn* but was ultimately compelled to invoke its restrictions to deny the petitioner relief.<sup>97</sup>

## II. STATE POSTCONVICTION RELIEF

In a 1970s habeas case, the U.S. Supreme Court explained that states “possess primary authority for defining and enforcing the criminal law,” and thus “hold the initial responsibility for vindicating constitutional rights.”<sup>98</sup> In a footnote, Justice O’Connor mentioned that there is “nothing more subversive of a [state] judge’s sense of responsibility” than “federal intrusions” into this authority and responsibility to enforce criminal laws and vindicate constitutional rights.<sup>99</sup> Despite this prominent role, U.S. history has been a story of consistently increasing superintendence of states and state courts by the federal government in general and the federal judiciary in specific, proceeding through phases such as the ratification of the Constitution,<sup>100</sup> Reconstruction,<sup>101</sup> and the post-1973 substantive due process cases.<sup>102</sup> While the detailed history of each of these elements is beyond the scope of this Note, each element undermines the values of comity and federalism

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94. *Rogers v. Mays*, 43 F.4th 530, 554 (6th Cir 2022), *rev’d*, 69 F.4th 381 (6th Cir. 2023) (en banc).

95. *Id.* at 552.

96. *Rogers v. Mays*, 69 F.4th 381, 396–97 (6th Cir. 2023) (en banc).

97. *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 720 (3d Cir. 2022).

98. *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

99. *Id.* at 128 n.33 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963)).

100. The Constitution itself dictates that it is the “supreme Law of the Land,” U.S. CONST. art. VI, cl. 2, and establishes a “supreme Court” with judicial power extending “to all Cases, in Law and Equity, arising under” the Constitution. U.S. CONST. art. III, §§ 1–2. As the Supreme Court has emphasized for centuries, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

101. The Reconstruction period, including most notably the Fourteenth Amendment, fundamentally altered the nature of federalism and the balance of federal–state power in the United States. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 85 (2019). Foner’s book is well worth reading in its entirety.

102. For a description of these cases and the development of substantive due process in this area, see JAMES E. FLEMING, *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS* 27–34 (2022).

theoretically at the core of AEDPA.<sup>103</sup> The Supreme Court has seen fit in recent times to invoke the U.S. Constitution to invalidate state laws,<sup>104</sup> state constitutional amendments,<sup>105</sup> and state criminal convictions on appeal.<sup>106</sup> However, in modern habeas jurisprudence, this superintendence is replaced by an unusual and extraordinary deference.<sup>107</sup> Perhaps in no area of the law other than habeas does the Supreme Court impose such powerlessness on itself and the lower federal courts, requiring a strict dependence “on the function, accuracy, and integrity of state . . . procedures and rulings.”<sup>108</sup>

Because of this deference to state-court decisions, a thorough analysis of federal habeas requires an analysis of state postconviction proceedings. Accordingly, this Part begins by exploring the history of state postconviction proceedings and how that history has been influenced by developments in the federal system. This Part then examines whether and to what extent states have provided exceptions for IATC claims defaulted via IAPCC. This Part concludes with an overview of the rules governing evidentiary hearings for state postconviction proceedings. In each of these two procedural areas, this Note examines how the decisions in *Martinez, Trevino*, and *Shinn* have influenced state courts.

#### A. HISTORY OF HABEAS AND POSTCONVICTION RELIEF AT THE STATE LEVEL

In 1948, the Supreme Court decided *Young v. Ragen*, which criticized Illinois’s byzantine and ineffective postconviction system.<sup>109</sup> A state circuit court’s denial of habeas relief was “unreviewable by the state supreme court under Illinois law,” and “many” of those circuit courts “continued to deny petitions . . . on procedural grounds” even after the Illinois Supreme Court “strongly indicat[e] that habeas corpus would” be the appropriate procedure in many cases, such as *Ragen*.<sup>110</sup> However, the U.S. Supreme Court criticized the clarity of the Illinois Supreme Court’s decision, putting the word “announcement” in scare quotes throughout the opinion,<sup>111</sup> and requesting that subsequent cases specifically advise the Court “[i]f there is now no post-trial procedure by which federal rights may be vindicated in Illinois.”<sup>112</sup>

103. See *supra* note 28 and accompanying text.

104. See generally *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/unconstitutional-laws> (last visited Aug. 20, 2025).

105. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating an amendment in the Constitution of the State of Colorado under the Equal Protection Clause of the U.S. Constitution).

106. Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1232–33 (2008).

107. See *id.* at 1233–34 (“[T]he Supreme Court’s unwillingness to insist on a meaningful and uniform application of federal rights, in particular constitutional criminal procedural rights, calls into question the vitality of incorporation as a principle of hornbook constitutional law.”). For further analysis, see the earlier discussion *supra* note 44.

108. *Powers v. State*, 2017 DR 00696 SCT (¶ 29) (Miss. 2023), 371 So. 3d 629, 646.

109. 337 U.S. 235, 236–39 (1949).

110. *Id.* at 237–38.

111. All six instances of the word “announcement” in the opinion are in quotes. *Id.* at 238–40.

112. *Id.* at 239.

In the wake of this decision, Illinois and many states attempted to restructure their postconviction procedures.<sup>113</sup> The American Law Institute adopted the Illinois legislature's postconviction reform as the model statute for postconviction relief: the Uniform Post-Conviction Procedures Act (UPCPA).<sup>114</sup> In some states which adopted post-*Ragen* legislative reforms like UPCPA, common law remedies exist alongside the statutory remedies.<sup>115</sup>

In this way, many states only adopted meaningful postconviction relief measures as a response to *federal action*,<sup>116</sup> indicating a reluctance to afford a collateral method of postconviction relief at all and underscoring the importance of the federal courts in general—and the Supreme Court in specific—in protecting federal constitutional rights. In fact, the U.S. Supreme Court has explained that states “have no obligation to provide” postconviction collateral relief at all, and when they do, “the fundamental fairness mandated by the Due Process Clause does *not* require that the State supply a lawyer as well.”<sup>117</sup> By contrast, in the federal context, the U.S. Constitution's Suspension Clause provides that the federal government must provide an opportunity for habeas relief except when suspended during invasion or rebellion.<sup>118</sup>

Despite the fact that the Supreme Court does not have supervisory authority over state courts in the same way it does over lower federal courts,<sup>119</sup> many states have followed the Court's lead in habeas jurisprudence, sometimes explicitly invoking the Court's reasoning when creating, applying, or discussing their own equitable rules or exceptions.<sup>120</sup> Accordingly, this may mean that “restrictionist”<sup>121</sup> holdings in the Supreme Court have and will continue to trickle down to state courts. On the other hand, some states have pushed back against the Supreme Court's

113. See Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 363–68 (1987).

114. *Id.* at 366–67. See BRIAN R. MEANS, POSTCONVICTION REMEDIES § 3:4 (2024).

115. *State v. Nace*, 371 N.W.2d 129, 131 (N.D. 1985) (North Dakota Rule 35(a) and UPCPA coexist for similar purposes); Kathleen M. Bure, Coram Nobis and *State v. Stinney: Why South Carolina Should Revitalize America's Legal "Hail Mary,"* 68 S.C. L. REV. 917, 921 (2017) (South Carolina has three forms of postconviction relief: UPCPA, state habeas, and motion for new trial).

116. *E.g.*, *Marshall v. Warden*, 434 P.2d 437, 438–39 (Nev. 1967) (explaining that “Nevada responded” to the Supreme Court's extension of “many federal protections to state criminal cases” by creating a statutory habeas corpus scheme), *superseded by statute as stated in* *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014).

117. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (emphasis added).

118. U.S. CONST. art. I, § 9, cl. 2.

119. Although the Supreme Court has the ability to hear cases through certiorari from a state's highest court, see 28 U.S.C. § 1257, the Supreme Court exercises a more limited review of state courts than federal courts. Compare SUP. CT. R. 10(a) (identifying the “Court's supervisory power” as one reason to grant certiorari to a federal circuit court), with *id.* R. 10(b) (no such language).

120. *E.g.*, *Bowling v. Commonwealth*, 163 S.W.3d 361, 372–73 (Ky. 2005) (applying *Coleman's* cause-and-prejudice analysis to a petition for collateral relief's procedurally defaulted claim), *abrogated on other grounds by* *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018); *Beauclair v. State*, 419 P.3d 1180, 1190–93 (Kan. 2018) (analyzing the U.S. Supreme Court's decisions in *Carrier*, *Schlup*, and *Herrera* to adopt an actual-innocence gateway in Kansas).

121. Kovarsky, *supra* note 28, at 459 (defining “restrictionists” as “reformers who sought to limit the writ's availability”).

habeas precedent, sometimes expanding the scope of state postconviction remedies beyond the federal requirements,<sup>122</sup> but more often refusing to adopt equitable exceptions that exist in the federal system.<sup>123</sup>

One particularly troubling aspect of state postconviction relief relevant to the *Martinez–Trevino* exception and *Shinn* is that many states which otherwise require evidentiary hearings for facially sufficient postconviction petitions nonetheless retain an exception for IATC claims. For example, in Alabama, “[w]hile it is true that . . . a judge must conduct a hearing on a post-conviction petition that is meritorious on its face, a judge who presided over the trial or other proceeding . . . need not hold a hearing on the effectiveness of those attorneys based upon conduct that [that judge] observed.”<sup>124</sup> Thus, in these states, people who receive ineffective assistance of counsel at trial will be denied an evidentiary hearing in state postconviction proceedings by operation of state law, and then face denial of an evidentiary hearing in subsequent federal habeas proceedings as a result of § 2254(e)(2) and *Shinn*. The Supreme Court has said that “[t]he doctrine of exhaustion of state remedies . . . presupposes that some adequate state remedy exists,”<sup>125</sup> and the *Martinez–Trevino* exception is an extension of this principle, but this logic is troubling in the post-*Shinn* world: if evidence of ineffective assistance cannot be introduced into either the state-court or federal-court record, it’s not clear that there will be any adequate remedy in either system.

In light of these developments in state courts, one habeas petitioner aptly commented that “[t]here are strong reasons to suspect that at least some states have gone too far in limiting postconviction review, thus calling for the [Supreme] Court’s intervention.”<sup>126</sup> Importantly, this concern harks back to the issues of state deprivation of constitutional rights underlying the passage of the Fourteenth Amendment.<sup>127</sup> However, given the Court’s increasingly skeptical view of habeas since the 1970s,<sup>128</sup> it’s unclear that excessively restrictive state policies will be significantly curbed in that forum. The remainder of this Part will explore how state courts have responded to the Supreme Court’s decisions in *Martinez*, *Trevino*, and *Shinn*. States have generally been reluctant to adopt federal procedures or analogs thereof, regardless of whether those procedures are friendly to petitioners such as the *Martinez–Trevino* exception or unfriendly to petitioners such as the *Shinn* bar on evidentiary hearings for procedurally defaulted claims.

122. *E.g.*, *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994) (“The *Coleman* case does not affect [the] ability to claim ineffective assistance of postconviction relief counsel because such a claim is not constitutionally based in Iowa.”).

123. *See infra* notes 167–198 and accompanying text (overwhelming refusal to adopt *Martinez–Trevino* exception).

124. *Ex parte Hill*, 591 So. 2d 462, 463 (Ala. 1991).

125. *Young v. Ragen*, 337 U.S. 235, 238–39 (1949).

126. Application for Stay of Execution at 2, *Creech v. Idaho*, 144 S. Ct. 1026 (2024) (No. 23-6791), 2024 WL 752867, at \*2.

127. *See generally* FONER, *supra* note 101.

128. *See supra* Part I; *see also* TYLER, *supra* note 23, at 113 (discussing the Supreme Court’s 2008 characterization of habeas as merely a “procedural mechanism” in *Boumediene v. Bush*, 553 U.S. 723 (2008)).

B. STATE RESPONSES TO *MARTINEZ* AND *TREVINO*

State courts have generally confronted two issues in the wake of *Martinez* and *Trevino*. In Section II.B.1, this Note explores how states have interpreted the right to postconviction counsel and the right to have that counsel provide effective assistance. In Section II.B.2, this Note examines whether the existence of the federal cause-and-prejudice exception for IAPCC on IATC claims can be extended to procedural defaults within the state system. Both sections will include an analysis on the degree to which states have been influenced by these two decisions. Unfortunately, few states have adopted petitioner-friendly policies as a result of these decisions.

## 1. Right to Postconviction Counsel

The Supreme Court has not required states to provide counsel to postconviction petitioners as a matter of constitutional law.<sup>129</sup> Because there is no constitutional right to postconviction counsel, there is generally no right to *effective assistance* of postconviction counsel.<sup>130</sup> While *Martinez* left open the possibility that there may be a constitutional right to effective postconviction counsel in “initial-review collateral proceedings” for IATC claims,<sup>131</sup> the *Martinez–Trevino* exception allowed at least a slim opportunity for the federal Constitution to protect against IAPCC. This Subsection explores the extent to which states have provided a different level of protection than the federal judiciary has for postconviction petitioners, either in terms of a right to postconviction counsel or by effectiveness requirements for postconviction counsel. Ultimately, this Note will show that although there are some differences between the state and federal system, *Martinez* and *Trevino* have had only a limited impact in effecting additional change.

Most states follow the Supreme Court and do not afford a constitutional right to counsel for postconviction petitioners.<sup>132</sup> Only Alaska and Mississippi guarantee a right to postconviction counsel based on their state constitution.<sup>133</sup> However, many

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129. See *supra* notes 39, 48.

130. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

131. *Martinez v. Ryan*, 566 U.S. 1, 8–9 (2012); see also *supra* note 48 and accompanying text (noting the Supreme Court’s explicit refusal to definitively decide whether the right to effective postconviction counsel for “initial-review collateral proceedings” exists).

132. For a much more thorough overview of the state-by-state standards of effective performance for postconviction counsel, see Hammel, *supra* note 9, at 353–68. However, some states have changed their standards since Hammel’s 2003 article. See, e.g., *infra* note 144 and accompanying text.

133. *Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003). At least at one point in time, Mississippi also had a right to postconviction counsel apparently based in its state constitution, at least for capital petitioners. *Jackson v. State*, 98-DR-00708-SCT (¶¶ 7–12) (Miss. 1999), 732 So. 2d 187, 190–91 (en banc) (noting first that “[n]othing in [Mississippi’s postconviction statute] requires that one seeking relief be furnished counsel, either at the trial level or on appeal,” then holding that *capital* petitioners in Mississippi have a right to postconviction counsel); see also *id.* ¶¶ 14–15 (Mills, J., specially concurring) (criticizing the majority for finding such a right to counsel in the Mississippi Constitution). However, the *Jackson* decision was not a model of judicial clarity: it did not explain which part of the Mississippi Constitution actually provides that right. The Mississippi Supreme Court significantly cut back on the significance of *Jackson* in *Ronk v. State*, which overruled an earlier decision establishing

states provide for a *statutory* right to postconviction counsel.<sup>134</sup> Some of these states have only a discretionary or conditional right for cases where the petitioner can show that their claim is meritorious and that appointing counsel is necessary;<sup>135</sup> Colorado aptly refers to such a right as a “limited statutory right.”<sup>136</sup> A number of states have a non-discretionary statutory right to postconviction counsel for all petitioners,<sup>137</sup> but some states limit this right to only petitioners convicted of felonies or capital crimes.<sup>138</sup> Finally, in some statutory postconviction states, courts have broad discretion whether to appoint postconviction counsel; i.e., while an individual court might decide to appoint counsel in some cases, there is no statutory *right* to counsel whatsoever.<sup>139</sup> I discovered zero instances of

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that postconviction counsel must render effective performance. 2021-DR-00269-SCT (¶ 23) (Miss. 2024), 391 So. 3d 785, 794 (en banc) (overruling *Grayson v. State*, 2012-DR-00059-SCT (Miss. 2013), 118 So. 3d 118 (en banc)). After *Ronk*, if a petitioner receives IAPCC, they have essentially no remedy, as even the *Ronk* majority admits. *See id.* at ¶ 24. While *Ronk* seemed to question *Jackson*, it stopped short of actually overruling it. *See id.* at ¶ 25 (“[T]he state constitutional right’s underpinnings are shaky. Mississippi alone recognizes a constitutional right to appointed counsel in state post-conviction proceedings.” (emphasis added)). Based on the use of the word “alone,” apparently the justices on the Mississippi Supreme Court had not read *Grinols* and did not realize that Alaska also recognizes that right.

134. For the purposes of this Note, a “statutory” right to postconviction counsel includes a right provided by a state’s rules of procedure.

135. *See* ALA. R. CRIM. P. 32.7(c); ARK. R. CRIM. P. 37.3(b); COLO. REV. STAT. §§ 21-1-103, 21-1-104(b); KY. REV. STAT. ANN. § 31.110(1)(a); LA. CODE CRIM. PROC. ANN. art. 930.7; MONT. CODE ANN. § 46-21-201; NEB. REV. STAT. § 29-3004; S.D. CODIFIED LAWS § 21-27-4; W. VA. R. GOVERNING POST-CONVICTION HABEAS CORPUS PROCS. 6; WYO. STAT. ANN. § 7-6-104(c)(vii) (only for claims of factual innocence). Pre-appointment review in each of these states is more demanding than the frivolous-claims review present in almost all states. *Cf. infra* notes 137–38 and accompanying text (discussing states with statutory non-discretionary rights to postconviction counsel, granting petitioners an easier path to obtaining such counsel).

136. *Silva v. People*, 156 P.3d 1164, 1167–68 (Colo. 2007).

137. *See* CONN. GEN. STAT. § 51-296; HAW. R. PENAL P. 40(i); 725 ILL. COMP. STAT. 5/122-4; IND. R. POST-CONVICTION REMEDIES PC 1 § 9(a); IOWA CODE § 822.5; KAN. STAT. ANN. § 22-4506(b); ME. R. UNIFIED CRIM. P. 70(c)(2); MD. CODE ANN., CRIM. PROC. § 7-108(a); MO. SUP. CT. R. 24.035(e); N.H. REV. STAT. ANN. § 604-A:2(I); N.J. CT. R. 3:22-6; N.M. STAT. ANN. § 31-11-6(B); N.D. CENT. CODE § 29-32.1-05(1); OR. REV. STAT. § 138.590(4); P.R. LAWS ANN. tit. 34a, § 192.1(b); 10 R.I. GEN. LAWS § 10-9.1-5; TENN. CODE ANN. § 40-30-107(b)(1); WASH. REV. CODE § 10.73.150; WIS. STAT. § 974.06(3)(b). North Carolina also arguably falls into this category: a person has a statutory entitlement to counsel if that person “has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment.” N.C. GEN. STAT. § 7A-451(a)(3) (incorporated by reference by N.C. GEN. STAT. § 15A-1421).

138. *See* ARIZ. REV. STAT. ANN. § 13-4041(B); CAL. PENAL CODE § 1509(b); DEL. SUPER. CT. R. CRIM. 61(e)(2) (incorporated by reference by DEL. SUP. CT. R. 26(b)); FLA. STAT. § 27.7001; IDAHO CRIM. R. 44.2(a); MISS. CODE ANN. § 99-39-23(9); NEV. REV. STAT. § 34.820(1)(a); OHIO REV. CODE ANN. § 2953.21(J)(1); OKLA. STAT. tit. 22, § 1089(B); TEX. CODE CRIM. PROC. ANN. art. 11.071(1)–(2) (a).

139. *See* *Gibson v. Turpin*, 513 S.E.2d 186, 188 (Ga. 1999); *Parker v. Commonwealth*, 863 N.E.2d 40, 42 (Mass. 2007); *People v. Walters*, 624 N.W.2d 922, 924 (Mich. 2001); UTAH CODE ANN. § 78B-9-109(1)–(2); *Alexander v. People*, 65 V.I. 385, 393–94 (2016); VT. STAT. ANN. tit. 13, § 7137. Virginia also appears to be a pure-discretion state in which there is no right to appointment of counsel. *See* *Darnell v. Peyton*, 160 S.E.2d 749, 751 (Va. 1968) (identifying that it is “the better practice to assign counsel” when “a petition ‘presents a triable issue of fact’” complex enough to justify appointing counsel, but stopping short of requiring appointment of counsel in such cases (quoting *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960))). *Contra* *Giarratano v. Murray*, 836 F.2d

a state changing its position on the right to counsel as a result of the *Martinez–Trevino* exception.

Generally, states with a *non-discretionary* right to postconviction counsel for *all* petitioners require that counsel provide competent and effective assistance. As the Connecticut Supreme Court famously put it, “[i]t would be absurd to have the right to appointed counsel who is not required to be competent.”<sup>140</sup> In most of these states, this means that state postconviction counsel are judged by similar standards of efficacy as trial and appellate counsel.<sup>141</sup> In other words, most of these states evaluate the performance of postconviction counsel under *Strickland*: a relatively deferential evaluation of whether counsel’s performance was deficient, and whether that deficient performance prejudiced their client.<sup>142</sup> States like Connecticut which also allow IAPCC to serve as “cause” to excuse procedurally defaulted claims<sup>143</sup> thus offer the highest current standard for constitutional safeguards in criminal trials.

Several states have a lower standard of performance for postconviction counsel. In Illinois, postconviction counsel are only required to provide a “*reasonable level* of assistance . . . ‘less than that afforded by the federal or state constitutions.’”<sup>144</sup> Indiana applies a “lesser standard” than *Strickland*, where effectiveness is met “if counsel in fact appeared and represented the petitioner in a procedurally fair setting.”<sup>145</sup> In Oregon, petitioners who believe that their postconviction counsel “has failed to assert a ground for relief” may file a so-called *Church*<sup>146</sup> motion to compel the court “either to replace counsel or to instruct counsel to assert the ground for relief”; this requires a showing that postconviction counsel is not

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1421, 1422 (4th Cir. 1988) (stating that “Virginia courts appoint counsel to represent any inmate who alleges nonfrivolous issues which require a hearing”). Given that Virginia courts have final say over Virginia law, this Note categorizes Virginia as a no-right-to-counsel state under *Darnell* notwithstanding the Fourth Circuit’s opinion in *Giarratano*.

140. *Lozada v. Warden*, 613 A.2d 818, 821 (Conn. 1992).

141. *See, e.g.*, *Grinols v. State*, 74 P.2d 889, 895 (Alaska 2003) (explaining that the previous decisions of the Alaska and United States Supreme Courts “provide guidance” on the analysis for effectiveness of postconviction counsel, though adopting a “four-part test” slightly harder to meet than *Strickland*); *Johnson v. State*, 2003 ND 256, ¶ 17, 681 N.W.2d 769, 776–77 (explicitly adopting the *Strickland* standard applicable to trial and appellate counsel under the U.S. Constitution for state postconviction counsel).

142. *See supra* notes 4–5 and accompanying text.

143. *See infra* note 166 and accompanying text.

144. *People v. Cotto*, 2016 IL 119006 ¶ 45, 51 N.E.3d 802, 811 (emphasis added) (quoting *People v. Pendleton*, 861 N.E.2d 999, 1007 (Ill. 2006)).

145. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989); *see also* *Hill v. State*, 960 N.E.2d 141, 146 (Ind. 2012) (extending the *Baum* standard to untimely direct appeals filed pursuant to Indiana’s P-C.R. 2 procedures). This seems to be one of the most glaring examples of what Yackle identified as the “‘process model’ in American jurisprudence,” which “contemplates that the substantive conclusions of governmental institutions,” here, the state postconviction proceeding, “should be accepted on the whole, unless the process by which those outcomes were generated is found to be flawed in a manner that undercuts their political legitimacy or accuracy.” Yackle, *supra* note 113, at 363; *see also* Bator, *supra* note 99, at 442 (“The notion that a criminal litigation has irrevocably ended may have been an acceptable one in an age with a robust confidence in (or, if you prefer, complacency about) the rationality and justice of the basic *process itself*.” (emphasis added)).

146. *See generally* *Church v. Gladden*, 417 P.2d 993 (Or. 1996) (en banc).

providing “adequate representation.”<sup>147</sup> However, Oregon appears to have no mechanism to guard against postconviction counsel who present all grounds for relief, but do so incompetently.<sup>148</sup> Rhode Island requires postconviction counsel to provide a “meaningful attorney–client relationship,”<sup>149</sup> but has stopped short of saying that petitioners have a right to effective assistance of postconviction counsel.<sup>150</sup>

Some states with limited statutory rights provide no guarantee of effective assistance, either by explicitly stating that there is no right to effective assistance of postconviction counsel,<sup>151</sup> or by indirectly categorizing IAPCC claims as not cognizable under the state’s scheme for subsequent postconviction claims.<sup>152</sup> Despite recognizing a *constitutional* right to postconviction counsel, Mississippi no longer requires that postconviction counsel be competent.<sup>153</sup>

The most egregious example of a hollow statutory guarantee to counsel is Nebraska. Nebraska’s discretionary statutory right to counsel is codified in § 29-3004 of the Nebraska Revised Statutes, which also states that any state-appointed postconviction attorney “shall be competent and shall provide effective counsel.”<sup>154</sup> Despite this clear language, the Nebraska Supreme Court has held that there is no postconviction remedy for IAPCC.<sup>155</sup> This might not be surprising; after all, IAPCC is rarely an independent ground for relief from a conviction. But a decade later, the Nebraska Supreme Court *also* rejected adopting a *Martinez*-like exception to procedural default when postconviction counsel’s ineffectiveness results in procedural default.<sup>156</sup> The court justified this decision by stating that “such matters of policy should be addressed in the first instance to the

147. *Bogle v. State*, 423 P.3d 715, 726 (Or. 2018) (en banc). The adequate-representation standard is “functionally equivalent” to the *Strickland* standard. *Id.* at 723 (citing *State v. Davis*, 201 P.2d 185, 202 (Or. 2008) (en banc)).

148. *See Bogle*, 423 P.3d at 725 (“*Church* did not authorize petitioners to seek court intervention to resolve every disagreement they may have with counsel. . . . [T]he purpose of a proper *Church* motion is to notify the post-conviction court that counsel *has failed to raise certain grounds of relief.*” (emphasis added)); *see also Church*, 417 P.2d at 996 (refusing to hear procedurally defaulted claims in state postconviction court because petitioner “acquiesced in his attorney’s failure”).

149. *Reyes v. State*, 141 A.3d 644, 658–59 (R.I. 2016) (citing *Campbell v. State*, 56 A.3d 448, 455 (R.I. 2012)).

150. *See id.* at 663 (Goldberg, J., concurring in part and dissenting in part) (“The majority concludes—correctly, in my opinion—that this case does not present the question of whether the United States Constitution requires that a PCR applicant asserting a claim of ineffective assistance of counsel be afforded effective assistance of counsel in the PCR context.”).

151. *Riley v. State*, 270 So. 3d 291, 302 (Ala. Crim. App. 2018); *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998).

152. *State v. Kang*, 19-227, (La. App. 5 Cir. 3/17/20), 2020 WL 8770901, at \*5; *McEachern v. State*, 456 A.2d 886, 890 (Me. 1983).

153. *Ronk v. State*, 2021-DR-00269-SCT (¶ 23) (Miss. 2024), 391 So. 3d 785, 793; *see also supra* note 133.

154. NEB. REV. STAT. § 29-3004.

155. *State v. Becerra*, 642 N.W.2d 143, 147 (Neb. 2002).

156. *State v. Hessler*, 850 N.W.2d 777, 785–87 (Neb. 2014). For more examples of state courts considering whether to adopt *Martinez*-style remedies, *see infra* Section II.B.2.

Legislature.”<sup>157</sup> This is unreconcilable with the fact that the Nebraska legislature unambiguously requires postconviction counsel to be effective. Given these decisions, the Nebraska Supreme Court has effectively written out any statutory requirement of effectiveness of postconviction counsel in defiance of its state legislature.

Only one state seems to have reconsidered its stance on effective assistance of postconviction counsel in the wake of *Martinez*. The Supreme Court of South Carolina explicitly invoked *Martinez* in its decision to apply the *Strickland* standard to postconviction counsel.<sup>158</sup> Every other state to confront the issue appears to have explicitly rejected arguments by petitioners to this effect.<sup>159</sup> Therefore, *Martinez* and *Trevino* have had only very limited impact on the availability or scope of state rights to postconviction counsel, despite the fact that both decisions are predicated on ineffective assistance of postconviction counsel.<sup>160</sup>

Lower standards for state postconviction counsel invite the question of how these standards may impact subsequent federal habeas proceedings.<sup>161</sup> From a doctrinal perspective, the answer is simple: the lower standards are irrelevant—which is great news for petitioners, at least in theory. The U.S. Supreme Court has held that, for the purposes of a *Martinez–Trevino* analysis, the traditional two-prong test from *Strickland v. Washington* applies.<sup>162</sup> For example, an attorney in Indiana might perform in such a way to satisfy that state’s “lesser standard” for postconviction effectiveness,<sup>163</sup> foreclosing a defaulted IATC claim in state postconviction proceedings; however, that attorney error might nonetheless be deficient under the more stringent *Strickland* standard, enabling a federal court to reach the merits of an IATC claim defaulted by that attorney. This is exactly what the Supreme Court of Indiana recently discussed in *Isom v. State*, where the court held that the petitioner’s postconviction counsel satisfied the state’s requirements and explained that the petitioner “need[ed] to persuade the federal habeas court that there is cause for . . . procedural default of these claims in state court.”<sup>164</sup>

157. *Hessler*, 850 N.W.2d at 787.

158. *Robertson v. South Carolina*, 795 S.E.2d 29, 37 (S.C. 2016) (“[B]ased on our reading of *Martinez*, we find the *Strickland* test is appropriate and should be applied to evaluate this type of case.” (footnote omitted)). However, *Robertson* reaffirmed South Carolina’s refusal to adopt a *Martinez–Trevino* exception to its own state postconviction procedures. *Id.* (citing *Kelly v. State*, 745 S.E.2d 377 (S.C. 2013)); see *infra* note 180 and accompanying text.

159. *Riley v. State*, 270 So. 3d 291, 302 (Ala. Crim. App. 2018); *Paige v. State*, 2013 Ark. 432, at 2 n.1; *Bunting v. State*, No. 263, 2014, 2015 WL 2147188, at \*2 (Del. May 5, 2015); *Isom v. State*, 235 N.E.3d 150, 155 (Ind. 2024); *Reese v. State*, 2017 ME 40, ¶¶ 7–9, 157 A.3d 215, 217–18.

160. Looking back even longer than *Martinez*, the landscape of state postconviction counsel seems to have changed remarkably little over the past 25 years. See generally Letty S. DiGiulio, Note, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109 (1999).

161. Another interesting question is whether these lower standards have any appreciable impact on the number or success of asserted *Martinez–Trevino* exceptions in federal court. Quantitative exploration of this is beyond the scope of this Note but deserves further research.

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

163. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989).

164. 235 N.E.3d 150, 155 (Ind. 2024).

*Strickland* thus supplies a floor for postconviction counsel's performance which may not be cognizable in state postconviction proceedings, but can in theory lead to success in federal habeas. Of course, federal habeas relief is not always available or easy to obtain, so in practice, individual defendants could be victims of performance below the *Strickland* standard yet nonetheless never obtain habeas relief in federal court.

## 2. Equitable Exceptions to State Procedural Defaults

After the Supreme Court's decisions in *Martinez* and *Trevino*, many state postconviction attorneys presented arguments encouraging their states' courts to adopt analogous protections in state law. The *Martinez* analog sought by petitioners is typically for IAPCC to serve as cause to excuse procedural default of an earlier claim.<sup>165</sup> At least four states recognizing such an analog have exceptions broader than *Martinez* itself, allowing ineffective assistance of postconviction counsel to serve as cause for more than just defaulted IATC claims.<sup>166</sup>

For the most part, these efforts have failed. Many high courts have grounded their refusal to adopt a *Martinez–Trevino* analog in the fact that the U.S. Supreme Court had announced only an equitable principle, not a constitutional rule.<sup>167</sup> Had the U.S. Supreme Court announced a constitutional holding, that holding would have been binding on the states via incorporation; however, an equitable holding is not binding precedent outside of the federal system.<sup>168</sup> Given that *Black's Law Dictionary* defines "equity" as "[f]airness," "[t]he body of principles constituting what is fair and right," and "[t]he recourse to principles of justice" to prevent hardship,<sup>169</sup> this is an especially counterintuitive stance to take. Essentially, courts who refuse to adopt an analog on this basis are saying: "While adopting a *Martinez–Trevino*-style exception may be the *fair* thing to do, we are not constitutionally *required* to create one and thus decline to do so." This subsection will examine the extent to which state courts have created or rejected an analogous exception within their jurisdiction.

165. See, e.g., *Reese v. State*, 2017 ME 40, ¶ 1, 157 A.3d 215, 216 (petition advocating that after *Martinez*, state review of ineffective postconviction counsel should be permitted under Maine law).

166. *Grinols v. State*, 74 P.3d 889, 894–96 (Alaska 2003) (authorizing second postconviction proceeding for claim of ineffective assistance of first postconviction counsel); *Kaddah v. Comm'r of Corr.*, 153 A.3d 1233, 1246–47 (Conn. 2017) (authorizing third postconviction proceeding for claim of ineffective assistance of second postconviction counsel); *Commonwealth v. Bradley*, 261 A.3d 381, 399, 401 (Pa. 2021) (authorizing IAPCC claim in part for failure to raise a claim of ineffective assistance of direct-appeal counsel); *Jackson v. Weber*, 2001 S.D. 30, ¶¶ 8, 16, 637 N.W.2d 19, 21, 23 (authorizing IAPCC claim for failure to assert "jurisdictional error").

167. See, e.g., *Johnson v. State*, 395 P.3d 1246, 1261 (Idaho 2017) (identifying *Martinez* as "explicitly equitable in nature" and "not a constitutional holding [that is] binding on state courts"); see also *Ex parte Preyor*, 537 S.W.3d 1, 2 (Tex. Crim. App. 2017) (Newell, J., concurring) ("[C]ourts have uniformly recognized that the *Martinez-Trevino* rule is a federal exception [and] not a constitutional command to correct state court habeas proceedings.").

168. See *Marceau*, *supra* note 106, at 1242–43 (highlighting that while "constitutional incorporation is a vehicle by which fundamental rights protected by the Constitution are nationalized," rights for individuals can vary between states when they are not incorporated).

169. *Equity*, BLACK'S LAW DICTIONARY (12th ed. 2024).

One state, Pennsylvania, has expressly adopted a *Martinez–Trevino*-style remedy. Although Pennsylvania courts had at one point declined to adopt such an exception,<sup>170</sup> the Pennsylvania Supreme Court reversed course in the 2021 case of *Commonwealth v. Bradley*.<sup>171</sup> Some other states, such as Alaska, California, Iowa, South Dakota, and Wisconsin, had *Martinez–Trevino*-like exceptions even before *Martinez* was decided.<sup>172</sup> Connecticut adopted a *Martinez–Trevino* analog in 2017—five years after *Martinez* and four after *Trevino*—but interestingly did not cite either *Martinez* or *Trevino*.<sup>173</sup>

Nevada has what could be described as a “partial” *Martinez* analog because it has a capital-only statutory right to postconviction counsel.<sup>174</sup> Specifically, Nevada has permitted IAPCC to serve as cause to excuse state procedural default when the petitioner had a statutory right to postconviction counsel in *Crump v. Warden*.<sup>175</sup> However, the Nevada Supreme Court has rejected an extension of the *Crump* rule to procedural default when the petitioner had *no* statutory right to postconviction counsel.<sup>176</sup>

The highest courts in several states have definitively rejected an equitable exception to procedural or time-bar errors.<sup>177</sup> In *Creech v. State*, the Idaho Supreme Court denied the petitioner’s request to apply a *Martinez–Trevino*-style equitable exception to its 42-day statute of limitations.<sup>178</sup> As discussed above, Nebraska rejected a *Martinez–Trevino* analog despite a clear legislative command that

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170. *Commonwealth v. Saunders*, 60 A.3d 162, 165 (Pa. Super. Ct. 2013) (“While *Martinez* represents a significant development in federal habeas corpus law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in [its postconviction act].”).

171. 261 A.3d 381, 399 (Pa. 2021).

172. *Grinols v. State*, 74 P.3d 889, 895 (Alaska 2003) (holding that the “due process of the Alaska Constitution requires that a defendant be given a chance to challenge the effectiveness of counsel in a second petition for post-conviction relief”); *In re Friend*, 489 P.3d 309, 316–17 (Cal. 2021) (explaining California’s “traditional successiveness bar” and how it does not impose “blanket restrictions on the consideration of every petition filed after an initial petition”); *Dunbar v. State*, 515 N.W.2d 12, 14–15 (Iowa 1994) (holding that ineffectiveness of postconviction counsel provides cause under Iowa law to excuse the failure of an applicant to raise an issue in prior proceedings); *Jackson v. Weber*, 2001 SD 30, ¶ 16, 637 N.W.2d 19, 23 (emphasizing that “providing a right to counsel implicitly include[s] effective counsel”); *State v. Allen*, 2010 WI 89, ¶ 85, 328 Wis. 2d 1, 786 N.W.2d 124 (citing *State ex rel. Rothering v. McCaughtry*, 556 N.W.2d 136, 139 (Wis. Ct. App. 1996)) (finding that ineffective postconviction counsel may constitute a sufficient reason as to why an issue was not raised on direct appeal).

173. See *Kaddah v. Comm’r of Corr.*, 153 A.3d 1233, 1246–47 (Conn. 2017).

174. NEV. REV. STAT. § 34.820(1)(a) (2023); see also Erica Berrett & Jessica Perlick, *Post-Conviction Primer: What Happens After the Verdict*, 28 NEV. LAW. 22, 23 & n.3 (2020).

175. 934 P.2d 247, 254 (Nev. 1997).

176. *Brown v. McDaniel*, 331 P.3d 867, 869, 875 (Nev. 2014).

177. The *Martinez–Trevino* exception does not excuse failure to abide by AEDPA’s statute of limitations. See *United States v. Rice*, No. CR 03-441-8, 2019 WL 1778509, at \*5 (D.D.C. Apr. 22, 2019) (collecting cases).

178. 543 P.3d 494, 499–500 (Idaho 2024); see also *Johnson v. State*, 162 P.3d 1246, 1261 (Idaho 2017) (describing *Martinez*’s holding as “explicitly equitable in nature” and “not a constitutional holding . . . binding on state courts”). After the decision in *Creech*, the petitioner, Thomas Creech, was scheduled to be executed on February 28, 2024; however, because medical staff were not able to establish an IV line, his execution was postponed. See Bill Hutchinson, *Death chamber glitch halts execution of serial killer Thomas Creech*, ABC NEWS (Feb. 28, 2024, 4:04 PM), <https://abcnews.go>.

postconviction counsel be effective.<sup>179</sup> Six other state supreme courts have also rejected a *Martinez–Trevino* exception.<sup>180</sup> The North Carolina legislature barred the exception by statute: “ineffective assistance of prior postconviction counsel [may not] constitute good cause” for procedural denials of the state’s motions for appropriate relief.<sup>181</sup> The Utah legislature similarly foreclosed an analogous exception by a 2008 amendment to its Postconviction Remedies Act,<sup>182</sup> potentially responding to the 2006 Supreme Court of Utah decision in *Menzies v. Galetka*, which applied *Strickland* and granted relief under Utah Rule of Civil Procedure 60(b)(6)<sup>183</sup> based on a finding that postconviction counsel had provided ineffective and “grossly negligent” assistance.<sup>184</sup>

Although Mississippi once had a *Martinez–Trevino*-like exception for death-penalty cases based on the principle of “meaningful access to the courts” during a “critical stage,”<sup>185</sup> its Supreme Court recently overruled that exception, apparently at least in part because it had been utilized by a large number of petitioners seeking stays in federal habeas cases.<sup>186</sup>

In other states, while the highest court has not yet commented, appellate courts have ruled on and rejected the issue. An Arizona appellate court held that *Martinez* did not impact the state’s framework because while there is a requirement that counsel be appointed for postconviction under Arizona Rule of Criminal Procedure 32, there is no requirement in the Arizona Constitution.<sup>187</sup> The Tennessee Court of Criminal Appeals had a similar ruling.<sup>188</sup> Oregon rejected an exception for so-called successive petitions.<sup>189</sup> Alabama, perhaps one of the least postconviction-friendly

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com/US/supreme-court-rejects-idaho-serial-killer-thomas-creechs/story?id=107634213 [https://perma.cc/RY87-H2GP].

179. *State v. Hessler*, 850 N.W.2d 777, 785–87 (Neb. 2014).

180. *Roten v. State*, No. 476, 2013, 2013 WL 5808236, at \*1 (Del. Oct. 28, 2013); *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019); *Isom v. State*, 235 N.E.3d 150, 155 (Ind. 2024); *State v. Deloch*, 2013–1975 (La. 5/16/14), 140 So. 3d 1167, 1167; *Reese v. State*, 2017 ME 40, ¶ 1, 157 A.3d 215, 216; *Kelly v. State*, 745 S.E.2d 377, 377 (S.C. 2013).

181. N.C. GEN. STAT. § 15A-1419(c) (1996). In North Carolina, the motion for appropriate relief is the vehicle for “relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, coram nobis, and all other post-trial motions.” N.C. GEN. STAT. § 15A-1411(c) (2006).

182. “Nothing in [Utah’s Postconviction Remedies Act] shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.” 2008 Utah Laws 1845, 1848 (codified at UTAH CODE ANN. § 78B-9-202(4) (2022)).

183. Utah’s rule 60(b)(6) is identical to the federal rule 60(b)(6). *See* UTAH R. CIV. P. 60(b)(6); FED. R. CIV. P. 60(b)(6).

184. 2006 UT 81, ¶¶ 78–101, 150 P.3d 480, 509–15.

185. *Grayson v. State*, 2012–DR–00059–SCT (¶ 90) (Miss. 2013), 118 So. 3d 118, 146.

186. *Ronk v. State*, 2021–DR–00269–SCT (¶¶ 20, 23) (Miss. 2024), 391 So. 3d 785, 793–94; *see also supra* note 133.

187. *State v. Escareno-Meraz*, 307 P.3d 1013, 1014 (Ariz. Ct. App. 2013).

188. *Niles v. State*, No. M2014-00147-CCA-R3-PC, 2015 WL 3453946, at \*7 (Tenn. Crim. App. June 1, 2015).

189. *Cunningham v. Premo*, 373 P.3d 1167, 1178 (Or. Ct. App. 2016). As a simplistic definition, a “successive” petition is one filed by the same petitioner in the same judicial system contesting the same judgment. However, the term has a strong common law gloss, and a complete definition is much more

states,<sup>190</sup> also has rejected an exception in its appellate courts.<sup>191</sup> Three appellate circuits in Illinois have all rejected arguments for *Martinez–Trevino* exceptions.<sup>192</sup>

Some state courts have only impliedly rejected a *Martinez–Trevino* exception. Missouri, for example, apparently does not allow a *Martinez–Trevino*-style exception, but the Missouri Supreme Court’s last opinion on the matter was post-*Coleman* and pre-*Martinez*, a time when its holding that the petitioner is responsible for postconviction counsel’s ineffective assistance was more mainstream.<sup>193</sup> Although the Texas Court of Criminal Appeals has not squarely addressed the issue, a concurring opinion by Judge Newell in 2017 indicated at least three judges on that court would reject a *Martinez–Trevino*-style exception,<sup>194</sup> adhering to the state’s pre-*Martinez* precedent.<sup>195</sup>

Lastly, more than a decade after *Martinez* and *Trevino* were decided, some state supreme courts have still not reached the question of whether a *Martinez–Trevino*-style exception applies within the state. Kentucky almost reached the question in a 2020 case, but ultimately decided that the case was not right for deciding the issue.<sup>196</sup> The North Dakota Supreme Court has only published one decision discussing *Martinez*; that decision distinguished the case at issue from *Martinez* both factually and legally, and the court did not explicitly say how or whether it would apply an equitable exception, though it seems unlikely that the court was ready to apply a *Martinez–Trevino*-style exception.<sup>197</sup> Vermont seemed willing to adopt a state-law “[a]daptation” of *Martinez* in *In re Towne*, but

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complex and likely varies by state. For an excellent recent overview of the U.S. Supreme Court’s caselaw defining “second or successive” in 28 U.S.C. § 2244, see generally Megan Volin, *Defining “Second or Successive” Habeas Petitions after Magwood*, 85 U. CHI. L. REV. 1545 (2018).

190. See *Alabama Post Conviction Relief Project*, FED. DEFS. FOR THE MIDDLE DIST. OF ALA., <https://alm.fd.org/alabama-post-conviction-relief-project> [<https://perma.cc/NBU5-689N>] (last visited July 13, 2025) (“Alabama does not have a statewide public defender system. Alabama does not guarantee appointment of counsel in post-conviction proceedings. Alabama does not permit appointment of post-conviction attorneys until a prisoner has filed a case in court. Alabama does not pay for training for the lawyers appointed to handle these difficult cases. Alabama caps these attorneys’ compensation at \$1500 and does not guarantee payment of expert or litigation expenses for this complex work.”).

191. *Van Pelt v. State*, 202 So. 3d 707, 718 (Ala. Crim. App. 2015).

192. See *People v. Donoho*, 2018 IL App (5th) 140501-U, ¶ 18. (observing that the Illinois First and Third Districts had “encountered a similar argument” and concluded *Martinez–Trevino* did not apply, and then holding that it also would not apply the exception).

193. “State habeas corpus relief is available if a movant can show . . . ‘(a) that the procedural defect was caused by something external to the defense—that is, a cause for which the defense is not responsible—and (b) prejudice resulted from the underlying error that worked to the petitioner’s actual and substantial disadvantage.’ . . . [*P*]ostconviction counsel’s failure to file a notice of appeal is not external to the defense . . . .” *Gerhke v. State*, 280 S.W.3d 54, 58–59 (Mo. 2009) (en banc) (emphasis added) (quoting *State v. Norsworthy*, 71 S.W.3d 610, 611–12 (Mo. 2002) (en banc) (per curiam)).

194. See *Ex parte Preyor*, 537 S.W.3d 1, 2–4 (Tex. Crim. App. 2017) (Newell, J., concurring).

195. See *Ex parte Graves*, 70 S.W.3d 103, 115–17 (Tex. Crim. App. 2002).

196. *Foley v. Commonwealth*, No. 2019-SC-0182-MR, 2020 WL 6390212, at \*5, \*7 (Ky. Oct. 29, 2020) (assuming *Martinez*-style exception does apply, but finding it unmet, and ultimately deciding not to reach the question of whether it does).

197. *Lehman v. State*, 2014 ND 103, ¶¶ 17–21, 847 N.W.2d 119, 124–26.

ultimately concluded that because the petitioner in that case failed to show prejudice, the court did not need to reach the question.<sup>198</sup>

Consequently, one can see that *Martinez* and *Trevino* have had some appreciable impact on state court postconviction procedures through exceptions to state-court procedural defaults. However, because most state courts to consider analogous issues have refused to reform their postconviction processes, that impact remains limited.

When considering the fact that *Shinn* seriously weakened the scope of the *Martinez–Trevino* exception together with the reality that many states have systems where there is no remedy for IAPCC—even when that IAPCC resulted in default of an otherwise valid IATC claim—one could rightly question how meaningful the right to effective assistance of counsel is.

### C. EVIDENTIARY HEARINGS IN STATE POSTCONVICTION PROCEEDINGS

*Shinn*'s effect was to forbid evidentiary hearings for procedurally defaulted IATC claims in federal habeas court, even if the petitioner could show cause for that default under the *Martinez–Trevino* exception. Claims are only defaulted in the federal courts if the prisoner could not return to state court to litigate them. If a petitioner could go back to state court to exhaust claims which are not procedurally barred in the state, federal courts will typically issue a stay-and-abey to allow them to exhaust the claims without risking expiration of AEDPA's strict one-year statute of limitations.<sup>199</sup> This Section examines the procedures the state courts themselves afford for evidentiary hearings, including those for successive postconviction petitions filed in state court.

States generally allow evidentiary hearings or other forms of discovery in a petitioner's first state postconviction action.<sup>200</sup> However, these hearings are often at the discretion of the court or require certain conditions be fulfilled: for example, Rule 37.3 of Arkansas Rules of Criminal Procedure provides that an evidentiary hearing "should be held" in postconviction proceedings "unless the files of the case conclusively show that the [petitioner] is entitled to no relief."<sup>201</sup> Indeed, even supporters of capital punishment acknowledge that a primary purpose of

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198. *In re Towne*, 2018 VT 5, ¶¶ 32–35, 206 Vt. 615, 182 A.3d 1149, 1160–61. Specifically, the Vermont Supreme Court said: "We need not decide whether to accept petitioner's invitation to import the reasoning of *Martinez* into our state law governing successive PCR petitions and abuse of the writ . . ." *Id.* ¶ 35 (emphasis added). Although the Vermont Supreme Court unambiguously *did not decide* the issue, a federal district court in Vermont later wrote that *In re Towne* had "expressly declined to" adopt *Martinez*. *Fellows v. Baker*, No. 30-cv-139, 2021 WL 4200875, at \*6 n.2 (D. Vt. Mar. 10, 2021) (emphasis added).

199. A "stay-and-abey," formally known as a "stay and abeyance," is a remedy employed by courts for dealing with "mixed petitions" which contain both exhausted and unexhausted claims. The federal habeas court is permitted to stay the proceedings to allow the petitioner to return to state court to exhaust any claims which are neither exhausted nor procedurally defaulted. *See generally* Rhines v. Weber, 544 U.S. 269 (2005).

200. *E.g.*, ALA. R. CRIM. P. 32.9(a); MASS. R. CRIM. P. 30(c)(4); MONT. CODE ANN. § 46-21-201(5) (2017).

201. *Mancia v. State*, 2015 Ark. 115, at 3, 459 S.W.3d 259, 263; *see* ARK. R. CRIM. P. 37.3(a), (c).

state postconviction proceedings is to “consider facts outside the trial record,”<sup>202</sup> which essentially requires an evidentiary hearing.

Even before *Shinn*, several states had relatively lenient rules permitting evidentiary hearings in successive postconviction petitions<sup>203</sup> if initial postconviction counsel provided ineffective assistance. This is significant because petitioners who receive IAPCC in an unsuccessful state proceeding might be tempted to subsequently seek relief from a federal court by seeking habeas under § 2254. However, in states where evidentiary hearings are permitted for successive petitions, *Shinn* may justify a second trip to state court to introduce evidence before filing for federal habeas.

For example, in *Rippo v. State (Rippo V)*, the Nevada Supreme Court permitted an evidentiary hearing on Michael Rippo’s judicial-bias claim presented in a second state postconviction proceeding. At least part of the justification for allowing this evidentiary hearing was the fact that “prior postconviction counsel provided ineffective assistance by not investigating and reasserting the . . . claim, which would if true provide good cause to excuse the procedural defaults.”<sup>204</sup> Similarly, more than a decade before *Shinn*, petitioners in Wisconsin could go to the trial court to “perform the necessary factfinding function” for issues they allege were not raised due to ineffective assistance of postconviction counsel.<sup>205</sup> These procedural rules provide postconviction petitioners with a broader right to present evidence than *Shinn* provides petitioners under § 2254.

Because it is such a recent decision, state courts and legislatures have not been presented with many opportunities to evaluate their own successive-petition evidentiary limitations. In the few state court cases to discuss *Shinn*, states generally seem hesitant to change their postconviction procedures in response. Nevada has responded by reaffirming that “any change” to the state’s postconviction scheme must originate in its legislature.<sup>206</sup> An Idaho appellate court said that “[n]either *Shinn* nor *Martinez* affect a state post-conviction proceeding.”<sup>207</sup> Fortunately, these examples show that state courts may be as unwilling to adopt petitioner-

202. Criminal Justice Legal Foundation, *CJLF Opposes Double Murderer’s Appeal*, ADVISORY, Winter 2017, at 1, 1.

203. See *supra* note 189.

204. 423 P.3d 1084, 1091 (Nev. 2018), *amended by Rippo v. State (Rippo VI)*, No. 53626, 2018 WL 6499391 (Nev. Dec. 7, 2018). Of course, another reason the Nevada Supreme Court may have ordered an evidentiary hearing is that the case had been remanded from the U.S. Supreme Court regarding the judicial-bias claim. See generally *Rippo v. Baker (Rippo IV)*, 580 U.S. 285 (2017).

205. *State v. Allen*, 2010 WI 89, ¶ 85, 328 Wis. 2d 1, 786 N.W.2d 124, 139 (citing *State ex rel. Rothering v. McCaughtry*, 556 N.W.2d 136, 139 (Wis. Ct. App. 1996)). In Wisconsin, courts “shall” “[g]rant a prompt hearing” and “make findings of fact” for postconviction motions “[u]nless the motion and the files and records of the action *conclusively* show that the person is entitled to no relief.” Wis. STAT. § 974.06(3)(c)–(d) (2025) (emphasis added).

206. *Coca v. State*, No. 85519, 2024 WL 1266990, at \*2 (Nev. Mar. 22, 2024) (citing *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014)).

207. *Moore v. State*, No. 49158, 2024 WL 1739343, at \*4 (Idaho Ct. App. Apr. 23, 2024). A Missouri appellate court expressed a nearly identical sentiment: “*Shinn* did not impose additional restrictions on post-conviction relief proceedings in state courts . . .” *Courtois v. State*, 693 S.W.3d 154, 165 (Mo. Ct. App. 2024).

unfriendly principles from the Supreme Court as they are to adopt petitioner-friendly principles such as the *Martinez–Trevino* exception.

### III. HOW PETITIONERS AND LITIGATORS CAN RESPOND

Perhaps the most effective response to *Shinn*—and many other problems in federal habeas litigation—would be legislative in nature.<sup>208</sup> Because the Supreme Court has made clear that *Martinez*, *Trevino*, and *Shinn* are all equitable and statutory rulings—not constitutional—Congress can amend the relevant statutes to achieve better results. An amendment to 28 U.S.C. § 2254(e)(2) could be a modest way to walk back the holding of *Shinn* while leaving the majority of extant habeas jurisprudence undisturbed. However, more aggressive statutory reforms would be even better because they could provide a more meaningful standard of effective assistance during the postconviction and habeas processes. For example, Congress could legislate that IAPCC is sufficient for federal courts to excuse procedural default and hear the merits of claims; this would effectively codify *Martinez* and could go a step further by providing the exception to all state prisoners regardless of their system of postconviction review.<sup>209</sup>

Of course, there are some attorneys who apparently believe that there is no problem to be solved, by legislation or otherwise. Even after *Shinn*, at least one law firm insisted that habeas petitioners had little to worry about as long as they hired competent state postconviction counsel.<sup>210</sup> However, this advice blithely ignores the fact that *Shinn*—like *Martinez* and *Trevino*—was a case inextricably linked to the fact that at least two presumably competent and qualified lawyers nevertheless provided constitutionally ineffective assistance, resulting in a loss of time and confidence by their clients. Such advice is cold comfort to petitioners with incompetent postconviction counsel.<sup>211</sup> An additional complicating factor is that it might not be possible for state postconviction counsel to continue to represent the petitioner in federal § 2254 proceedings, especially if the federal proceeding will result in application of the *Martinez–Trevino* exception.<sup>212</sup>

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208. See, e.g., Garrett & Phillips, *supra* note 27, at 1764–77 (proposing legislative amendments to AEDPA). There are also some avenues to pursue changes in Supreme Court precedent, but given *Shinn*'s recency, those will likely not be effective at changing the procedural-default doctrine. See *supra* note 44 (discussing one argument habeas practitioners could make to challenge the U.S. Supreme Court's interpretation of AEDPA).

209. A legislative solution would also put an end to the “endless . . . state-by-state litigation” to determine whether the exception applies. *Trevino v. Thaler*, 569 U.S. 413, 433 (2013) (Roberts, C.J., dissenting).

210. *Don't Panic over Shinn v Ramirez but Also Make Sure to Hire Competent State Habeas Counsel*, PULLAN & YOUNG: POST CONVICTION (May 30, 2022), <https://www.pullanyoung.com/blog/dont-panic-over-shinn-v-ramirez-but-also-make-sure-to-hire-competent-state-habeas-counsel> [<https://perma.cc/6UNH-92JB>].

211. See, e.g., *Commonwealth v. Debois*, No. 82 EDA 2021, 2022 WL 2112772, at \*1, \*3–5 (Pa. Super. Ct. June 13, 2022) (describing the numerous errors made by *two* separate court-appointed postconviction counsel for one indigent petitioner, including mistaking postconviction collateral review for a direct appeal).

212. See, e.g., *Idaho State App. Pub. Def. v. Fourth Jud. Dist. Ct.*, 540 P.3d 311, 330 (Idaho 2023) (expressly declining to opine on “whether the same attorney or law firm should represent a criminal

Even if legislative solutions are not forthcoming, however, there are ways for attorneys to achieve meaningful change within the existing doctrinal framework. This Part will briefly explore and discuss strategies that trial counsel, direct-appeal counsel, postconviction counsel, and federal § 2254 counsel can employ in order to give their clients the greatest opportunity for success in the modern postconviction world in state and federal court.

#### A. OPTIONS IN STATE COURT

It is tautological to say that the most important thing that trial counsel could do to safeguard their clients' rights is to perform effectively. An effective trial defense attorney is the most important safeguard for criminal defendants because they are positioned to address constitutional errors at the earliest possible point in time and perhaps even prevent the state from obtaining convictions through constitutional violations. However, it is almost certainly impossible to have a constitutionally perfect trial.<sup>213</sup> Even assuming a perfect trial, though, trial counsel may be unable to influence whether their client timely files state or federal postconviction remedies. Because error correction can involve an uphill battle with appeals, postconviction proceedings, and habeas petitions, coordination across attorneys at each level—when possible and ethically permitted—is essential.

Accordingly, defense counsel at trial and on direct and discretionary appeal should primarily focus on error preservation. Claims of error that are not “fairly presented” to the state are not exhausted, and when those claims are no longer presentable in the state’s judicial system, federal courts will consider them procedurally defaulted.<sup>214</sup> In preserving these issues, capital habeas practitioner Jonah Horwitz emphasizes that “they must not only be raised as constitutional arguments but as *federal* constitutional arguments.”<sup>215</sup> Additionally, when the underfunding of public defender services potentially results in situations which could constitute ineffective assistance,<sup>216</sup> trial counsel should prominently raise the issue and ensure that it is properly documented.<sup>217</sup>

State postconviction counsel—primarily those in *Martinez–Trevino* statutory postconviction states who are the first attorneys handling IATC claims—must also focus specifically on identifying as many bases for arguing IATC as possible, keeping in mind that there are many possible areas where ineffective assistance can arise:

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defendant in both a federal habeas case and a state post-conviction proceeding” based on the “extremely fact intensive” nature of the question, and instructing trial courts to decide “on a case-by-case basis”).

213. “To Err is *Humane* . . . .” Alexander Pope, *An Essay on Criticism*, EIGHTEENTH-CENTURY POETRY ARCHIVE, <https://www.eighteenthcenturypoetry.org/works/o3675-w0010.shtml> [https://perma.cc/C4RM-WSU9] (last visited July 17, 2024).

214. *See, e.g.*, *Knight v. Reyes*, No. 23-cv-01085, 2024 WL 4826988, at \*2 (D. Or. Nov. 15, 2024).

215. Jonah J. Horwitz, *Maximizing Your Client’s Chance of Success in Federal Habeas*, IDAHO STATE BAR: DIGITAL ADVOC. (Mar. 2, 2023) (emphasis added), <https://isb.idaho.gov/blog/maximizing-your-clients-chance-of-success-in-federal-habeas> [https://perma.cc/LN4E-L9H3].

216. This is frequently the case. *See supra* note 9 and accompanying text.

217. Telephone Interview with Paula Harms, Assistant Fed. Pub. Def. (Aug. 29, 2024) (on file with author).

[A] single prosecution can give rise to ineffective assistance claims arising at every stage of the case, based on different events, and involving different counsel. Plea bargaining, pre-trial investigation, trial preparation, pre-trial motions or the lack thereof, advising the defendant as to his or her rights, opening or closing arguments, presentation of evidence or omission of evidence, objections to prosecution evidence or lack thereof, testimony by the defendant or lack thereof, not taking an appeal, and the arguments made on appeal are among the multitude of events that may give rise to ineffective assistance claims.<sup>218</sup>

Although *Shinn* theoretically left the exceptions in *Martinez* and *Trevino* undisturbed, its strong limitations on evidentiary hearings mean that postconviction counsel cannot hope to later try to introduce IATC claims or their supporting evidence without an initial presentation in state court.

Because of those strong limitations, discretionary-appeal and postconviction counsel have a second focus area: introduction of evidence. This is especially true for state postconviction counsel, who will likely be the last person who can introduce evidence on the petitioner's behalf. The Supreme Court has pointed out that petitioners are "bound by the oversight[s]" of their postconviction attorneys.<sup>219</sup> And it is particularly important to introduce any evidence potentially related to any colorable claim of IATC, much of which will necessarily be outside of the trial record. Since several states permit evidence to be introduced in successive petitions,<sup>220</sup> state postconviction attorneys who have time before the AEDPA statute of limitations runs should also file a successive petition in state court *before* filing an initial federal habeas petition to ensure that evidence can be added to the state-court record.

State trial and postconviction counsel should also both be willing to sign affidavits or declarations discussing their performance, including indications of whether specific actions were strategic decisions or mistakes.<sup>221</sup> This may be more palatable to state postconviction counsel in states like Indiana or Illinois which have lower standards for effective assistance of counsel because it may not require admitting to providing *constitutionally* ineffective assistance.<sup>222</sup> Members of the capital-litigation bar have a greater understanding of the need for these concessions,<sup>223</sup> but the most effective way to approach this problem is by bringing specific evidence to the attention of the prior attorney and having them describe the impact it would have made on their strategies and tactics.<sup>224</sup>

218. *Yick Man Mui v. United States*, 614 F.3d 50, 56 (2d Cir. 2010).

219. *Maples v. Thomas*, 565 U.S. 266, 281 (2012).

220. *See supra* Section II.C.

221. Interview with Paula Harms, *supra* note 217. Counsel's admission of error can be highly persuasive to a court determining ineffective assistance, especially on *Strickland's* performance prong. *See, e.g., McHam v. State*, 746 S.E.2d 41, 46 (S.C. 2013), *abrogated on other grounds by Smalls v. State*, 810 S.E.2d 836 (S.C. 2018).

222. *See Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989); *People v. Cotto*, 2016 IL 119006, ¶ 45, 51 N.E.3d 802, 811.

223. Interview with Paula Harms, *supra* note 217.

224. *Id.*

## B. OPTIONS IN FEDERAL COURT

If relief is not available or not granted in state court, petitioning a federal court for habeas relief may be the only option available. Federal habeas litigators must employ strategies to avoid *Shinn*'s limitations, either by somehow getting the case back to state court or by introducing arguments that *Shinn* should not apply. One technique recommended by several sources is for federal habeas counsel to seek a stay-and-abeey, also known as a *Rhines* stay, to return to state court to introduce evidence.<sup>225</sup> A stay-and-abeey is available only for petitioners with "mixed" petitions, meaning that some of their claims have been exhausted while some are neither exhausted nor defaulted.<sup>226</sup> Habeas petitioners typically find "surprising levels of success" in having these stays granted,<sup>227</sup> and they provide a mechanism by which evidence can be added to the state-court record for unexhausted claims. However, federal courts are unable to grant a *Rhines* stay for the sole purpose of adding evidence if all claims in the petition have already been exhausted in state court; in other words, if a petition is not "mixed," a *Rhines* stay cannot help the petitioner, and litigators must use other means instead.<sup>228</sup>

Relitigation in state postconviction may offer a narrow window of opportunity. In an American Bar Association publication, David Barron specifically recommends practitioners pursue state postconviction relitigation simultaneously with federal habeas litigation.<sup>229</sup> If this relitigation is procedurally proper, it is obviously an excellent option because it allows evidence to be added to the state-court record without a stay. However, state courts do not seem open to excusing untimely or successive petitions as a response to *Shinn*,<sup>230</sup> so state courts might not permit this litigation strategy. Moreover, it appears that it may be problematic for the federal habeas action as well: at least the Ninth Circuit has refused to accept evidence that was presented to a state court in a procedurally inappropriate manner in *McLaughlin v. Oliver*.<sup>231</sup>

In *McLaughlin*, the Ninth Circuit discussed the simultaneous-relitigation strategy. "Shortly after submitting [Michael] McLaughlin's federal petition, federal habeas counsel returned to state court and filed a successive post-conviction petition."<sup>232</sup> The state court, however, upheld the dismissal of this petition because it "was both untimely and successive" and thus procedurally defaulted.<sup>233</sup> Therefore, the Ninth Circuit held that the evidence could not be used in the federal habeas proceeding

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225. David M. Barron, *Martinez Remains Alive After Shinn v. Ramirez*, CRIMINAL JUST., Winter 2023, at 8, 12; Interview with Paula Harms, *supra* note 217; *see also* *Rhines v. Weber*, 544 U.S. 269, 275–79 (2005) (outlining a *Rhines* stay).

226. *See Rhines*, 544 U.S. at 275, 277–78.

227. E-mail from Lee Kovarsky, Bryant Smith Chair in L. & Co-Dir. of Cap. Punishment Ctr., Univ. of Tex. Sch. of L., to author (Oct. 2, 2024, at 22:39 ET) (on file with author).

228. *Id.*

229. Barron, *supra* note 225, at 12.

230. *See, e.g., Creech v. State*, 543 P.3d 494, 498 (Idaho 2024) (disallowing successive state postconviction petition to develop evidentiary record to use in federal habeas petition).

231. 95 F.4th 1239, 1240 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 598 (2024) (mem.).

232. *Id.* at 1244.

233. *Id.*

because it has not been “previously present[ed] to the state courts in compliance with state procedural rules.”<sup>234</sup> This holding underscores that simultaneous state postconviction relitigation may be ineffective unless the claim is still procedurally viable in some form in state court.

*Coram nobis* is another potential option, but it will probably only rarely succeed. If federal habeas counsel discovers truly new evidence, then they could pursue simultaneous state *coram nobis*,<sup>235</sup> at least for those states which still maintain it as a unique remedy.<sup>236</sup> A writ of *coram nobis* is a rare remedy which applies to newly discovered facts which, if known at the time, would have caused a trial court not to render the judgment at issue.<sup>237</sup> Many states require that the petitioner no longer be in custody when filing a writ of *coram nobis*,<sup>238</sup> for petitioners in these states, *coram nobis* would not be available as a means to introduce evidence into the federal habeas record, which requires that the petitioner be “in custody.”<sup>239</sup> However, even for petitioners who can file the writ in custody, it is unclear whether *coram nobis* would truly be an effective response, given its demanding standard compared with the standard announced in *Shinn*.<sup>240</sup> Any information which would satisfy the burden for *coram nobis* likely could also satisfy the evidentiary requirements of § 2254(e)(2). However, because *coram nobis* may be a procedurally proper proceeding in certain cases, it would avoid the *McLaughlin* issue. Therefore, for a potentially very narrow class of states where *coram nobis* exists as an independent remedy, in-custody petitions are permitted, and effective-assistance standards exist that would not impute counsel’s failure to introduce those facts to their client, *coram nobis* may be effective.<sup>241</sup>

234. *Id.* at 1249 (emphasis removed) (quoting *Shinn v. Ramirez*, 596 U.S. 366, 375–76 (2022)).

235. For an example of an attempt of this method, see generally *Henderson v. State*, No. W2023-00515-CCA-R3-ECN, 2024 WL 278542 (Tenn. Crim. App. Jan. 25, 2024).

236. *See, e.g.*, 42 PA. CONS. STAT. § 9542 (“The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose . . . including habeas corpus and *coram nobis*.”); N.C. GEN. STAT. § 15A-1411(c) (2006); *see also* MEANS, *supra* note 114, § 3:1 (“The functions the writ once performed have been taken over in many respects by statutory procedures, particularly modern motion practice.”).

237. *See* *Coram nobis*, BLACK’S LAW DICTIONARY (12th ed. 2024) (definition 2). In the federal system, *coram nobis* is broader than habeas in at least one way because the petitioner does not need to be “in custody” to request the writ. *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013).

238. *Using a Writ of Coram Nobis to Address Errors in a Criminal Case*, CHAMBERS L. FIRM (Dec. 18, 2024) <https://www.chamberslawfirmca.com/using-a-writ-of-coram-nobis-to-address-errors-in-a-criminal-case> [<https://perma.cc/S7QB-PJ5S>] (“Most states require the defendant to no longer be in custody to file [a writ of *coram nobis*].”).

239. 28 U.S.C. § 2254(a).

240. “[I]n most jurisdictions, the writ of *coram nobis* is available only to seek a determination of facts outside the record. If the alleged facts were determined at trial, or might have been if the defendant had exercised due diligence, *coram nobis* is usually unavailable.” MEANS, *supra* note 114, § 3:2 (footnotes omitted). Because many courts impute postconviction counsel’s lack of due diligence to the petitioner, *see supra* note 39 and accompanying text, it is not clear that *coram nobis* is an easier hurdle to clear than *Shinn* itself.

241. Although a state-by-state survey of the requirements for *coram nobis* is beyond the scope of this Note, it could be very beneficial to practitioners. Such a survey could address all three of the requirements mentioned above on a state-by-state basis as well as any other particular considerations necessary for effective pursuit of state *coram nobis* relief.

Petitioners may have more success arguing in federal court that an exception to the requirements of § 2254 applies. Petitioners could make an attempt to present evidence to state courts for procedurally defaulted claims, and subsequently argue for admission of that evidence in federal court under § 2254(b)(1)(B)(i).<sup>242</sup> This section “excuses the requirement to present, and develop, a claim in state court if ‘there is absence of available State corrective process.’”<sup>243</sup> Assuming a petitioner could prove that the subsection applied, federal courts would not be able to deny an evidentiary hearing based on the same reasoning from *McLaughlin*, and federal habeas counsel would be able to have an evidentiary hearing in federal court.<sup>244</sup>

Lastly, postconviction counsel should argue for a limited reading of *Shinn*.<sup>245</sup> Justice Thomas summarized the holding of *Shinn* by stating that, “under § 2254 (e)(2), a prisoner is ‘at fault’ even when state postconviction counsel is *negligent*.”<sup>246</sup> Litigators should argue that IAPCC which exceeds mere negligence does not fall within the rubric of *Shinn*, is not attributable to the petitioner via the agency relationship, and should not constitute a failure to develop the state-court record for the purposes of § 2254(e)(2).<sup>247</sup>

#### CONCLUSION

Relief from a conviction after trial has always been difficult, and the counterintuitive obstacle put in petitioners’ paths by the *Shinn* court makes the process even more difficult. Postconviction and habeas relief is an incredibly complex area of the law and one subject to significant change. Since *Martinez* was decided, federal appellate courts and state supreme courts have each issued dozens of precedential opinions, creating a complex and confusing network of rules and exceptions, including reduced standards for effectiveness of postconviction counsel. Despite this flurry of activity, however, many issues remain unresolved for many states. This gives criminal-defense, postconviction, and habeas litigators unique opportunities to make novel arguments on behalf of their clients, such as arguing for statutory exceptions under § 2254(b)(1)(B)(i) or equitable exceptions such as IAPCC exceeding mere negligence. The federal judiciary is apparently still adhering to a restrictive view of habeas, but states like Pennsylvania and South Carolina prove that litigation in state courts can provide a viable option to meaningfully change the nature of IATC claims through the development of petitioner-friendly caselaw.

State trial attorneys can preserve issues for appeal and come forward to support allegations of ineffective assistance; these actions are essential to enable subsequent attorneys to vindicate their clients’ interests in postconviction or habeas proceedings. Postconviction attorneys must focus on building as comprehensive of a record as possible in the state-court proceedings to avoid *Shinn*’s restrictive reading of § 2254(e)(2). And federal habeas attorneys need to be ready to exercise creative options to try to reopen the state record.

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242. Barron, *supra* note 225, at 13.

243. *Id.* (quoting 28 U.S.C. § 2254(b)(1)(B)(i)).

244. *See id.*

245. E-mail from Lee Kovarsky, *supra* note 227.

246. *Shinn v. Ramirez*, 596 U.S. 366, 384 (2022) (emphasis added).

247. E-mail from Lee Kovarsky, *supra* note 227.