No. 20-1009

IN THE
Supreme Court of the United States

DAVID SHINN, *et al.*,
Petitioners,
v.
DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HABEAS SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are scholars at universities across the United States with expertise in the law of habeas corpus. Amici have collectively spent decades researching, studying, and writing about the writ of habeas corpus and have a professional interest in ensuring that this Court is accurately informed regarding the implementation of *Martinez v. Ryan*, 566 U.S. 1 (2012), by the federal courts. The Amici believe that *Martinez* is a vital mechanism for criminal defendants to have a meaningful opportunity for review of ineffective assistance of trial counsel claims that were never adequately presented in state habeas proceedings because of ineffective assistance of state post-conviction relief counsel.

The group of habeas scholars consists of:

John H. Blume, the Samuel F. Leibowitz Professor of Trial Techniques and Director of the Cornell Death Penalty Project at Cornell Law School. He teaches Criminal Procedure, Evidence, and Federal Appellate Practice, and supervises the Capital Punishment and Juvenile Justice Clinics. In addition to being the author of several books and numerous law review articles, Professor Blume has argued eight cases in the Supreme Court of the United States and has been co-counsel or amicus curiae counsel in numerous other Supreme Court cases.

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[1] The parties have filed blanket consents to the filing of all amicus briefs at the merits stage. No counsel for a party authored this brief in whole or in part, and no person other than the amici and their counsel has made any monetary contribution to the preparation or submission of this brief.

Erwin Chemerinsky, the Dean and Jesse H. Choper Distinguished Professor of Law at Berkeley Law at the University of California. He is the author of a leading treatise on federal courts and of casebooks on constitutional law and criminal procedure. In 2017, *National Jurist* magazine again named Dean Chemerinsky the most influential person in legal education in the United States.

Michael C. Dorf, the Robert S. Stevens Professor of Law at Cornell Law School. He is the author, co-author, or editor of six books and over one hundred scholarly articles and essays for law reviews, and peer-reviewed science and social science journals on various topics including the death penalty and habeas corpus.

Eric M. Freedman, the Siggi B. Wilzig Distinguished Professor of Constitutional Law at Hofstra University School of Law. He is the author of numerous articles regarding habeas corpus, defense representation in death penalty cases and related matters. He is also the author of the scholarly monographs *Habeas Corpus: Rethinking the Great Writ of Liberty* (NYU Press 2003) and *Making Habeas Work: A Legal History* (NYU Press 2018). Professor Freedman serves as the Reporter to the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, and on the steering committee of the ABA's Death Penalty Representation Project. He regularly provides legislative testimony and expert testimony on matters relating to habeas corpus and the performance of counsel in capital cases.

Brandon Garrett, the L. Neil Williams, Jr. Professor of Law at Duke Law School and director of the law school's Wilson Center for Science and Justice. In addition to numerous articles published in leading law reviews and scientific journals, Professor Garrett's work has been widely cited by courts, including this Court, lower federal courts, state supreme courts, and international courts.

Randy Hertz, the Vice Dean of N.Y.U. School of Law and director of the law school's clinical program.[2] Before joining the N.Y.U. faculty, Professor Hertz worked at the Public Defender Service for the District of Columbia in the juvenile, criminal, appellate and special litigation divisions. He is the co-author of a two-volume treatise titled *Federal Habeas Corpus Law and Practice*.

James Liebman, the Simon H. Rifkind Professor of Law at Columbia Law School. Professor Liebman has argued five capital and habeas corpus appeals in front of the U.S. Supreme Court. He has also testified before the Senate Judiciary Committee and the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice about the need for improved legal representation in state capital trials and revisions to federal habeas corpus law, respectively. He is the co-author of a two-volume treatise titled *Federal Habeas Corpus Law and Practice*.

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[2] Mr. Hertz's title and institutional affiliation are being provided for identification purposes only, and the views expressed in the brief should not be regarded as the position of N.Y.U. School of Law.

Justin Marceau, a Professor at the University of Denver's Sturm College of Law. He specializes in Constitutional Law, Criminal Law and Procedure, and in particular, habeas corpus. He is a member of the American Law Institute, and the recipient of the Colorado *Gideon* award. He has published a textbook and numerous academic articles on issues involving habeas corpus. His articles have been cited frequently, including by this Court and other state and federal courts.

Keir M. Weyble, Clinical Professor of Law at Cornell Law School. He teaches Evidence, Trial Advocacy, Post-Conviction Remedies and Capital Punishment Law, and co-teaches the Capital Punishment and Juvenile Justice Clinics. He has been co-counsel or amicus curiae counsel in nine capital or habeas corpus cases decided by the Supreme Court of the United States. He has also written, lectured, and consulted extensively on habeas corpus law and practice for more than twenty-five years.

SUMMARY OF THE ARGUMENT

In asking this Court to erode its decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), the State of Arizona paints a dismal picture of that decision's practical consequences—a picture that turns out to bear little relationship to the reality of habeas corpus litigation. According to Arizona, *Martinez* "would inevitably swell beyond its bounds and envelop the interests in finality, comity, and federalism AEDPA was intended to protect," vindicating the concern of the dissenting Justices in *Martinez* that the majority is granting criminal defendants a "'free pass to feder-

al habeas'" relief. (Pet. Br. 28 (quoting *Martinez*, 566 U.S. at 28 (Scalia, J., dissenting)). In fact, a decade of post-*Martinez* practice repudiates these dire predictions and confirms that federal courts have granted habeas relief predicated on *Martinez* exceedingly rarely.

To help illustrate this, Amici present an analysis of federal court decisions addressing *Martinez* related claims in the three jurisdictions that have the highest number of those decisions. This analysis, summarized in the Appendix, confirms that—far from granting a "free pass"—federal courts have applied *Martinez* narrowly and only in extraordinary circumstances.

Although federal courts in these jurisdictions have addressed habeas petitions asserting that petitioner's procedural default should be excused under *Martinez* in 1,200 cases, they have granted relief in only 38 of these cases, and a hearing relating to the prisoner's *Martinez* related claim in only 19. These results confirm that federal courts grant relief on the basis of *Martinez* only in extraordinary cases, where it is essential to safeguard criminal defendants' "right to the effective assistance of counsel at trial," which serves as "a bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. A spotlight on two illustrative cases confirms that, as in the cases before the Court, federal courts have granted relief only under unusual circumstances as contemplated in *Martinez*.

ARGUMENT

I. FEDERAL COURTS HAVE APPLIED *MARTINEZ* NARROWLY

Federal courts are precluded from considering the merits of most habeas petitions for procedural reasons, and evidence presented here by Amici confirms that this remains true following this Court's decision in *Martinez*. As before, the "role of federal courts in reviewing habeas corpus petitions by prisoners in State custody is exceedingly narrow." *Milam v. Dir., TDCJ-CID*, No. 4:13-CV-545, 2017 WL 3537272, at *6 (E.D. Tex. Aug. 16, 2017).

Federal courts have followed this Court's guidance in *Martinez*—including in permitting evidentiary development—without opening the proverbial litigation floodgates. On the contrary, federal courts recognize "that the equitable rule announced in *Martinez* is exceedingly narrow," applying only to failure to raise ineffective assistance of counsel claims in initial-review collateral proceedings. *Isbell v. Nagle*, No. 2:94-cv-2448-CLS-TMP, 2016 WL 7320914, at *2 (N.D. Ala. Apr. 4, 2016), *report and recommendation adopted*, 2016 WL 7242178 (N.D. Ala. Dec. 15, 2016); *see also Griffin v. Crews*, No. 08-cv-22817-KMM, 2014 WL 11380944, at *2 (S.D. Fla. June 19, 2014) ("*Martinez* has a very specific and very narrow holding with a limited application."); *id.* at *3 ("The limitations of the holding in *Martinez* are clear."); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) ("The Court in *Martinez* purported to craft a narrow exception to *Coleman*. We will assume that the Supreme Court meant exactly what it wrote:

"'*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true *except* as to initial-review collateral proceedings for claims of ineffective assistance of counsel *at trial*.'" (quoting *Martinez*, 566 U.S. at 15)).

Federal courts have also consistently rejected attempts to broaden the reach of *Martinez* and offer relief outside the four corners of its holding. *See, e.g.*, *Isbell*, 2016 WL 7320914, at *2 (declining to extend *Martinez* where petitioner proceeded pro se because the rule does not apply to "appeals from initial-review collateral proceedings" (quoting *Martinez*, 566 U.S. at 16)); *Gray v. Gilmore*, No. 3:14-CV-1595, 2016 WL 3254862, at *7 (M.D. Pa. June 14, 2016) (declining to extend *Martinez* to ineffective assistance of post-conviction counsel claims outside of claims of ineffective assistance of trial counsel).

Litigation outcomes match these careful pronouncements by federal courts. Amici present an analysis of all cases that seek to apply the Court's holding in *Martinez* in the three jurisdictions (spanning three different circuits) with the greatest number of federal court opinions that do so: Pennsylvania, Florida, and South Carolina.[3] This review

[3] Amici selected these three states because they present the greatest number of federal court opinions that cite or discuss the Court's holding in *Martinez*. Federal District Court opinions in those three states that cite *Martinez* and related appellate decisions, a total of 2,294 cases, have been considered. Amici now present data solely from cases where the court held that *Martinez* could arguably apply to petitioner's claims and undertook the relevant analysis, a total of 1,200 cases.

confirms that habeas relief remains the rare exception.

Collectively, the federal courts in these states have addressed a *Martinez* related claim in 1,200 cases between March 27, 2012 and August 20, 2021, but have granted habeas relief in only 38 of those. Only three of the 38 were capital cases. *See* Appendix. Further, these courts granted *Martinez* evidentiary hearings even less frequently—out of the 1,200 cases—only 19 petitioners received an evidentiary hearing. *See id*.

As this Court accurately predicted in *Martinez*, its holding does not "put a significant strain on state resources," because "[w]hen faced with the question whether there is cause for an apparent default, a State may answer that the ineffective assistance of trial counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Martinez*, 566 U.S. at 15-16. Indeed, out of the 1,200 cases discussing a *Martinez* related claim, in 1,037 cases (86%), the court held that *Martinez* could not provide an avenue for relief because it held that the prisoner's claim of ineffective assistance of trial counsel was not "substantial" or did not have "some merit." *See* Appendix.

In total, *Martinez* has provided an avenue for relief in less than *four percent* of the cases that invoked it before the federal courts of these three states. *See id*. In the nine years since *Martinez* was decided,

federal courts have demonstrated that they are more than capable of safeguarding the principles of comity, finality and federalism while preserving the important function of *Martinez*'s narrow exception.

II. THE RARE APPLICATION OF *MARTINEZ* IS NECESSARY TO SAFEGUARD THE CONSTITUTIONAL RIGHT TO COUNSEL

Although *Martinez* has not made relief broadly available, it succeeded in permitting federal courts to review newly developed evidence in the narrow context where both trial counsel and post-conviction counsel are ineffective. This narrow opportunity for meaningful habeas relief remains critical for the reason this Court identified in *Martinez*: "A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel." *Martinez*, 566 U.S. at 12. Without the procedural avenue afforded by *Martinez*, including the ability to present newly developed evidence on federal habeas review, defendants may be denied *any* effective review of the sufficiency of trial counsel—no matter how poor the representation. The cases currently before this Court are illustrative, as are two recent federal court decisions discussed below that granted habeas relief. Each involves acute deficiencies in trial counsel's representation that would have evaded scrutiny without the narrow *Martinez* gateway to federal habeas review.

A. Joe Mitchell

The case of Joe Clark Mitchell provides one example of how ineffective assistance of counsel might evade review if a federal court is precluded from considering new evidence on a habeas petition. In 1986, Mitchell, a Black man, was sentenced to life in prison plus thirteen years after an all-white jury convicted him of raping two white women in Tennessee. *Mitchell v. Genovese*, 974 F.3d 638, 640 (6th Cir. 2020). The prosecution's case against Mitchell consisted of wholly circumstantial evidence; they had neither a confession nor eyewitness identification. *Id.* at 641. During voir dire, Mitchell's attorney failed to object when the prosecution struck a prospective Black juror on the basis of her race, despite the Supreme Court's recent decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), months prior. *Mitchell*, 974 F.3d at 640-41. Mitchell's post-conviction counsel failed to argue that this failure rendered trial counsel ineffective. *Id* at 640-41. It was not until the post-conviction hearing that Mitchell's post-conviction counsel orally moved to add a *Batson* claim. *Mitchell*, 974 F.3d at 641. Even then, post-conviction counsel "failed to show how many peremptory strikes were used, who they were used against, or whether black prospective jurors remained in the venire." *Id.* The state post-conviction court denied relief, without ruling on the *Batson* claim. *Id.*

The district court reviewing Mitchell's federal habeas petition heard newly presented evidence, including testimony by the prosecutor himself, persuading the court that the only Black juror was stricken from the venire in violation of *Batson*.

Mitchell, 974 F.3d at 641, 650-51. Despite the fact that the district court heard the evidence of this *Batson* violation in 1994—the only court to do so—and granted Mitchell relief on three separate occasions, the Sixth Circuit overturned that relief all three times because it "repeatedly viewed post-conviction counsel's failure to bring an [ineffective assistance of counsel]-*Batson* claim . . . to constitute a procedural default." *Id.* at 641-42, 647, 651. It was only in 2020 that the Sixth Circuit, relying on *Martinez*, held that Mitchell was entitled to "a new trial[,] free of unconstitutional race discrimination." *Id.* at 651. In 2020, the Sixth Circuit concluded that "it [wa]s time—past time—that [it] rectif[ied] the 'judicial travesty' that is Mitchell's sentence." *Id*. (citation omitted). The court explained: "Striking black prospective jurors on the basis of race '"poisons public confidence" in the judicial process,' because it suggests the justice system is complicit in racial discrimination. Denial of the opportunity to seek relief in such situations undermines respect for the courts and the rule of law." *Id*. at 652 (citations omitted). *Martinez* "remove[d] [the] barrier" for the relief Mitchell was due 25 years earlier. *Id*.

Mitchell's case well illustrates how federal courts target "the danger *Martinez* sought to address—that the provision of two consecutive constitutionally ineffective lawyers would trap habeas petitions in a procedural double-bind through which they would be consigned to prison without a court ever hearing the merits of their constitutional claim." *Mitchell*, 974 F.3d at 652.

B. Lawrence Gaines

The Eastern District of Pennsylvania's decision addressing Lawrence Gaines's habeas petition likewise illustrates the federal courts' well-tailored application of *Martinez*. *Gaines v. Marsh*, No. 20-361, 2021 WL 1141965 (E.D. Pa. Mar. 24, 2021). Gaines, acting as "muscle" outside of a drug house, scuffled with a prospective drug purchaser who "later surprised Mr. Gaines by hitting him in the back with a house rail after Mr. Gaines turned away." *Id.* at *1. Gaines reacted by stabbing the prospective purchaser, who later succumbed to his injuries. *Id.* Gaines and his trial counsel chose to rely on a self-defense argument "after the evidence confirmed the potential drug purchaser hit Mr. Gaines with a house rail after Mr. Gaines turned away thinking the scuffle ended" and "[a]n eyewitness described the scuffle and Mr. Gaines's response to being hit with a house rail." *Id.* at *37.

Gaines's trial counsel suggested that he may not want to testify in his defense. *Id.* The trial judge twice agreed to instruct the jury it could draw "no adverse inference" from Gaines's decision to not testify if requested. *Id.* The "no adverse inference" instruction ensures that jurors do not equate defendants' refusal to testify with guilt—a concern especially relevant here in light of Gaines's self-defense theory. *Id.* at *20-21.

Before the charging conference, trial counsel twice informed the judge he would seek a "no adverse inference" instruction, and the trial court indicated it would give the instruction. *Id.* at *8. But ultimately

counsel "did not ask for the instruction at the charging conference or after the instructions to the jury when afforded at least three opportunities to do so," *id.* at *17, to purportedly "avoid drawing attention to the issue which presumably could only aid Mr. Gaines." *Id.* at *37. Trial counsel made this decision without consulting with Gaines. *Id.* The jury never received the instruction. *Id.* The court charged the jury on first and third-degree murder and voluntary and involuntary manslaughter because it "found sufficient evidence to allow the jury to choose a lesser included homicide offense which also involved the possibility of a significantly reduced sentence." *Id.* at *9. The jury convicted Gaines of first-degree murder and Gaines was sentenced to life without possibility of parole. *Id.*

The error was compounded when Gaines's post-conviction counsel "failed to notice the omission of the 'no adverse inference' instruction from the trial transcripts." *Id.* at *17. The district court found that "[i]t [was] objectively unreasonable to omit from the PCRA petition [trial counsel's] failure regarding the instruction." *Id.* The court held that post-conviction counsel "had no strategic reason for failing to raise the 'no adverse inference' instruction issue . . . ." *Id.* "[H]e simply did not notice the issue," even though "[a] reading of the trial transcripts" clearly showed that the instruction had been contemplated but never given to the jury. *Id.*

It was only through a *Martinez* hearing that testimony from both sets of counsel revealed the lack of strategy and reasoning that went into their failure to address the lack of a "no adverse inference" in-

struction. The district court concluded: "After evaluating the credibility of testimony from trial and post-conviction counsel, we must find Mr. Gaines has been deprived of constitutionally effective assistance of counsel from the trial and direct appeal counsel as well as the post-conviction counsel." *Id.* at *38. Absent *Martinez*, Gaines's meritorious claim would not have been heard by any court because post-conviction counsel "simply did not notice the issue." *Id.* at *17-18.

* * *

The successful habeas petitions of Mr. Mitchell and Mr. Gaines, as well as the cases now before the Court, illustrate that, while *Martinez* rarely results in habeas relief, it is necessary to ensure that an individual accused of a criminal offense that involves the potential loss of physical liberty—or, as in the cases before the Court, life—has a meaningful Sixth Amendment right to effective assistance of counsel at trial. In the decade since *Martinez*, federal courts have diligently endeavored to provide meaningful relief in such cases without offering the "free pass" to habeas relief that Arizona invokes before the Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted,

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