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

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BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 68 current members of the Network represent hundreds of prisoners with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.[2] The Innocence Network and its mem-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* or its counsel made such a contribution. The parties have provided written consent to the filing of this *amicus* brief.

[2] The member organizations for amicus brief purposes include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Law Center for Criminal Justice and Professional Responsibility, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Indiana University McKinney Wrongful Conviction Clinic, Innocence Delaware, Inc., Innocence Project, Innocence Project Argentina, Innocence Project at the University of Virginia School of Law, Innocence Project Brasil, Innocence Project London, Innocence Project New Orleans, Innocence Project of Florida, Innocence Project of Texas, Italy Innocence Project, Justicia Reinvindicada Puerto Rico Innocence Project, Korey Wise Innocence Project, Loyola Law School Project for the Innocent, Manchester Innocence Project,

bers are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

Through its substantial experience with later-exonerated defendants, the Innocence Network has a unique perspective on the legal and practical issues implicated in this case. More specifically, *amicus* has seen first-hand that, much of the time, innocent defendants are convicted after receiving ineffective assistance of trial counsel. To reduce the chance of such wrongful convictions, *amicus* has a direct interest in ensuring that criminal defendants have a meaningful opportunity to develop meritorious ineffective-assistance claims—and to prove their actual innocence—in post-conviction proceedings. The Innocence Network therefore respectfully files this brief in sup-

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Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Arizona Innocence Project, University of Baltimore Innocence Project Clinic, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University School of Law Innocence and Justice Clinic, Washington Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

port of David Martinez Ramirez's and Barry Lee Jones's positions.

SUMMARY OF ARGUMENT

This Court held in 2012 that, when a state has removed trial-based claims of ineffective assistance from the direct-appeal process, a habeas petitioner who received ineffective assistance at trial *and* in state post-conviction proceedings can assert the latter ineffectiveness to excuse a procedural default and obtain merits review of his trial-based ineffectiveness claim. *Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012). That equitable exception was vital, the Court reasoned, because, without it, the right to counsel and the fabric of the adversary process would be endangered. *Id.* at 12–13. Less than a decade later, Arizona now asks the Court to reverse the decisions below on the premise that 28 U.S.C. § 2254(e)(2) actually forbids the very factual development that *Martinez* recognized to be a necessary aspect of meaningful habeas review. That is both wrong and dangerous.

I. *Martinez* and Section 2254(e)(2) address distinct points in the post-conviction review process. For its part, *Martinez* recognizes the right to a hearing to excuse procedural default and specifically contemplates the introduction of post-trial evidence as a part of that proceeding. Section 2254(e)(2), by contrast, governs what happens after a procedural default hearing and merely forbids new evidence when the defendant was at fault and the case is firmly on the path to merits review. That has nothing to do with evidence that was introduced at the *Martinez* proceeding, which simply remains a part of the case. Arizona's alternative view—*i.e.*, that Section 2254(e)(2) swoops in to gut *Martinez* after the fact—would trivialize the right to counsel for individuals who have already *twice* suf-

fered from ineffective assistance of counsel. The constitutional questions raised by that atextual position underscore its flaws.

II. Arizona's position would also carry the profoundly unjust consequence of precluding habeas petitioners from developing and presenting claims of *actual innocence*. An innocent individual who received ineffective assistance of counsel will often require the development of post-trial evidence to vindicate his or her innocence claim. In *amicus*'s experience, as illustrated through a handful of real-life examples, many exonerations based on ineffective assistance depend critically on the development of post-trial evidence. Without such evidence, basic failures to investigate cannot be corrected, faulty forensic evidence cannot be unmasked, and the innocent individuals who are the victims of these deficiencies have no route to justice. A fair and reliable criminal process cannot tolerate that outcome.

ARGUMENT

I. *MARTINEZ* AND SECTION 2254(e)(2) PERMIT THE DEVELOPMENT OF EVIDENCE THAT A LITIGANT COULD NOT PRESENT AT TRIAL.

Petitioner acknowledges that "§ 2254(e)(2) and *Martinez*'s exception to procedural default work independently; each applies at a different stage of habeas litigation." Pet'rs Br. 4. That concession paves the way to affirmance: *Martinez* requires placing post-trial evidence before a federal court, Section 2254(e)(2) does not expressly prohibit that *Martinez* procedure, and Arizona's interpretation would vitiate *Martinez* and undermine the right to counsel and the many other protections that it secures.

A. Section 2254(e)(2) does not apply to evidence developed in *Martinez* proceedings.

Martinez is clear that post-trial evidence regarding an ineffective assistance of trial counsel claim can be introduced and considered in federal court. The Court not only acknowledged that ineffective-assistance claims frequently depend on the ability to supplement the post-trial record but also stated that, in a *Martinez* hearing, the "prisoner must . . . demonstrate that the underlying [ineffective-assistance] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14. Doing so often requires evidence, and, once presented, that evidence is properly before the district court for the case's duration.

Section 2254(e)(2) does not speak to these *Martinez*-controlled processes and hearings. The statute states that "the court shall not hold an evidentiary hearing" on a claim whose factual basis an applicant "failed to develop" in State court. 28 U.S.C. § 2254(e)(2). As petitioner agrees, that language concerns a "separate and independent" aspect of habeas litigation. Pet'rs Br. 36; see also *id.* at 4. Section 2254(e)(2) therefore limits the addition of new evidence *after* the *Martinez* phase, when the district court considers the merits of the habeas claim, and when the habeas claimant was actually "at fault" for the failure to develop evidence in state court.[3] It has no bearing on any evidence that has already been placed before the district court as part of the *Martinez* process.

Martinez and Section 2254(e)(2) thus operate separately and harmoniously, striking a balance between

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[3] A habeas petitioner is not "at fault" when he demonstrates cause and prejudice under *Martinez*. See Resp'ts Br. 31–41.

avoiding the constitutional problems associated with precluding a remedy for ineffective-assistance claims and protecting the interests of "finality, comity, and federalism." Pet'rs Br. 28.

B. The constitutional avoidance canon supports construing Section 2254(e)(2) to incorporate an effective remedy for ineffective-assistance claims in initial-review collateral proceedings.

This Court has repeatedly explained that, where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [it is] obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299–300 (2001) (citation omitted). Application of that doctrine here underscores why Arizona's preferred approach—which would erode the Sixth Amendment right to effective assistance of counsel for even innocent defendants, through no fault of their own—is not tenable.

1. This case's constitutional stakes are profound: the Court has repeatedly recognized that the Sixth Amendment plays a uniquely important role in protecting the criminal justice system and preventing wrongful convictions.

That begins with the right to counsel's far-reaching implications for any individual defendant. Most directly, it simultaneously ensures that individual defendants enjoy a fair trial and—through its contribution to a robust adversarial process—ensures that the trial is one "whose result is reliable." *Strickland* v. *Washington*, 466 U.S. 668, 686–87 (1984). But the Sixth Amendment also serves as a first-line defense against other constitutional defects, making it "by far

the most pervasive" "[o]f all the rights that an accused person has, . . . for it affects his ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 653–54 (1984); see also *Martinez*, 566 U.S. at 12 (noting role of right to counsel in "protecting the rights of the person charged").

The Sixth Amendment right to counsel is especially essential for an innocent defendant—"[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 68–69 (1932). After all, "it is the defense counsel's responsibility to protect the innocent from the mistakes of others: from witnesses' misidentifications, police officers' rush to judgment, and prosecution's reluctance to reveal potentially exculpatory material." Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Conviction After a Century of Research*, 100 J. Crim. L. & Criminology 825, 855 (2010) (cleaned up). Inadequate defense lawyering can therefore result in "a cascade of errors that dilutes or even destroys the barrier provided by an effective advocate between an innocent defendant and a wrongful conviction." *Id.* at 856.

Empirical evidence confirms that ineffective assistance is a leading cause of wrongful convictions. One study of exonerations, for example, concluded that "egregiously incompetent defense lawyering" was one of the two "most common errors found at the state post-conviction stage." James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1850 (2000). Similarly, the American Bar Association has noted that "inadequate representation often is cited as a significant contributing factor" to wrongful conviction. A.B.A. Standing Comm.

on Legal Aid & Indigent Defendants, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* 3 (Dec. 2004).

2. Arizona's interpretation of § 2254 "would raise serious constitutional problems" by eliminating the *only* opportunity to meaningfully vindicate these rights for many defendants. *INS*, 533 U.S. at 299–300.

The starting point for *Martinez* and this case is that many states—like Arizona—have chosen to eliminate the ability to raise ineffective-assistance claims on direct appeal. Those states reason that consideration on direct appeal "gains very little," because appellate courts "cannot consider facts outside the record," but "risks a great deal, as the defendant who asks this Court to determine issues of ineffectiveness on the appellate record faces the possibility of later preclusion." *State* v. *Kiles*, 213 P.3d 174, 183–84 (Ariz. 2009); see also, *e.g.*, *Thompson* v. *State*, 9 S.W.3d 808, 813–14 & n.6 (Tex. Crim. App. 1999) ("[I]n the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*."); *Wuornos* v. *State*, 676 So. 2d 972, 974 (Fla. 1996) (per curiam) (holding that ineffectiveness claims are not cognizable on direct appeal, unless the claim is obvious on the existing record).

In precluding such claims on direct appeal, these states implicitly recognize that "[i]neffective-assistance claims often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13. In fact, the trial record "in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." *Massaro* v. *United States*, 538 U.S. 500, 504–05 (2003). It "may contain *no* evidence of alleged errors of omission," or it "may reflect the action taken

by counsel but not the reasons for it." *Id.* (emphasis added).

Nor is the trial record likely to reveal counsel's failure to challenge the "[s]erious deficiencies [that] have been found in the forensic evidence used in criminal trials." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 319 (2009). "The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity." Nat'l Rsch. Council, *Strengthening Forensic Science in the United States: A Path Forward* 8 (2009). Worse, "[a] forensic analyst 'may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution,'" and "[e]ven the most well-meaning analyst may lack essential training, contaminate a sample, or err during the testing process." *Stuart* v. *Alabama*, 139 S. Ct. 36, 36 (2018) (mem.) (Gorsuch, J., dissenting from the denial of certiorari). These problems are devasting for innocent defendants: a comprehensive study found that, in exoneration cases, invalid forensic testimony had contributed to convictions *60 percent of the time*. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009). Without competent counsel, the trier of fact will likely have no reason to question this often fundamentally flawed evidence.

These facts have critical implications for this case. "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). But those "unparalleled protections" must be scrupulously safeguarded and maintained. With no "meaningful opportunity . . . for the full and fair litigation of a habeas petitioner's

ineffective-assistance claims at trial and on direct review," *Kimmelman* v. *Morrison*, 477 U.S. 365, 378 n.3 (1986), post-conviction proceedings are the first possible opportunity to develop or present evidence to protect the "most pervasive" "[o]f all the rights that an accused person has," *Cronic*, 466 U.S. at 654. An interpretation of Section 2254(e)(2) that would prevent post-trial evidentiary development for defendants who receive ineffective assistance in initial-review collateral proceedings would significantly undermine that right. It therefore cannot be preferred over a "fairly possible" interpretation that does not. *INS*, 533 U.S. at 299–300.

II. THE DEVELOPMENT OF POST-TRIAL EVIDENCE IS IMPERATIVE TO ENSURE THAT THE CLAIMS OF INNOCENT INDIVIDUALS CAN BE HEARD.

The concerns raised above are not just abstract. Jones's case exemplifies all of them. Authorities rushed to judgment, disregarding elementary investigatory standards and presenting deeply flawed and "scientifically unreliable" forensic evidence about the timeline of injury. J.A. 126, 129, 244, 262, 339–41; see also Liliana Segura, *What Happened to Rachel Gray?*, The Intercept (Oct. 23, 2017), https://theintercept.com/2017/10/23/barry-jones-arizona-death-row-rachel-gray/. These deficiencies intersected with trial counsel's failure to investigate obvious leads or to challenge that forensic evidence through cross-examination and independent expert analyses. See J.A. 200–16, 195–99, 263–64. Only supplementation of the record following post-trial investigation revealed these defects.

Nor is Jones alone. Rather, based on *amicus*'s experience with exonerations of innocent individuals, there are numerous examples of wrongfully convicted individuals who were able to demonstrate trial coun-

sel's inadequacy only by supplementing the record following post-trial investigation. A few salient examples follow below.

- Lisa Marie Roberts was charged with the murder of a woman with whom she was involved in a love triangle. *Roberts* v. *Howton*, 13 F. Supp. 3d 1077, 1082 (D. Or. 2014). She pleaded guilty to manslaughter in 2004 due to ineffective assistance. *Id.* at 1082, 1103. Namely, when confronted with the prosecution's preliminary analysis of cell tower evidence, her trial counsel failed to obtain an expert analysis of that evidence, and then provided deficient advice to Roberts. *Id.* at 1098, 1103. In reality, the cell tower evidence was inconclusive and did not actually inculpate Roberts. See *id.* at 1101. After the district court excused Roberts's procedural default under *Martinez*, *id.* at 1099, expert reinvestigation of the phone records led to the conclusion that cell phone tower data was incapable of pinpointing Roberts's location, *id.* at 1102–03. Ms. Roberts was later exonerated. *Lisa Roberts*, Nat'l Registry of Exonerations, https://tinyurl.com/hcn9wszu (last updated June 9, 2014).

- Floyd Bledsoe was convicted in 2000 of first-degree murder, aggravated kidnapping, and aggravated indecent liberties with a child, his 14-year-old sister-in-law. *Bledsoe* v. *State*, 150 P.3d 874, 874 (Kan. 2007); *Bledsoe* v. *Bd. of Cnty. Comm'rs*, 501 F. Supp. 3d 1059, 1069 (D. Kan. 2020), *appeal docketed*, No. 20-3252 (10th Cir. Dec. 18, 2020). Bledsoe's brother had explicitly confessed to the crime, left incriminating messages on the telephone of the family church pastor, and provided the location of the victim's body. 150 P.3d at 874–75; *Bledsoe* v. *Bruce*, 569

F.3d 1223, 1227 (10th Cir. 2009). Nevertheless, police arrested Bledsoe after his brother framed him through false statements, including that Bledsoe had blackmailed him into confessing. 150 P.3d at 875. Bledsoe's counsel failed to cross-examine the brother about inconsistencies in his testimony or provide any forensic evidence to rebut the brother's account. See *Floyd Bledsoe*, Nat'l Registry of Exonerations, https://tinyurl.com/26m5uttj (last updated May 24, 2019). Subsequent DNA testing during counsel's post-conviction investigation confirmed Bledsoe's brother's involvement with the victim, and Bledsoe's brother provided a second, detailed confession in a series of suicide notes. *Bledsoe* v. *Vanderbilt*, 934 F.3d 1112, 1115–16 (10th Cir. 2019). Bledsoe was exonerated in 2015. *Bledsoe*, 501 F. Supp. 3d at 1069; *Floyd Bledsoe*, Nat'l Registry of Exonerations, *supra*.

- Kimberly Long was convicted of murdering her boyfriend in 2005. *In re Long*, 476 P.3d 662, 664 (Cal. 2020). Her trial counsel failed to investigate the victim's time of death. *Id.* at 668. Long subsequently sought post-conviction relief in state court on ineffective-assistance grounds. *Id.* at 667. Relying on post-trial evidence, the California Supreme Court held that trial counsel provided ineffective assistance in (1) relying on the time-of-death opinion of someone who had never been to medical school and never had the information necessary to render an informed opinion, and (2) failing to specifically seek out a time-of-death expert—when the conviction depended almost entirely on time of death. *Id.* at 668–69, 670–71. The prosecution dismissed the

charges in April, 2021. *Kimberly Long*, Nat'l Registry of Exonerations, https://tinyurl.com/teakjn9v (last updated May 18, 2021).

- Daniel Larsen was convicted of felony possession of a dagger and sentenced to 28 years to life. *Larsen* v. *Adams*, 718 F. Supp. 2d 1202, 1206–07 (C.D. Cal. 2010), *aff'd sub nom. Larsen* v. *Soto*, 742 F.3d 1083 (9th Cir. 2013). Although he did not raise ineffective assistance on direct review, the district court excused the default under *Schlup* and held an evidentiary hearing, at which Larsen supplemented the record with documentary evidence and exculpatory testimony from multiple witnesses. *Id.* at 1211–19. The court determined that trial counsel prejudiced Larsen in failing to locate reasonably reachable and "extraordinarily exculpatory" witnesses, and in failing to bring a motion for a new trial after Larsen notified counsel about the witnesses. *Id.* at 1228. The court granted Larsen's habeas petition, and he was later exonerated. *Daniel Larsen*, Nat'l Registry of Exonerations, https://tinyurl.com/4mtk523c (last updated Dec. 15, 2017).

- Randy Liebich was convicted of first-degree murder of Steven Quinn, a two-year-old child, and sentenced to 65 years in prison. *People* v. *Liebich*, 2016 IL App (2d) 130894U, ¶ 3. He raised an ineffective assistance claim in a post-conviction petition. *Id.* ¶ 4. In support, Liebich's post-conviction counsel obtained affidavits from doctors explaining why Steven's cause of death could not have been attributed to Liebich—based on new evidence of Steven's medical records and histological slides. *Id.* ¶¶ 7, 65. Finding

a reasonable basis to conclude that Liebich's trial counsel was ineffective for failing to present such evidence at trial, the appellate court reversed the trial court's dismissal of the ineffective-assistance claim and remanded. *Id.* ¶¶ 107–09. The State eventually dropped the charge. *Randy Liebich*, Nat'l Registry of Exonerations, https://tinyurl.com/47cw4b8y (last updated Apr. 30, 2020).

- Howard Dudley was convicted of sexually abusing his nine-year-old daughter and given a life sentence. *Dudley* v. *City of Kinston*, No. 4:18-CV-00072-D, 2020 WL 2091789, at *1–2 (E.D.N.C. Apr. 30, 2020). His daughter's testimony was important to the State's case, but trial counsel failed to conduct any investigation into the child's school or medical records and did not consult a medical expert. See *Howard Dudley*, Nat'l Registry of Exonerations, https://tinyurl.com/v7c3ye8s (last updated Sept. 25, 2018). In 2013, after a thorough investigation, Dudley filed a post-conviction petition including new records and a series of medical and psychological examinations demonstrating that his daughter suffered from a number of issues that rendered her highly suggestible and her testimony unreliable. *Id.* In March 2016, the daughter recanted her testimony, and the Court vacated the convictions on the ground that trial counsel's failure to investigate amounted to an inadequate legal defense. *Id.*

- Frank Burrell was convicted of first-degree murder and sentenced to 32 years in prison. *People* v. *Burrell*, 2019 IL App (1st) 172665-U, ¶ 2. Burrell then filed for post-conviction relief, alleging that his trial counsel was ineffective for

failing to investigate and present evidence that would have impeached the state's primary witnesses. *Id.* Burrell provided testimonial evidence from his uncle and father explaining that he had returned home from work before the time of the shooting, *id.* ¶ 9, an affidavit from his employer showing that time records corroborated his version of events, see *id.* ¶ 10, and testimony from his grandmother establishing that he lacked access to the car allegedly used in the murder, *id.* ¶¶ 9, 14. Although the circuit court summarily denied the motion, an appellate court vacated Burrell's conviction and remanded for a new trial, concluding that trial counsel's failure to elicit testimony from key witnesses or present evidence of Burrell's timecard constituted ineffective assistance. *Id.* ¶¶ 2, 9, 24–31.

- Jennifer Del Prete was convicted of first-degree murder after a child passed away in her care. *Del Prete* v. *Thompson*, 10 F. Supp. 3d 907, 909–10 (N.D. Ill. 2014). After exhausting her post-conviction remedies in state court, she filed a habeas petition in federal court, alleging ineffective assistance based on her counsel's failure to investigate or challenge the state's expert testimony. *Id.* at 921, 951–52. At a procedural default hearing, she presented expert testimony about the implausibility of the causal chain that supported her conviction. *Id.* at 954–55. The court found cause and prejudice to excuse Del Prete's procedural default and set a date for further proceedings. *Id.* at 958. Del Prete's conviction was subsequently reversed and she was released. See *People* v. *Del Prete*, 92 N.E.3d 435, 448 (Ill. Ct. App. 2017).

- Jerome Morgan was convicted of second-degree murder in connection with a shooting at a birthday party. *State* v. *Morgan*, No. 2014-K-0276, 2014 La. App. LEXIS 3223, at *1–4 (La. Ct. App. May 23, 2014). Morgan sought post-conviction relief, alleging ineffective assistance based on his counsel's failure to investigate, and later supplemented his petition. *Id.* at *5, *17–19. Morgan offered a range of new evidence demonstrating that his counsel's failure to speak with witnesses and request 911 call records caused him to neglect testimony and other information that, when presented in the post-conviction proceeding, was found to have "drastically damage[d]" the state's theory of the case. *Id.* at *18, *20. Relying on this evidence, the trial court vacated Morgan's conviction and granted him a new trial. *Id.* at *12–14, *24 (affirming vacatur and grant of new trial). The prosecution dismissed the charges in 2016. See *Jerome Morgan*, Nat'l Registry of Exonerations, https://tinyurl.com/z67ju4uy (last updated May 24, 2019).

These profiles illustrate the substantial risk and irreparable harm of wrongful conviction that criminal defendants face from ineffective trial counsel. These individuals—who should never have been convicted in the first place—spent years incarcerated because their counsel was constitutionally defective. Critically for this case, moreover, these defendants were only able to realize justice because a diligent post-trial investigation revealed earlier counsels' inadequacies. Without the ability to supplement the record with the fruits of post-conviction investigations—an avenue that Arizona's position would eviscerate—these individuals would still be in prison. That is not an outcome this Court should countenance and reinforces

why the Ninth Circuit's reading of Section 2254(e)(2) is correct.

CONCLUSION

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

Respectfully submitted,

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