Ineffective Assistance of Case Law: The Supreme Court's Deficient Habeas Jurisprudence

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Introduction

For centuries, observers have lauded the "Great Writ" of habeas corpus as an opportunity to free people unlawfully detained by the state.[1] Born in England, this procedure empowers litigants to demand that government officials justify why they "have the body" in custody either before or after trial. In the United States, the writ is enshrined in Article I of the Federal Constitution,[2] and Congress later codified it through legislation in 1867.[3]

Yet habeas corpus served as a "sleeping giant" until the U.S. Supreme Court awakened it through a series of seminal cases in the middle of the twentieth century.[4] Habeas corpus nowadays provides a critical federalist function in its American incarnation. Federal courts have the capacity to conduct habeas review of state convictions after the exhaustion of the appeal in state court, a vehicle for ensuring a modicum of uniformity and baseline standards of justice in all fifty states.

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[1] For instance, in the eighteenth century, English legal commentator William Blackstone termed habeas corpus a "great and efficacious writ in all manner of illegal confinement." 3 William Blackstone, Commentaries *131. The Supreme Court later referred to habeas as the "Great Writ." Stone v. Powell, 428 U.S. 465, 474 n. 6 (1976) (quoting *Ex parte* Bollman, 8 U.S. 75, 95 (1807)).

[2] U.S. Const. Art. I, § 9, cl. 2.

[3] Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[4] *See* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 31–32 (1965). The origin of this awakening is often traced to Brown v. Allen, 344 U.S. 443 (1953), a case involving the review of several cases in which Black defendants had been convicted of murder before juries that had been selected in a racially biased fashion. *Brown* opened a pathway for state prisoners to challenge the constitutional validity of their convictions, even when state courts had already completed their review. *See* Diane P. Wood, *The Enduring Challenges for Habeas Corpus,* 95 Notre Dame L. Rev. 1809, 1812 (2020). Fay v. Noia, 372 U.S. 391 (1963), represents another watershed moment, with the Supreme Court holding that the failure to challenge an issue on the direct appeal of a conviction in state court does not necessarily lead to a "procedural default" of a federal habeas petition. *See also* Kimberly A. Thomas, *Substantive Habeas*, 63 Am. U. L. Rev. 1749, 1758 (2014) ("From the 1950s to 1970s, state inmates increasingly used federal habeas corpus petitions. Some scholars attribute this increased use of the writ to Supreme Court decisions which, first, applied federal constitutional protections to state defendants and, second, often permitted inmates acting in good faith to obtain federal review of their constitutional claims.") (internal citations omitted).

That's the theory. Here's the reality.

Habeas corpus is less-than-great. The Supreme Court and Congress have gradually eroded the power of habeas to right state court wrongs by installing procedural booby-traps that make it hazardous for prisoners to traverse the process unscathed.[5] This is especially true when it comes to correcting the most fundamental of errors wrought by our criminal justice system: the conviction of a factually innocent person. Case precedent dictates that detainees must cite constitutional or jurisdictional defects as grounds for habeas relief; a "freestanding" claim of actual innocence by itself is generally inadequate.[6] In the eyes of the Court, the substantive question of guilt or innocence is best suited for evaluation at trial, which the Justices have labeled the "main event" of our criminal justice system.[7] If reevaluation of that threshold question is eventually needed, the Court has indicated that executive clemency is the "fail safe" to protect against a wrongful conviction.[8]

This might be a reasonable stance to take—that procedure trumps substance in the habeas sphere—*if* trial, appellate, and executive clemency processes were up to this task. Sadly, they are not. As I chronicle in my recent book, *Barred: Why the Innocent Can't Get Out of Prison*, innocent people all too often slip through the porous net of trial, and the narrow scope of the "direct appeal" seldom catches wrongful convictions.[9] That leaves the dispensation of courtroom justice in the hands of judges during their review of petitions submitted through a "collateral" postconviction remedy like habeas corpus. Postconviction remedies exist beyond habeas corpus to grapple with potential miscarriages of justice. For instance, state court procedures structured along the lines of a different ancient writ, *coram nobis*, permit prisoners to seek a new trial by presenting "newly discovered evidence" that casts doubt on the integrity of a conviction.[10] But coram nobis often falls short at the state level for a variety of reasons. Courts offer stingy interpretations about what counts as "new evidence"; they impose nearly insurmountable standards for proving that this evidence would have altered the trial

[5] *See, e.g.*, Thomas, *supra* note 4, at 1759 ("From the late 1970s to the early 1990s, the Court raised the procedural hurdles to federal habeas review."). *See also infra* notes 39–49 and accompanying text (chronicling how Congress restricted access to federal habeas corpus in 1996).

[6] *See* Herrera v. Collins, 506 U.S. 390, 404–05 (1993).

[7] Davila v. Davis, 137 S. Ct. 2058, 2066 (2017).

[8] *Herrera*, 506 U.S. at 415.

[9] The "direct appeal" typically refers to the right of a criminal defendant to appeal a criminal conviction to a higher court. But defendants are restricted in the issues that they may raise through this process. They may not introduce new evidence and, for the most part, may only raise issues that are adequately "preserved" for appellate review. Even more, deferential standards of review and a doctrine known as "harmless error" make it exceptionally difficult to identify, much less overturn, a wrongful conviction on the direct appeal. For a deep dive into these issues, *see* DANIEL S. MEDWED, BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON 35–101 (2022).

[10] *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts,* 47 ARIZ. L. REV. 655, 665 (2005).

outcome; and they only grudgingly order evidentiary hearings on the matter.[11]

Outside of the litigation context, the executive branch could right wrongful convictions through its power to grant clemency. But executive officials are neither empowered nor encouraged to revisit the facts of a case in considering a pardon or sentence commutation. The suitability of the convict*ed* person for mercy is more important at the clemency stage than the validity of the underlying convict*ion*.[12]

The poor safety record of trials, appeals, state postconviction procedures, and executive clemency in protecting innocent criminal defendants—coupled with barriers to raising innocence claims through federal habeas corpus—often prompt advocates to devise indirect litigation strategies to overturn wrongful convictions. One such strategy involves raising a constitutional claim of "ineffective assistance of counsel" (IAC) in a federal habeas corpus action. The heart of an IAC claim in this forum is frequently that the trial lawyer's failure to investigate, mount an alibi defense, and/or challenge an assortment of prosecutorial and judicial missteps contributed to unwarranted incarceration. What lies beneath the surface is an intimation that an innocent person is trapped behind bars; IAC is the label affixed to a claim that seeks to rectify an injustice.

Relying on IAC as a proxy for an actual innocence claim is not ideal. Some trials yield wrongful convictions despite the valiant efforts of effective defense counsel, which makes IAC an ill-fitting suit to cover those cases. And even those injustices generated in part through poor lawyering deserve to be called out for what they truly are—the conviction of an innocent person—rather than shrouded in the garb of a constitutional violation.

Those of us who are part of the "Innocence Movement"[13] often raise IAC as a surrogate for actual innocence in the federal habeas arena, more by necessity than by choice. Yet the recent Supreme Court opinion in *Shinn v. Ramirez* has strewn major obstacles along that path.[14] Going forward, *Ramirez* could make the road to freedom nearly impassable for prisoners who want to rely on IAC claims as a proxy for establishing innocence in a federal habeas corpus action.

Part I of this Essay provides an overview of federal habeas corpus jurisprudence in the context of actual innocence and IAC claims. Next, Part II contains a case study that illustrates how the innocent have used IAC doctrine in the past to steer through the potholes of federal habeas. Finally, Part III discusses some of the hazards on the route to litigating IAC claims, how *Ramirez* has altered this federal habeas landscape for the worse, and what this means for innocent prisoners in the days ahead.

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[11] *See id.* at 683–86; MEDWED, *supra* note 9, at 131–50.

[12] *See* MEDWED, *supra* note 9, at 208.

[13] *See generally* ROBERT J. NORRIS, EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT (2017).

[14] 142 S. Ct. 1718 (2022).

I. Ineffective Assistance of Counsel as a Proxy for Innocence

The evolution of deoxyribonucleic acid (DNA) testing in the 1980s opened the door to proving something that commentators had suspected but could never show definitively—that a sizable number of prisoners are actually innocent.[15] Since 1989, DNA testing has exonerated at least 375 people,[16] and almost 3000 others have proven their innocence without the benefit of that technology.[17] In addition to revealing the fault lines in the system, these cases form a dataset for scholars to study in order to pinpoint "what went wrong" originally. Distinct patterns have emerged. Some combination of eyewitness misidentification, false confession, police and prosecutorial misconduct, weak forensic science, and shoddy defense lawyering tend to join together in many instances to convict innocent criminal defendants.[18]

Let's focus on how paltry performance by defense counsel contributes to a large percentage of these convictions at trial. Documented exonerations involving postconviction DNA testing include cases where trial lawyers fell asleep in the courtroom during trial, failed to investigate alibis, neglected to consult experts about forensic issues, never showed up for hearings, or were later disbarred for a variety of indiscretions.[19] According to a 2010 report, in about 20% of DNA exonerations, where science ultimately came to the rescue and proved actual innocence, defendants had previously raised the issue of ineffective assistance of trial counsel.[20] But courts rejected these claims in the vast majority of cases.[21] Part of the explanation for this disconnect—the notion that lawyers who committed these misdeeds in cases with innocent clients were deemed effective on appeal—lies in the deferential standard for gauging what it means to deliver effective legal services at trial. A 1984 Supreme Court case, *Strickland v. Washington*, created a two-part test for determining whether a conviction will be reversed for a constitutional violation of the Sixth Amendment right to counsel: first, whether the lawyer objectively engaged in deficient performance; and, second, whether that deficiency af-

[15] For an early exploration of the issue, *see* Edwin Borchard, Convicting The Innocent: Errors of Criminal Justice 367–78 (1932).

[16] *Exonerate the Innocent*, Innocence Project (Feb. 3, 2023), https://innocenceproject.org/exonerate/ [https://perma.cc/EE33-DZWG].

[17] *See About*, National Registry of Exonerations, (Feb. 9, 2023), https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/6VP3-S6ZU].

[18] *See generally* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 14–177 (2012).

[19] *Inadequate Defense*, Innocence Project (Feb. 3, 2023), https://innocenceproject.org/causes/inadequate-defense/ [https://perma.cc/5YSL-MQ6V].

[20] Emily West, *Court Findings of Ineffective Assistance of Counsel in Postconviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project, 1 (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/EBS6-Z2L5].

[21] *Id.*

fected the end result.[22] In legions of cases, appeals courts may find a deficiency, only to tout the quantum of evidence of guilt to hold that the deficiency did not impact the trial outcome.[23]

Fortunately, habeas corpus has long provided a means for criminal defendants to pursue IAC claims in a federal district court after the exhaustion of state court remedies. Prisoners can even try to draw upon "new" evidence of trial and/or appellate attorney incompetence in developing their IAC claims for collateral review via habeas. In contrast, IAC claims on direct appeal are typically limited to the evidence that appears on the trial record.[24]

Crafting a robust IAC argument is an especially useful advocacy tool in the innocence context because of the Supreme Court's aversion to recognizing "bare" or "freestanding" actual innocence claims as suitable for habeas relief. A 1993 case captures this aversion in all its ignominious glory. *Herrera v. Collins* concerned whether a federal judge had jurisdiction to review an innocence claim, and only that claim, in a habeas action initiated by a man on death row in Texas.[25] To be fair, ample evidence pointed to Leonel Herrera's guilt in killing two law enforcement officials in the Rio Grande Valley. One of the victims identified Herrera before he died nine days after the shooting and Herrera's Social Security card was found at the crime scene.[26] His defense team, however, later compiled affidavits from two witnesses who claimed that Leonel's brother Raul had committed the crimes.[27]

Leonel Herrera's attorneys had accumulated this new evidence after the statute of limitations had passed for submitting a motion for a new trial under Texas law.[28] Restrictions on introducing new evidence through the appellate process posed another hurdle, and, even then, he had already completed or "exhausted" his appeals with the Texas courts.[29] So, he pursued federal habeas corpus relief. At the time, the Supreme Court had not answered the vexing question of whether federal judges could consider an independent claim of actual innocence through this route. Habeas corpus had traditionally served as a forum for alleging constitutional or jurisdictional errors, not factual ones.[30] Other courts had largely adhered to this vision. For example, when confronted with a habeas claim based on new evidence of

[22] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[23] *See, e.g.*, MEDWED, *supra* note 9, at 63–65.

[24] *See id.* at 36 (noting that usually "the defendant-appellant is confined to the trial record in raising claims on appeal").

[25] Herrera v. Collins, 506 U.S. 390, 393 (1993).

[26] *Id.* at 394.

[27] *Id.* at 396–98.

[28] *Id.* at 410 ("Texas is one of 17 [s]tates that requires a new trial motion based on newly discovered evidence to be made within 60 days of judgment."). *See also* TEX. R. APP. P. 21.4(a) (2023) ("The defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.").

[29] *Herrera*, 506 U.S. at 395.

[30] *See* MEDWED, *supra* note 9, at 109; Wood, *supra* note 4.

innocence in 1917, the Iowa Supreme Court refused to entertain it, proclaiming that "we are not yet ready to make so radical a venture."[31]

It turned out the U.S. Supreme Court was equally reluctant to create "radical" jurisprudence. The *Herrera* case wended its way up to the court of last resort, which issued a stunning rebuke to his request to evaluate the substance of his innocence claim. The Supreme Court reiterated that historic role of habeas: "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[32] Prisoners with fact-based innocence claims must normally pair those allegations with purported constitutional errors to get them before a federal judge.[33] Actual innocence could serve as a "gateway" to revive habeas analysis of constitutional issues that were procedurally barred, perhaps due to tardy filing or withholding of the claim in an earlier piece of the litigation.[34] The Court stopped short of conferring federal habeas jurisdiction over a standalone innocence claim, even when the death penalty was at stake. The Justices hinted that, in other instances, "a truly persuasive demonstration of 'actual innocence' after trial" could render an execution unconstitutional and therefore cognizable on federal habeas if there were no other avenues available.[35] The bar for meeting this standard, the Court insisted, "would necessarily be extraordinarily high."[36] I am unaware of any prisoners who have cleared this height in the past thirty years, let alone anyone outside the capital context.[37]

In the years since *Herrera*, Congress has made it even harder for prisoners, both the innocent and the guilty alike, to obtain recourse through federal habeas corpus.[38] The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 was designed to close some perceived loopholes in federal habeas litigation that purportedly enabled the "guilty" to obtain relief.[39] AEDPA implemented a slew of rules that, taken together, enhance the likelihood that state prisoners will engage in "procedural default," essentially forfeiting their claims before reaching the federal courthouse. Here is a sampling of those rules:

- AEDPA imposed a strict one-year statute of limitations for submitting a habeas claim after completing the direct appeal in state

[31] Springstein v. Saunders, 164 N.W. 622, 624 (Iowa 1917).

[32] *Herrera*, 506 U.S. at 395.

[33] *Id.* at 401 ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").

[34] *Id.* at 404.

[35] *Id.* at 417.

[36] *Id.*

[37] *See* MEDWED, *supra* note 9, at 111.

[38] The Supreme Court has also contributed to the erosion of the power of federal habeas corpus to correct state court injustices—and its contributions arguably began well before *Herrera*. *See, e.g.*, Micah Horwitz, Note, *An Appealing Extension: Extending* Martinez v. Ryan *to Ineffective Assistance of Appellate Counsel*, 116 COLUM. L. REV. 1299, 1303 (2016).

[39] *See* MEDWED, *supra* note 9, at 111.

court.[40] The deadline may be extended in instances where a prisoner seeks to litigate a constitutional claim based on the discovery of new evidence.[41] Even then, an applicant must file their habeas petition within one year after the evidence could have been discovered with due diligence.[42]

- AEDPA installed a rule that deterred the filing of multiple or "successive" habeas petitions.[43]
- Prisoners must now show that, before seeking relief through federal habeas, they have (1) already exhausted their state court remedies,[44] and (2) given state courts a "full and fair opportunity" to resolve through their appellate review process the federal constitutional claims that they intend to raise in federal court.[45]
- What is more, the state court assessment of the issues that litigants intend to raise through federal habeas receives exceptional deference. The state court ruling will withstand habeas review unless it is contrary to or entails an "unreasonable application of clearly established Federal law, as determined by the Supreme Court."[46] Few issues are explicitly delineated in Supreme Court case law—and few state courts unreasonably apply those precedents that do exist—signaling in turn that state court decisions rarely fail this test.[47]
- AEDPA boosted the power of federal courts to deny habeas applications summarily, on the papers alone, without holding evidentiary hearings.[48]
- Finally, AEDPA curtailed a prisoner's right to appeal an unfavorable habeas decision.[49]

AEDPA reflects a triumph of procedure over substance, of finality and efficiency over accuracy.[50] A 2007 study of habeas results in the decade after the enactment of AEDPA targeted a random sampling of 2,384 habeas petitions that did not involve the death penalty.[51] It concluded that only seven

[40] 28 U.S.C. § 2244(d)(1)(A) (2023).

[41] 28 U.S.C. § 2244(d)(1)(D) (2023).

[42] 28 U.S.C. § 2244(d)(1) (2023); *see also* Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012) ("The statute of limitations begins to run under § 2244(d)(1)(D) when the factual predicate of a claim 'could have been discovered through the exercise of due diligence,' not when it actually was discovered.").

[43] 28 U.S.C. § 2244(a) (2023).

[44] 28 U.S.C. § 2254(b)–(c) (2023).

[45] O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

[46] 28 U.S.C. § 2254(d)(1) (2023).

[47] *See* MEDWED, *supra* note 9, at 113; Williams v. Taylor, 529 U.S. 362, 403–409 (2000) (explaining how deferential this standard is in evaluating state court decisions).

[48] *See* 28 U.S.C. § 2243 (2023) ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."); *see also* 28 U.S.C. § 2254(e)(2) (2023).

[49] 28 U.S.C. § 2253(b)–(c) (2023).

[50] *See* MEDWED, *supra* note 9, at 113.

[51] *Id.* (citing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY

prisoners—one out of every 341—earned relief.[52] Just getting an evidentiary hearing proved a tall order, with just nine litigants in the sample reaching that stage.[53]

In light of the general procedural barriers to filing federal habeas actions, plus the specific ones applicable to innocence claims, postconviction litigators must be creative. The desire to "think outside the box" frequently leads them to resort to arguing IAC as a proxy for innocence in the federal postconviction realm. They may even succeed, assuming they are mindful of the procedural potholes created by AEDPA.[54] An underlying actual innocence issue can be dressed up in the legalese of IAC—the failure of the system to produce an accurate result seen through the lens of attorney neglect to investigate pretrial leads of an alternative suspect, to call an alibi witness to testify, or any number of other transgressions. The following case from New York illustrates how this can play out in practice.

II. *People of the State of New York v. Stephen Schulz*

A. The Incident

On February 3, 1999, a large white man entered the El Classico Restaurant in Brentwood, New York, on Long Island.[55] There were no other patrons in the establishment at the time, only a cook and a waitress. The man ordered a shrimp dinner. While the cook prepared the meal in the kitchen, the man allegedly withdrew a knife, put it up against the waitress's throat, and demanded money from the cash register. She readily complied, then screamed as he fled. The cook rushed out of the kitchen, catching a glimpse as the man left in a white late-model car with a "T" and a "1" in the license plate.[56]

The police later showed the witnesses a "six-pack," an array of six photographs of large white men who resembled the description of the assailant. The cook and the waitress identified the same man, Stephen Schulz, as the

State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996 (Executive Summary) (2007)).

[52] *Id.*

[53] *Id.*

[54] Winning an IAC claim in any court—state or federal, direct appeal or postconviction—is extraordinarily difficult. One study found that judges reject IAC claims 97% of the time. *See* Joshua Dressler et al., Criminal Procedure: Principles, Policies, and Perspectives 1096 n.10 (7th ed. 2020).

[55] The description of this case is based on the following sources: Medwed, *supra* note 9, at 21–24, 39–40, 55–56, 65, 134–36, 234–35, 255–56; Daniel S. Medwed, Prosecution Complex: America's Race to Convict and Its Impact on the Innocent 55–56 (2012); Medwed, *supra* note 10, at 662–64; Schulz v. Marshall, 528 F.Supp.2d 77 (E.D.N.Y. 2007); People v. Schulz, 829 N.E.2d 1192 (N.Y. 2005); People v. Schulz, 5 A.D. 3d 799 (N.Y. App. Div. 2004); People v. Schulz, Brief for Defendant-Appellant, New York Supreme Court, Appellate Division-Second Department, Suffolk Co. Ind. No. 368/99, A.D. Nos. 2003-01596, 2000-09423, 1999-10592 (Oct. 3, 2003) (on file with author).

[56] Medwed, *supra* note 9, at 21.

person who had robbed the El Classico. At first blush, this identification made sense. Schulz shared the chief physical attributes of the perpetrator—he was a 6' 2", 250-pound white man in his thirties—and he had an extensive criminal record. But there was reason for pause. Nothing on his rap sheet showed a penchant for violence, let alone the use of a weapon. Schulz also had an alibi, that he was at his home watching an ABC sitcom, *Dharma and Greg*, with his roommate. Nevertheless, the police arrested him and prosecutors filed robbery charges. Schulz lacked the resources to retain private counsel, so the court assigned a local lawyer to represent him. That attorney belonged to the "18-B" panel in New York, the cadre of litigators who had enlisted to serve indigent criminal defendants at bargain-basement rates paid for by the state.[57]

One day, while Schulz was in pretrial detention, he came across an article in the local newspaper about a white man who had pled guilty to six robberies from January to March 1999. The man, Anthony Guilfoyle, had apparently used his size—he was 6' 4 and weighed more than 300 pounds—to intimidate people into handing over cash. The photo that accompanied the article depicted a man who looked like Stephen Schulz. Schulz called his sister who, in turn, contacted the trial lawyer about the case. The attorney did not seem especially motivated to investigate Guilfoyle despite the circumstantial evidence suggesting that this third party might be responsible for the El Classico robbery.[58]

The case moved into a trial posture. Schulz turned down an offer to plead guilty in exchange for a three-year prison sentence. This deal might seem attractive to a person with his criminal past. But it was not attractive to Schulz, who maintained his innocence and thought the truth would prevail in open court.[59]

B. The Trial

At trial, the cook and waitress served as the principal witnesses for the prosecution. The cook reiterated his identification of Schulz on the stand. Notably, the cook had his own pending gun possession charge that had disappeared in the period between the robbery and his appearance at trial. Although the defense could not prove any explicit promise of leniency in the gun case in exchange for testifying against Schulz, the scenario cast a cloud over the cook's testimony.[60]

The lynchpin of the government case was the waitress, the crime victim who had experienced the sensation of a knife blade against her throat. When she took the stand, however, she refused to identify Schulz. Rather, she in-

[57] *Id.* at 21–22. For information about the 18-B Panel during this era, see *Background on Assigned Counsel Programs*, 73 N.Y. ST. B.J. 8 (May 2001).
[58] MEDWED, *supra* note 9, at 21–22.
[59] *Id.*
[60] *Id.* at 23.

sisted the perpetrator was taller and heavier, attributes not easily discernible from a photo alone.[61]

At this stage, Schulz's defense lawyer had a pressing tactical choice to make. He had Guilfoyle's photograph in his possession and could show it to the waitress on cross-examination in the hopes that she might identify him. A time-tested maxim of trial practice, though, is that lawyers should refrain from asking questions on cross that they do not know the answer to. And the attorney here did not know how the witness would respond to the photo because he had not interviewed her beforehand. If she failed to identify Guilfoyle, then it would undercut her stunning refusal to identify Schulz and yield the odd inference that a *third* heavyset white man must have committed storefront robberies with a peculiar *modus operandi* in the Brentwood region in early 1999.[62]

So, the defense lawyer selected a compromise approach. He sought to introduce the photograph into evidence to allow jurors to consider for themselves whether someone resembling the defendant may be responsible for the El Classico robbery. Yet under New York evidence rules at the time, in order to introduce evidence of third-party guilt in a criminal case the defense had to show essentially a "clear link" between the alternative suspect and the crime in question.[63] The trial judge determined that the defense failed to make this showing. The connection between Guilfoyle and the El Classico hinged on circumstantial evidence. It was a tenuous link, not a clear one, presumably in large part because the defense lawyer had neglected to conduct the type of searching pretrial investigation that might have established a stronger nexus between Guilfoyle and the events of February 3, 1999. Defense counsel rested his case without calling any witnesses or presenting other evidence, even though Schulz's alibi witness—his roommate—was prepared to testify.[64]

The jury found Schulz guilty of first-degree robbery, and the judge later sentenced him to eleven years in prison. By asserting his constitutional right to trial, and forsaking the generous three-year plea offer, Schulz essentially incurred an eight-year penalty, or what some scholars call a "trial tax."[65]

C. State Court Litigation: The Direct Appeal and Coram Nobis

In 2001, while his direct appeal was still pending, Schulz requested help from the Second Look Program at Brooklyn Law School (Second Look), a clinic that investigated and litigated postconviction claims of innocence.[66] I

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[61] *Id.*

[62] *Id.*

[63] The "clear link" standard governed in this area of New York law until it was modified by People v. Primo, 753 N.E. 2d 164, 168–69 (N.Y. 2001).

[64] Schulz v. Marshall, 528 F. Supp. 2d 77, 83–84 (E.D.N.Y 2007).

[65] *See* MEDWED, *supra* note 9, at 26.

[66] For an article describing the origins and case selection process of Second Look, *see* Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003).

oversaw the day-to-day operations of the clinic back then and found his case extremely compelling. After Second Look conducted a preliminary investigation, we agreed to represent Schulz on both his direct appeal and possible postconviction litigation. We knew the appeal was unlikely to bear fruit. Under the rules of New York appellate procedure, we could only raise issues that had cropped up at trial. We were barred from introducing new evidence that could shed light on those issues. Indeed, the trial judge's decision to exclude Guilfoyle's photograph was later upheld on direct appeal as an appropriate exercise of judicial discretion.[67]

So, we focused our efforts on another postconviction remedy. New York Criminal Procedure Law Section 440.10(g)—an outgrowth of the ancient writ of error *coram nobis*—permits a criminal defendant to seek a new trial based upon a showing of "newly discovered evidence" that would "probably" have produced a different outcome had it been presented at the original trial.[68] Section 440.10(h) of that statute also allows litigants to move for a new trial on the grounds of constitutional violations.[69] Schulz had already filed a Section 440.10(h) motion raising an IAC claim pro se, without legal representation, in 2000.[70] We investigated the Schulz case with an eye to developing both claims—to compiling new evidence that undermined the integrity of Schulz's conviction, and honing the argument that his trial lawyer's meager performance violated the constitutional right to effective assistance of counsel.

We followed this dual track for several years and assembled substantial information that, in our view, provided fodder for viable claims under both prongs of Section 440.10:

- We met with Schulz's former roommate. He struck us as credible. He also corroborated the assertion that they were watching the television program *Dharma and Greg* at the time of the El Classico robbery.
- Our review of state motor vehicle records revealed that a close family member of Anthony Guilfoyle owned a white Oldsmobile car with a "T" and a "1" in the license plate, details that meshed with the eyewitness account of the getaway vehicle.
- Most significantly, we showed the waitress a photograph of Guilfoyle. She identified him with 90% certainty as the man who had robbed her that evening at the El Classico.[71]

We presented this evidence to Schulz's original trial judge, replete with affidavits and exhibits as required by New York procedure. We argued that this newly discovered evidence met the standard for a new trial. The judge denied our motion without even granting an evidentiary hearing.[72]

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[67] People v. Schulz, 5 A.D. 3d 799, 799–800 (N.Y. App. Div. 2004).
[68] N.Y C.P. L. § 440.10(g) (2023).
[69] N.Y C.P. L. § 440.10(h) (2023).
[70] Brief for Defendant-Appellant, *supra* note 55, at 22–24.
[71] MEDWED, *supra* note 9, at 39–40.
[72] *Id.* at 134–36.

We lost our direct appeal and an appeal of the denial of both our Section 440.10(g) motion and Schulz's pro se Section 440.10(h) motion in the Appellate Division, Second Department, an intermediate appellate court in New York.[73] The State's highest court, the New York Court of Appeals, granted further review. But we lost there too, with only a strident dissent from a single jurist giving us hope. Judge Rosenblatt found the case "disquieting."[74] He believed "this Court should remand so that [the waitress] can be called before the court, under oath, to give her a chance to see Guilfoyle under court-arranged auspices . . . The interests of finality count for a great deal, and may be alluring, but they are not always consistent with the higher ends of justice."[75]

D. Federal Habeas Corpus

Eventually, after eight years of litigation, Schulz earned his freedom—but not on the basis of actual innocence. Victory came in a federal habeas corpus action in which a district court judge in the Eastern District of New York held an evidentiary hearing on Schulz's IAC claim.[76] Schulz and Second Look had preserved the IAC claim by litigating the issue throughout much of the postconviction process and offering state judges a thorough opportunity to review the constitutional allegation.[77] Considering that New York state courts had adjudicated the issue, AEDPA required the federal judge to apply a "deferential" standard in his review.[78] That is, the judge could only grant relief if the state court adjudication of the IAC claim was "contrary to" or an "unreasonable application" of "clearly established" law.[79] He ruled in our favor, concluding that the state courts had unreasonably applied the *Strickland* IAC test. Although the judge looked at the "totality" of the case, "the Court especially ground[ed] its ruling on [defense counsel's] failure to interview [the waitress] prior to trial."[80] He underscored that "even in the absence of conclusive proof of actual innocence, there is a reasonable likelihood that, but for defense counsel's constitutional errors, the result of the trial would likely have been different."[81]

Schulz left prison in 2007 and took a job as a long-haul truck driver. He called me once from a pit stop along his route in Maine to report that he had tasted lobster for the first time and loved it. Schulz has had a taste of freedom—and seafood—for more than fifteen years. Yet he has never received

[73] *See* Brief for Defendant-Appellant, *supra* note 55; People v. Schulz, 5 A.D. 3d 799 (N.Y. App. Div. 2004).
[74] People v. Schulz, 829 N.E.2d 1192, 1200 (N.Y. 2005).
[75] *Id.* at 1201.
[76] Schulz v. Marshall, 528 F. Supp. 2d 77, 87–88 (E.D.N.Y 2007).
[77] *Id.* at 89.
[78] *Id.* at 89–90.
[79] *Id.*
[80] *Id.* at 90.
[81] *Id.* at 102 n.18.

compensation from New York State for his wrongful conviction because he was not formally declared innocent.[82]

At least a federal court recognized the defects in Stephen Schulz's conviction and granted him freedom through habeas corpus, even if the result was not an exoneration. Regrettably, this type of result for innocent prisoners—inadequate and incomplete as it is—may prove elusive in the years ahead. And the blame lies at the feet of the United States Supreme Court.

III. Supreme Failure: Raising the Bar for Litigating IAC Claims

As noted in Part II above, the Second Look Program at Brooklyn Law School worked closely with Stephen Schulz to exhaust his state appellate and postconviction remedies and to preserve claims based on both newly discovered evidence of innocence and ineffective assistance of counsel. This is not meant as self-aggrandizement; it is what any decent postconviction litigator can and should do. And we certainly made mistakes along the way. But the reality is that our efforts to collaborate for six years arguably helped pave the way for Schulz's successful IAC claim in a federal habeas corpus action.

Not all prisoners have this advantage. They usually lack the assistance of two professors and multiple students from a law school clinic in pursuing postconviction relief. The landmines strewn throughout federal habeas corpus procedure make the route perilous enough for prisoners with adequate legal representation, let alone for litigants who file federal habeas petitions without any lawyer at all. Most prisoners are in this predicament, forced to navigate habeas procedure and bypass potential landmines on their own, because there is no constitutional right to either state or federal counsel after the direct appeal.[83]

One such landmine lies in the risk of "procedural default." If a prisoner fails to develop the factual basis of a constitutional claim in state court, she will not ordinarily receive an evidentiary hearing on the claim via federal habeas.[84] Worse yet, the failure to present an issue in state court before seeking federal habeas review normally leads to a forfeiture of that claim in federal court. The Supreme Court has justified this rigid procedural default rule as "grounded in concerns of comity and federalism,"[85] a belief that as a matter of respect federal courts should not reverse a case when state judges had no chance to fully consider the claim. This rule can only be overcome if the prisoner can establish "cause" to excuse the procedural default.[86]

One issue that crops up, then, is whether a prisoner can be deemed responsible for a procedural default in a federal habeas action when the *attor-*

[82] *See* Medwed, *supra* note 9, at 255–56.
[83] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).
[84] 28 U.S.C. § 2254(e)(2) (2023).
[85] Coleman v. Thompson, 501 U.S. 722, 730–31 (1991).
[86] Martinez v. Ryan, 566 U.S. 1, 10 (2012).

ney, not the prisoner, made the missteps that led to the default. Perhaps the lawyer did not raise an issue in the appropriate forum and therefore neglected to preserve it for further review or missed a filing deadline or took any number of dubious actions. Reason and sound policy would suggest that a prisoner should not pay the steep price of procedural default for a lawyer's incompetence. After all, prisoners typically lack expertise in the field of habeas law, not to mention that people trapped behind bars are poorly positioned to monitor whether their attorneys are following the procedural roadmap to a tee. The Supreme Court had a different take. In 1991, it found that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause'" under the theory that the lawyer is an "agent" of the litigant.[87] Accordingly, the prisoner "bears the risk in federal habeas for all attorney errors made in the course of the representation."[88]

In the 2012 case of *Martinez v. Ryan*,[89] the Supreme Court carved out a "narrow exception" to this principle when the procedural default stems from a *postconviction lawyer's* failure to raise an IAC claim about trial counsel's performance at the appropriate juncture in the state court process.[90] The prisoner's procedural default of the underlying IAC-at-trial claim may be "excused" in these instances, with the effect that federal judges may review the merits of the claim during habeas review.[91] Court-watchers heralded *Martinez*—as well as another case, *Trevino v. Thaler*,[92] handed down the following year that reinforced its holding—as a victory for the Sixth Amendment right to counsel.[93]

Martinez and *Trevino* clarified that prisoners in a federal habeas action could put forth claims of IAC by trial counsel that otherwise may be defaulted due to missteps by postconviction counsel. To clarify, the meager performance of the postconviction attorney gives cause to excuse the procedural default generated by a failure to exhaust an IAC-at-trial claim in state court. What remained unclear was whether prisoners in this posture were entitled to evidentiary hearings that, as a practical matter, might be the only means of proving the merits of their claims. May a federal judge in a habeas action order an evidentiary hearing, or simply consider evidence outside the record, in evaluating whether defense counsel performed adequately at trial?[94]

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[87] *Id.*; *see also Coleman*, 501 U.S. at 753–54.

[88] *Coleman*, 501 U.S. at 754.

[89] 566 U.S. 1, 10 (2012).

[90] *See Martinez*, 566 U.S. at 9.

[91] *Id.*

[92] 569 U.S. 413, 417 (2013) (extending the *Martinez* exception to situations when a prisoner was unable to raise an IAC-at-trial claim because state procedures made it "virtually impossible" to do so on direct appeal).

[93] *See* Note, *Habeas Corpus—Ineffective Assistance of Counsel—Procedural Default*—Shinn v. Ramirez, 136 HARV. L. REV. 400, 400 (2022).

[94] In fact, the question presented for review in *Shinn v. Ramirez-Martinez* was designed to address this precise issue: "Does application of the equitable rule this Court announced in *Martinez v. Ryan* render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review

This lingered as an open question for roughly a decade. On the one hand, AEDPA had raised the bar that habeas petitioners must overcome to get an evidentiary hearing when the litigant has "failed to develop the factual basis of a claim in state court proceedings."[95] Technically, without further clarification from the Supreme Court, prisoners in the situation envisioned by *Martinez* might not be entitled to present new evidence because, as agents of their postconviction lawyers, they had not developed the factual basis of the IAC at trial. On the other hand, *Martinez* created a limited exception to AEDPA's harsh procedural default rule. Logic and the interests of justice intimate that the *Martinez* exception should also apply to the rule about evidentiary hearings. Revisit the Schulz case for a moment: a federal judge ordered an evidentiary hearing in regard to his habeas petition, presumably in large part because of the extensive record developed through litigation of the IAC issue in the state courts, an effort facilitated by a pro bono team of law professors and students. Should not prisoners get an evidentiary hearing to develop the IAC-at-trial claim when that claim remains undeveloped solely because of postconviction counsel's failure to pursue it?

This question has more profound implications than might appear at first glance. When postconviction counsel neglects to advance an IAC-at-trial issue in state court proceedings, the facts about what trial counsel did or did not do might be quite scanty. In the Schulz case, we developed information about his possible alibi—that he was watching television with his roommate—and insisted that his trial lawyer should have put the roommate on the witness stand. Suppose Schulz had different postconviction counsel, and that lawyer omitted an argument about how trial counsel overlooked the alibi evidence. Without a fulsome record of the trial attorney's decision and the potential alibi defense, a judge conducting habeas review might be hard-pressed to determine whether the attorney engaged in deficient performance that affected the outcome, as demanded by *Strickland*. Ordering an evidentiary hearing, and permitting witnesses to elaborate on what happened before and during trial, could go a long way in aiding a federal judge to understand whether trial counsel violated *Strickland* and therefore whether habeas corpus relief is deserved. Denying an evidentiary hearing, in contrast, would make it harder for prisoners to develop their IAC-at-trial claim and thus for judges to determine whether a constitutional error occurred. The upshot is that refusing to hold a hearing could render the *Martinez* exception meaningless for prisoners harmed by poor defense lawyering at trial but without the factual record to prove it due to poor defense lawyering by *other* attorneys later in the process.

In 2022, the Supreme Court finally answered this question in *Shinn v. Ramirez*.[96] Two men, David Martinez Ramirez and Barry Lee Jones, had

of a claim for habeas relief?" *See* Daniel Epps. *Supreme Court Cases of Interest*, 37-SPG CRIM. JUST. 54, 55–60 (2022).

[95] 28 U.S.C. § 2254(e)(2) (2023). *See also supra* notes 39–49 and accompanying text.

[96] 142 S. Ct. 1718 (2022).

received death sentences for murder convictions in separate cases in Arizona. Ramirez alleged that his trial attorney had been ineffective by not adequately investigating his case before trial and presenting insufficient mitigation evidence at the sentencing phase.[97] Jones made similar claims, contending that his trial attorney had not investigated his case properly prior to trial.[98] Most notably, they independently submitted federal habeas petitions in which they insisted that their postconviction attorneys had provided ineffective assistance of counsel by virtue of their inability to develop the claims of ineffective assistance by trial counsel throughout the state court litigation.[99]

Based on *Martinez/Trevino*, the federal district court allowed supplemental briefing and the submission of new evidence in both cases. A federal judge did not find the new evidence compelling enough in Ramirez's case, concluding that his trial lawyer had not been ineffective and therefore that Ramirez had defaulted his claim.[100] The outcome differed with respect to Jones. A federal judge conducted a seven-day evidentiary hearing that resulted in a finding that the trial lawyer's deficient pretrial investigation had grave repercussions for the case, which in turn spurred the judge to grant Jones's habeas petition.[101]

Ramirez appealed his case to the Ninth Circuit Court of Appeals, while Arizona prosecutors appealed Jones's case. The Ninth Circuit affirmed both results, emphasizing under the *Martinez* exception that federal judges sitting in habeas review may consider new evidence to ascertain whether there was cause to excuse the default, *i.e.*, whether there was merit to the underlying claim of IAC by trial counsel.[102] Arizona then petitioned—unsuccessfully—for a rehearing *en banc* in front of the full Ninth Circuit on the basis that the pertinent habeas statute, Section 2254(e)(2), did not countenance ordering evidentiary hearings to develop new evidence on the merits of a *Martinez* claim.[103] The Supreme Court granted Arizona's petitions for a writ of certiorari in both *Jones* and *Ramirez*, and consolidated the two cases.[104]

By a vote of six-to-three, the Supreme Court ruled in favor of the state of Arizona. In his majority opinion, Justice Thomas emphasized that "the availability of habeas relief is narrowly circumscribed,"[105] and relied heavily on arguments about states' rights to justify that position. The presence of firm rules in federal habeas corpus procedure like "exhaustion and procedural default," Thomas reasoned, "promote federal-state comity."[106] He further

[97] For the procedural history of the *Ramirez* litigation, see *id.* at 1728–29.
[98] For the procedural history of *Jones*, see *id.* at 1729–30.
[99] *Id.* at 1729.
[100] *Id.*
[101] *Id.* at 1729–30.
[102] *See* Ramirez v. Shinn, 971 F.3d 1116 (9th Cir. 2020); Jones v. Shinn, 943 F.3d 1211 (9th Cir. 2019).
[103] 142 S. Ct. at 1730.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1732.

posited that, given the need for a harmonious relationship between the federal and state systems, the Court has displayed caution in crafting exceptions to procedural default, such as the one established by *Martinez* and extended by *Trevino* that "ineffective assistance of state postconviction counsel may constitute 'cause' to forgive procedural default of a trial-ineffective-assistance claim" in certain instances.[107]

Having set the habeas table in this manner, the rest of the meal served by the majority is unsurprising and proceeds in three courses. First, the appetizer. According to the majority, while the bar for excusing procedural default in many circumstances is high, "[t]here is an even higher bar for excusing a prisoner's failure to develop the state-court record."[108] Thomas proceeded to explain the height of the bar imposed by Section 2254(e)(2), which envisions only two narrow scenarios in which a habeas petitioner is entitled to an evidentiary hearing on a claim he did not develop sufficiently in state court.[109] Thomas highlighted how virtually insurmountable he believed this bar to be: "[E]ven if all of these requirements are satisfied, a federal habeas court still is not required to hold a hearing or take any evidence. Like the decision to grant habeas relief itself, the decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case."[110] Second, the main course. Thomas cited the traditional view that, because there is no right to state postconviction counsel, a prisoner ordinarily must bear responsibility for all attorney errors along the postconviction path. Third, dessert. Thomas insisted the plain language of AEDPA as well as the Court's own precedents demanded an inexorable result: that "[w]e have no power to redefine when a prisoner has failed to develop a factual basis of a claim in State court proceedings"[111] and "no warrant to impose any factfinding"[112] beyond Section 2254(e)(2).

The holding in *Ramirez*, which denied two prisoners on Arizona's death row the right to present new evidence during federal habeas review about their trial attorney's inept performance, left many people queasy.[113] And for good reason. Advocates for Barry Jones have identified exculpatory evidence in his case suggesting the injury that led to the murder their client was convicted of committing could not have occurred in the manner or at the time claimed by state prosecutors.[114]

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[107] *Id.* at 1733.
[108] *Shinn*, 142 S. Ct. at 1733.
[109] *Id.* at 1734.
[110] *Id.*
[111] *Id.* at 1736.
[112] *Id.* at 1740.
[113] *See, e.g.*, Christina Swarns, *Justices Leave Many with No Court to Hear Innocence Claims*, LAW360 (June 17, 2022), https://www.law360.com/articles/1503963/justices-leave-many-with-no-court-to-hear-innocence-claims [https://perma.cc/WPQ5-KSXD].
[114] *See* Radley Balko, *In Death Row Case, Supreme Court Case Says Guilt Is Now Beside the Point,* WASH. POST (June 1, 2022), https://www.washingtonpost.com/opinions/2022/06/01/arizona-death-row-supreme-court-shinn-innocence/https://www.washingtonpost.com/opinions/2022/06/01/arizona-death-row-supreme-court-shinn-innocence/ [https://perma.cc/

Justice Sotomayor, joined by Justices Breyer and Kagan, wrote an impassioned dissent in *Ramirez*. Her words spoke volumes:

> This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, as *Martinez* and *Trevino* did, but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim.[115]

Sotomayor put it even more bluntly later on in her dissent, stating that "[a] petitioner cannot logically be faultless for not bringing a claim because of postconviction counsel's ineffectiveness, yet at fault for not developing its evidentiary basis for exactly the same reason."[116] She cited precedent interpreting what it means to "fail to develop" an issue and thereby forfeit the possibility of an evidentiary hearing on that topic under Section 2254(e)(2). *Williams v. Taylor* found that the term "fail" in this context signals some measure of "omission, fault, or negligence"[117] and that a litigant is not at fault "when his diligent efforts to perform an act are thwarted" by an external factor.[118] As Sotomayor pointed out, "*Martinez* cases are among the rare ones in which attorney error constitutes such an external factor."[119]

Justice Sotomayor not only laid bare the fault lines in the majority's logic, but also took issue with the policies advanced by Justice Thomas to support the result. Congress has not afforded "maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system."[120] Rather, AEDPA struck "a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in 'guard[ing] against extreme malfunctions[.]'"[121] The majority, in Sotomayor's view, "supplants the balance Congress struck with its single-minded focus on finality."[122]

In the future, without that balance in place, I fear "extreme malfunctions" will proliferate in the state courts due to lackluster services provided by post-conviction counsel—and federal habeas corpus review will no longer be available to correct those breakdowns. One of those breakdowns may have happened in the Barry Jones case itself. And it could have taken place in the Stephen Schulz case under different circumstances.

7FEV-XS2P]; Liliana Segura, *Tunnel Vision: Arizona Prosecutors Double Down on Murder Theory As the Evidence Crumbles Around Them*, The Intercept (Feb. 9, 2018), https://theintercept.com/2018/02/09/arizona-death-row-barry-jones-evidentiary-hearing/ [https://perma.cc/Z285-D7SR].

[115] 142 S. Ct. 1718, 1740 (2022) (Sotomayor, J., dissenting).

[116] *Id.* at 1743.

[117] Williams v. Taylor, 529 U.S. 420, 431–32 (2000).

[118] *Id.* at 432.

[119] 142 S. Ct. at 1746 (Sotomajor, J., dissenting).

[120] *Id.* at 1748.

[121] *Id.* at 1749 (quoting Harrington v. Richter, 562 U.S. 86, 102–03 (2011)) (internal quotation marks omitted).

[122] *Id.*

Concluding Thoughts

It is premature to speculate about the likely impact of *Ramirez* on the postconviction litigation landscape, but it seems fair to suggest that it will prevent scores of prisoners, both the guilty and the innocent alike, from airing the substance of their IAC claims in federal court.[123] Imagine how the Stephen Schulz case might have played out if his federal habeas corpus petition had been submitted after *Ramirez* as opposed to fifteen years before.[124] Under the facts of the case, Schulz would still have had a potent case for relief because the Second Look Program had thoroughly developed and preserved the claim that his trial attorney had delivered ineffective assistance. We had compiled an affidavit from the crime victim, the waitress, identifying with 90% certainty a third party, Anthony Guilfoyle, as the man who had robbed her at the El Classico Restaurant on February 3, 1999. Guilfoyle had not only pled guilty to six analogous robberies in the Brentwood vicinity during this time frame, but he was two inches taller and much heavier than the defendant Stephen Schulz. This identification fit in nicely with the waitress's trial testimony that the actual perpetrator was larger than Schulz. We also procured an affidavit from Schulz's alibi witness verifying his assertion that they were watching television in their apartment on the night of the robbery as well as state motor vehicle records indicating that the getaway car possessed attributes comparable to those found in a vehicle registered to Guilfoyle's wife. This was powerful evidence. Even without a hearing to unearth more evidence, Schulz would have had a strong case that his lawyer had performed ineffectively at trial.

But what if the Second Look Program had *not* entered the case? What if Schulz had received less zealous postconviction representation or no state postconviction counsel at all? Assume postconviction counsel never located the waitress, bothered to scour state motor vehicle records, or interviewed Schulz's roommate. As noted previously, before he contacted the Second Look Program, Schulz had filed a pro se Section 440.10(h) motion under New York law insisting that his trial lawyer should have conducted a more extensive pretrial investigation.[125] Without information suggesting that those efforts would have borne fruit, namely that the waitress could identify Guilfoyle as the culprit, would Schulz have succeeded in meeting the *Strickland* standard—in proving that the absence of a pretrial investigation was a deficiency that had affected the outcome of the trial? I have my doubts. The interview with the waitress, in particular, is what connected the dots between Guilfoyle and the El Classico robbery. Absent her affidavit, Schulz would have likely struggled to show that his lawyer's "deficient" performance

[123] For a more sanguine assessment of *Ramirez*, which maintains that the decision is rather narrow and offers advice on how postconviction litigators might proceed in light of its holding, see David M. Barron, Martinez *Remains Alive after* Shinn v. Ramirez, 37 WTR Crim. Just. 8 (2023).

[124] *See* Part II, *supra*.

[125] *See supra* note 698 and accompanying text.

"prejudiced" him by affecting the outcome of the trial. What I have no doubt about is that it would have been tragic if Schulz had not received the opportunity to fully develop the argument that his trial attorney's missteps had led to his wrongful conviction.

An innocent person faces enough obstacles on the route to federal habeas corpus relief, considering the limitations on raising freestanding innocence claims, without the additional one generated by *Ramirez*. The Supreme Court has cut off one of the few federal court detours available for the innocent—a claim of IAC by trial counsel—unless the prisoner has the good fortune of procuring robust and dedicated state postconviction counsel to develop the issue before it reaches the federal habeas stage. Such good fortune is rare. For one thing, there is no right to counsel at the state postconviction stage.[126] For another, nonprofit organizations like the Second Look Program that investigate and litigate state postconviction innocence claims are few and far between; those that exist are overwhelmed and underresourced.[127] In fact, the Second Look Program is now defunct. So, too, I fear is the likelihood of achieving justice for the innocent via federal habeas corpus review.

Shame on the Supreme Court.

[126] *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).
[127] *See* MEDWED, *supra* note 9, at 4.