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

AMICI CURIAE BRIEF OF BIPARTISAN FORMER DEPARTMENT OF JUSTICE OFFICIALS AND FORMER FEDERAL PROSECUTORS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici are former United States Department of Justice officials and former federal prosecutors, many of whom served as United States Attorneys or had leadership roles in United States Attorney's Offices.[2] *Amici* are a bipartisan group with diverse political beliefs and judicial philosophies. *Amici* share, however, an overarching interest in ensuring that the criminal justice system functions in a manner that inspires public confidence. From their experience representing the United States and their private-sector work on criminal law issues, *amici* know that the criminal justice system cannot function effectively without the public's confidence. For the reasons explained herein, this case profoundly impacts *amici*'s interest.

SUMMARY OF THE ARGUMENT

The criminal justice system depends upon public confidence. If the public lacks confidence in the criminal justice system, the system loses its moral force and cannot effectively inculcate respect for the criminal law.

A defendant's right to a fair jury trial is the bedrock of our criminal justice system. If the public is to have confidence in the criminal justice system as a whole, the public must have confidence in the reliability of criminal jury verdicts and capital sentencing deci-

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[1] All parties have provided blanket consent to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The *amici* are individually listed in the Appendix.

sions. Trial defects that create an unacceptably high risk of wrongful conviction—or, in a capital case, a wrongful death sentence—erode such confidence. And trial defects that disproportionately impact economically disadvantaged defendants are particularly corrosive, because they lead people to believe that the system is stacked against the poor and that defendants often are convicted (or sentenced to death) not because they actually are guilty (or deserve to be executed) but because they cannot afford a good lawyer. This case puts these public confidence concerns squarely at issue.

In Respondent Barry Jones's case, the federal district court found that Jones's court-appointed trial counsel conducted a deficient investigation into the prosecution's felony murder and related charges. The federal district court found that trial counsel's deficient performance deprived the jury of substantial evidence of Jones's innocence, rendering Jones's conviction and death sentence unworthy of confidence and entitling Jones to a new trial. See, *e.g.*, J.A. 264 ("[Trial] counsel's deficient investigation pervaded the entire evidentiary picture presented at trial, resulting in a 'breakdown in the adversary process that renders the result [of Jones's trial] unreliable.' " (quoting *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984))). With respect to Respondent David Ramirez, the Ninth Circuit held that Ramirez had demonstrated a substantial claim that his trial counsel, a public defender with no prior capital trial experience, conducted a prejudicially deficient investigation into mitigation evidence, including the severity of Ramirez's intellectual disability. See, *e.g.*, J.A. 517-518 (pointing to trial counsel's failure to discover and introduce evidence that Ramirez is "borderline mental-

ly retarded"). Neither Respondent Jones nor Respondent Ramirez properly raised their ineffective assistance of trial counsel claims during their state court collateral review proceedings. This, however, was because their post-conviction counsel likewise failed to provide competent representation, which under *Martinez* v. *Ryan*, 566 U.S. 1 (2012), excuses their procedural default. Nevertheless, Petitioner argues that 28 U.S.C. 2254(e)(2) should be construed in a manner that precludes any meaningful federal judicial review of Jones's and Ramirez's ineffective assistance of trial counsel claims. In Petitioner's words, Section 2254(e)(2) "should have doomed their habeas claims." Pet. Br. 40.

Judicial review of ineffective assistance of trial counsel claims plays a critical role in maintaining public confidence in the criminal justice system. Ineffective assistance of trial counsel claims tend to involve indigent defendants and court-appointed counsel, the latter of whom are often over-worked and under-resourced. If a defendant's trial counsel—whether due to a lack of competence, lack of care, or lack of adequate resources—fails to discover exculpatory evidence that substantially undermines the prosecution's theory of guilt or argument for a death sentence, it compromises the essential truth-seeking function of trial. The reliability of the verdict or capital sentencing decision is diminished, and the risk of a wrongful conviction or wrongful death sentence increases dramatically. Post-conviction judicial review of such ineffective assistance of trial counsel claims provides assurance to the public that a defendant will not be imprisoned—or, even worse, put to death—simply because he could not af-

ford, and was not provided by the state, effective trial counsel.

Judicial review of a constitutional claim, however, is not meaningful if it is effectively impossible for the claimant to obtain relief on it. Under Petitioner's construction of 28 U.S.C. 2254(e)(2), a federal habeas petitioner who meets *Martinez*'s "cause-and-prejudice" test would not have any way to obtain relief on an ineffective assistance of trial counsel claim that requires proof extrinsic to the trial record, which most such claims do. In the most extreme scenario, a habeas petitioner could make at a *Martinez* "cause-and-prejudice hearing" an uncontroverted factual showing that his trial counsel incompetently failed to discover evidence strongly indicating innocence, and yet the federal habeas court still would be required to deny the petitioner any relief. Petitioner would transform *Martinez* into a hollow precedent that offers a federal habeas petitioner an empty promise of judicial review. This is anathema to public confidence in the criminal justice system.

ARGUMENT

I. THE COURT HAS RECOGNIZED THE IMPORTANCE OF PUBLIC CONFIDENCE IN CRIMINAL JURY VERDICTS AND CAPITAL SENTENCING DECISIONS

The criminal justice system cannot function effectively without the public's confidence. The Court has identified public confidence in criminal jury verdicts as particularly important. In *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 869 (2017), the Court stated that "confidence in jury verdicts * * * is a central premise of the Sixth Amendment trial right."

The importance of maintaining public confidence in the reliability of jury verdicts and capital sentencing decisions has animated some of the Court's most important criminal law decisions. For example, in *In re Winship*, 397 U.S. 358, 364 (1970), the Court explained that "the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." A lesser standard, the Court explained, would "dilute[ ]" the "moral force of the criminal law" because it would "leave[] people in doubt whether innocent men are being condemned." *Ibid.* In *Peña-Rodriguez*, the Court held that "the Sixth Amendment requires that [Federal Rule of Evidence 606(b)'s] no-impeachment rule give way in order to permit the trial court to consider" evidence that a juror "ma[de] a clear statement [during deliberations] that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." 137 S. Ct. at 869. The Court explained its decision as "necessary to prevent a systemic loss of confidence in jury verdicts." *Ibid.* And, in cases where the jury or court was wrongly deprived of exculpatory or mitigation evidence, either because the prosecution suppressed it or the defendant's trial counsel failed to discover it, the Court has held that the defendant is entitled to a new trial or sentencing hearing if the new evidence undermines confidence in the jury's verdict or the capital sentencing decision. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (holding that a defendant is entitled to a new trial if suppressed exculpatory evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"); *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (holding that trial counsel's deficient performance prejudices the de-

fendant if it "undermine[s] confidence in the outcome" of the trial); see, *e.g.*, *Porter* v. *McCollum*, 558 U.S. 30, 44 (2009) (vacating death sentence because the new mitigation evidence resulted in a lack of confidence in the original sentencing decision).

II. Meaningful Judicial Review Of Substantial Ineffective Assistance Of Trial Counsel Claims Is Necessary To Maintain Public Confidence In Jury Verdicts And Capital Sentencing Decisions

The Sixth Amendment guarantees a criminal defendant the right to "have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. In *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963), the Court recognized that, if a defendant is "[l]eft without the aid of counsel he may be * * * convicted upon incompetent evidence, or evidence irrelevant to the issue." "Without [counsel]," the Court explained, "though [the defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Ibid.*

A defendant who raises a claim that his trial counsel incompetently failed to discover exculpatory evidence demonstrating his innocence, or mitigation evidence demonstrating that he should be spared the death penalty, is not asking for relief on a technicality. At bottom, the defendant is asserting that the public cannot have confidence in the reliability of the jury's guilty verdict or the death sentence, because the jury and court were deprived of essential exculpatory or mitigation evidence. "It has long been recognized," of course, "that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*,

397 U.S. 759, 771 n.14 (1970). Not surprisingly, the Court's decisions addressing ineffective assistance of trial counsel claims express the same concern that the Court expressed in *Gideon* regarding the risk of wrongful convictions. For instance, in *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986), the Court stated that "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." And in *Martinez* v. *Ryan*, 566 U.S. 1, 12 (2012), the Court stated that effective trial counsel is necessary "to ensure that the proceedings serve the function of adjudicating guilt or innocence."

An ineffective assistance of trial counsel claim alleging the failure to discover substantially exculpatory or mitigating evidence is perhaps the quintessential claim for which post-trial judicial review is essential. First, such a claim fundamentally calls into question the factual accuracy of the jury's verdict or the moral reliability of the death sentence. Second, economically disadvantaged defendants are disproportionately at risk of being denied the effective assistance of counsel, because the court-appointed counsel that they receive are often too over-worked and too under-resourced—and sometimes too inexperienced—to investigate the defendant's case and to adequately prepare the trial defense that the defendant deserves.[3] See, *e.g.*, Erica J.

[3] An effective trial defense cannot be slapped together at the eleventh hour. Even where a defendant is actually innocent, demonstrating the evidentiary flaws in the prosecution's theory of guilt requires trial counsel to conduct a competent, significant pretrial investigation into the facts. In a capital case, an adequate

Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 464 (2007) ("Outrageously excessive caseloads have compromised the quality of indigent defense representation. Nationwide, even public defenders representing defendants charged with serious felonies sometimes represent as many as 500 clients per year."). Without meaningful judicial review of such claims, the criminal justice system cannot hope to inspire public confidence in verdicts or capital sentencing decisions.

It is against this backdrop that the Court decided *Martinez*. *Martinez* re-affirmed that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system" because effective counsel is necessary "to ensure that [trial] proceedings serve the function of adjudicating guilt or innocence." 566 U.S. at 12. The "chief concern" underlying the Court's decision in *Martinez* was that a "meritorious claim[]" of ineffective assistance of trial counsel should "receive review by at least one state or federal court" and should not "escape review altogether" merely because the defendant lacked adequate assistance of counsel during his state-court collateral appeals. *Davila* v. *Davis*, 137 S. Ct. 2058, 2067 (2017).

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investigation into mitigating circumstances almost always takes substantial time and care.

III. PETITIONER'S CONSTRUCTION OF SECTION 2254(E)(2) WOULD TURN *MARTINEZ* INTO A HOLLOW PRECEDENT, TO THE DETRIMENT OF PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM

In holding that state court post-conviction proceedings will not bar federal habeas review of a substantial ineffective assistance of trial counsel claim if the defendant lacked effective post-conviction counsel, *Martinez* sent a strong salutary message: the criminal justice system values the truth-seeking function of criminal jury trials and thus the reliability of criminal jury verdicts and capital sentencing decisions. Petitioner's proposed construction of Section 2254(e)(2) would reverse that message.

Most ineffective assistance of trial counsel claims require extrinsic factual development. Indeed, the type of ineffective assistance counsel claim that most seriously calls into question the reliability of the jury's verdict—a claim alleging trial counsel incompetently failed to discover exculpatory evidence strongly indicating the defendant's innocence and undermining the prosecution's trial evidence—is the type that most requires extrinsic factual development. The same is true of an ineffective assistance of trial counsel claim that involves the failure to discover mitigation evidence relevant to a capital sentencing decision. Such claims, of course, are precisely the ones that Petitioner's proposed construction of Section 2254(e)(2) would effectively preclude.

The rules governing federal habeas corpus review seek to balance two important public interests: the finality of convictions and the reliability of verdicts. Sec-

tion 2254 "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems.'" *Harrington* v. *Richter*, 562 U.S. 86, 102–103 (2011) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 332 n.5 (1979)). Ironically, the constitutional claims that represent the most extreme trial malfunctions are the claims to which Petitioner's position would deny judicial review.

In its merits brief, Petitioner calls Section 2254(e)(2) an "insuperable obstacle" to Respondents' claims, no matter how meritorious those claims are. Pet. Br. 40 (internal quotations omitted). Notwithstanding that this case involves death sentences, Petitioner brushes away as a "routine occurrence" that a meritorious ineffective assistance of trial counsel claim "may escape one [procedural] bar only to fall victim to another." *Id.* at 40-41. Petitioner essentially acknowledges that its proposed construction of Section 2254(e)(2) would "divest[] *Martinez* of its relevance." *Id.* at 36. If that strikes the Court as too odd, Petitioner says, the Court should "revisit *Martinez*." *Ibid.* This, of course, is simply Petitioner's way of saying that the Court should just overrule *Martinez*.

The Court should reject Petitioner's call to hollow out or overrule *Martinez*. Petitioner's position is not based on any plausible comity concerns. *Martinez* provides a procedural default exception in a narrow set of circumstances—where, for reasons that are not the federal habeas petitioner's fault, his ineffective assistance of trial counsel claim was not properly raised during the available state court post-trial process and, therefore, was never addressed by the state courts. Petitioner's position is based instead on hypothetical

administrative concerns that it believes should take super-priority over the judicial review that is necessary to ensure that the jury's verdict (or the trial court's sentence of death) is one in which the public can have confidence. This cannot be what Congress intended when it enacted Section 2254(e)(2).

If the Court were to adopt Petitioner's position, it would send the message that federal law is indifferent to whether a substantial claim of ineffective assistance of trial counsel receives any meaningful judicial review. This would cause incalculable damage to public confidence in the criminal justice system.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reject Petitioner's arguments and to affirm the judgments of the court of appeals below.

Respectfully submitted.

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