

GUEST ESSAY

Losing the Lawyer Lottery Shouldn't End in Execution

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By Christina Swarns

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On Dec. 8, the Supreme Court will consider arguments from two men sentenced to death in Arizona. They argue that they should be allowed to present evidence in federal court that their trial lawyers badly mishandled their cases, landing them on death row.

It is undisputed that the two men may raise claims of ineffective counsel in federal court. A 2012 Supreme Court case, *Martinez v. Ryan*, established just that. But Arizona now argues that a federal law, the Antiterrorism and Effective Death Penalty Act of 1996, bars federal courts from considering evidence supporting those claims unless it was first presented in state court. How the justices rule — how they reconcile the A.E.D.P.A. and *Martinez* — will have important consequences for how far federal courts can go in remedying inadequate lawyering at the state level.

Since 1989, almost 3,000 people have been wrongfully convicted of crimes in the United States. And since 1973, 186 people condemned to death have been exonerated. Bad lawyering — including poor preparation, inadequate investigation and intrinsic bias — was a leading cause. This sobering number, surely an undercount, should compel careful and thorough judicial scrutiny of the cases in which a lawyer clearly failed to properly represent a client, especially where there is substantial evidence of innocence.

Unfortunately, the path to proving wrongful conviction remains convoluted, invariably involving twists and turns and numerous obstacles. It shouldn't be that way. But Arizona is urging the Supreme Court to make this already difficult road all but impassable.

Consider the case of Barry Jones, one of those two men on death row in Arizona. After he was charged with murdering the 4-year-old daughter of his girlfriend at the time, he was represented at his 1995 trial by a lawyer who did no meaningful investigation into the evidence against him. The jury never heard the medical, forensic and witness testimony that would have destroyed the prosecution's case. Left without a reason to reach a different conclusion, the jury convicted Mr. Jones of murder, and the court then sentenced him to death.

After his conviction, Arizona appointed an attorney to handle Mr. Jones's postconviction review. This state court review was critically important because, under Arizona law, these proceedings are the first and only chance in state court for people to prove that they were wrongfully convicted because of incompetent representation. Therefore, the attorney assigned to handle his postconviction petition should have argued that because of his trial lawyer's failures, Mr. Jones did not receive a fair trial.

But the postconviction lawyer never made that argument. Mr. Jones lost the lawyer lottery twice.

Arizona has a well-documented history of appointing ineffective postconviction lawyers — including ones who were later suspended from the practice of law or disciplined by the state bar — to represent poor people. To make matters worse, as of 2018, Arizona had not increased the maximum compensation for appointed counsel in 20 years. Without a competent lawyer at his side, Mr. Jones's postconviction petitions were denied, and he lost his one shot in state court to prove that he had been wrongfully convicted as a result of the ineffectiveness of his trial counsel and to secure a new, fair trial.

Years after Mr. Jones's appeal, a Federal District Court judge and a three-judge appeals court panel concluded that his lawyers had been ineffective. They found that a minimally competent defense investigation would have uncovered and presented extensive forensic evidence demonstrating that the victim's fatal injury could not have been inflicted when she was in Mr. Jones's care, that the state had relied on a scientifically unreliable method to date the victim's injuries and that the state's investigation had failed to follow basic standards to preserve potentially exonerating evidence or investigate other suspects.

In a damning assessment, U.S. District Court Judge Timothy Burgess criticized law enforcement's "rush to judgment" and lamented that if Mr. Jones's lawyers had done their job, "there is a reasonable probability that his jury would not have convicted him of any of the crimes with which he was charged and previously convicted."

It wasn't a given that a federal court would have considered Mr. Jones's substantial claims of innocence. The A.E.D.P.A. gives state courts primary responsibility to review state convictions. This law — which was an effort to promote the finality of convictions and discourage frivolous federal litigation — closes federal courthouse doors to claims of error that do not receive such state court review. But the vast majority of people charged with and convicted of crimes rely on public defenders whose offices, in too many states, are chronically underfunded, overburdened and backlogged. That means strong claims of innocence can and do go uninvestigated and unrepresented. As a result, thousands of people are left in the nightmarish position of having no court to which they can turn for justice.

Fortunately, in 2012 another door opened for people like Mr. Jones. In *Martinez v. Ryan*, the Supreme Court ruled that a federal court can review a potentially meritorious claim of ineffective assistance of trial counsel even if it was not properly raised in state court. It is because of *Martinez* that Mr. Jones was able to argue his case before a federal court, which ultimately ordered Arizona to release Mr. Jones or try him again.

But Arizona has refused to do either. Instead, the state now argues that the federal courts should not have examined the adequacy of Mr. Jones's trial representation or the fairness of his trial. Despite the powerful and indisputable link between ineffective counsel and wrongful conviction, Arizona contends that no federal court should consider evidence of incompetent state court lawyering unless it was first developed and presented in state court. Because Arizona courts have already reviewed Mr. Jones's case, this means that no court — state or federal — would be able to correct his unjust conviction or that of anyone else in his position. Possibly innocent prisoners would bear the brunt of their appointed counsel's ineffectiveness.

As the executive director of the Innocence Project, I know that gutting *Martinez* will make it all but impossible for people like Mr. Jones to regain the freedom that they so profoundly deserve. As the Supreme Court recognized in *Martinez*, "the right to counsel is the foundation for our adversary system." Defense counsel is supposed to test the prosecution's case rigorously to ensure the accurate adjudication of guilt and to safeguard the right to a fair trial. Arizona's position would gravely erode the foundation of that system, further harming those who have already suffered the devastating and unjust consequences of incompetent lawyering.

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