

Conservative majority hollows out precedent on ineffective-counsel claims in federal court

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In [Shinn v. Ramirez and Jones](#), two men on Arizona’s death row raised claims in habeas corpus proceedings that their trial attorneys were constitutionally ineffective – one for failing to investigate evidence suggesting his client could not have committed the crime, and the other for failing to investigate her client’s intellectual disability, which could have spared him the death penalty. Although the Supreme Court’s 2012 decision in *Martinez v. Ryan* permitted defendants to raise such claims for the first time in federal court, on Monday the court [ruled 6-3](#) that they cannot develop evidence to support those claims.

Before delving into the opinions, a little background: Defendants convicted in state court must first raise any constitutional infirmity with their conviction in state court. Failure to do so “procedurally defaults” the claim, and a federal court cannot review it. In *Martinez*, however, the court recognized an equitable exception to this strict procedural default rule: If a state allows a prisoner to raise a claim of ineffective assistance of trial counsel for the first time in post-conviction proceedings (i.e., after the direct appeal concluded), a lawyer’s ineffectiveness at that stage of the case can constitute “cause” to excuse the procedural default. At the same time, however, [Section 2254\(e\)\(2\)](#) of the Anti-Terrorism and Effective Death Penalty Act forbids, with limited exceptions, the federal court from holding an evidentiary hearing if the defendant “has failed to develop the factual basis of a claim in State court proceedings.” The question in *Shinn* was how to square *Martinez*’s allowance for prisoners to raise a claim of ineffective assistance of trial counsel with AEDPA’s apparent prohibition on developing evidence to support that claim.

In my [oral argument recap](#), I discussed how several of the conservative justices seemed genuinely to struggle with that question. Even Justice Clarence Thomas led off the questioning by noting that Arizona’s position that the statute governs would render *Martinez* “pretty worthless.”

Despite such apparent qualms, Thomas wrote for the majority endorsing the state’s position, and all five of the other conservatives joined him. Thomas spent the first 11 pages of his 22-page opinion recounting the grisly facts of the murders the defendants were convicted of, extolling the states’ authority to enforce criminal laws, and emphasizing the importance of the finality of convictions. Finally arriving at the issue at hand, Thomas cited cases holding that defendants are generally held responsible for their attorneys’ errors, and noted that while that general rule does not apply when counsel is constitutionally ineffective, the Sixth Amendment does not guarantee a right to counsel at the post-conviction stage – therefore, at this stage, the defendants were “at fault.” Of course, this is why the *Martinez* court held that, as a matter of equity, ineffective assistance of post-conviction counsel could excuse the failure to raise a claim, but Thomas concluded that case has no bearing when a congressional statute – in this case, AEDPA – precludes such judge-made equitable rules. As Thomas put it, “Congress foreclosed respondents’ proposed expansion of *Martinez* when it passed AEDPA.”

In so holding, Thomas cited a discussion from a dissent by Chief Justice John Roberts in [Trevino v. Thaler](#), a case applying *Martinez*, that argued that the scope of *Martinez* was uniquely narrow. He also cited the late Justice Antonin Scalia’s dissent from *Martinez* itself (which he joined) that predicted that the decision would “put a significant strain on state resources.” On this front, Thomas bemoaned the “sprawling evidentiary hearing” held by the district court in Barry Lee Jones’ case, which involved 10 witnesses, including various

investigators and forensic pathologists who did not testify at trial. “This wholesale relitigation of Jones’ guilt,” he wrote, “is plainly not what *Martinez* envisioned.”

Justice Sonia Sotomayor, joined by Justices Stephen Breyer and Elena Kagan, dissented. Her opinion was striking, even for a justice who is known for passionate dissents. She called the majority opinion “perverse,” “illogical,” and said it “makes no sense.” The decision, she contended, “all but overrules two recent precedents” and “guts *Martinez*’s and *Trevino*’s core reasoning.” (This criticism was echoed by Robert Loeb, the defendants’ counsel, who in a written statement said, “today’s decision guts *Martinez* and renders the review promised by the Court (less than ten years ago) meaningless.”)

The dissent zeroed in on the court’s prior holdings that the procedural default rule only applies to defendants who are “at fault” for failing to raise a claim, and that a defendant represented by a constitutionally ineffective lawyer cannot be held to be “at fault” for his lawyer’s errors. This requirement underscored what Sotomayor saw as the core absurdity in the majority’s reasoning: “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.”

Sotomayor also pointed out that because ineffective-assistance claims frequently turn on errors of omission, such as failure to investigate, proof of such ineffectiveness will, by definition, be outside the trial record. For example, she pointed out, the lengthy evidentiary hearing in Jones’ case against which Thomas inveighed developed new evidence that Jones could not have caused the injuries that led to the victim’s death – evidence his trial and post-conviction counsel failed to investigate and thus was not part of the record. Without the hearing, that evidence could never be considered by any court, state or federal. Thus, to allow defendants to raise a claim of ineffective assistance but forbid them from developing that claim with evidence beyond the trial record “hollows out *Martinez* and *Trevino*,” rendering those decisions “meaningless in many, if not most, cases.”

The debate between Thomas and Sotomayor in *Shinn* has reverberations beyond the cases of Barry Lee Jones and David Martinez Ramirez. Sotomayor argued that the majority opinion “tellingly” relied on dissents in *Martinez* and *Trevino* to support its reasoning. While the conservative majority’s explicit overruling of precedent has recently captured the public’s attention (albeit through a [leaked draft](#)), the practice of citing dissents to “hollow out” past precedents has garnered less scrutiny. But Sotomayor’s opinion subtly emphasized the danger that practice poses for the legitimacy of the court’s decision-making. Noting that the court in this case “resuscitates” an argument “that previously was relegated to a dissent,” Sotomayor contended that the argument “is just as unavailing now that it has captured a majority.”

Finally, one procedural quirk is worth mentioning in a case all about whether death row defendants are “at fault” for the failures of their constitutionally ineffective lawyers. In Ramirez’s case, Arizona did not object to the evidentiary hearing in the district court and did not raise AEDPA’s bar on developing new evidence until the case reached the U.S. Court of Appeals for the 9th Circuit. Ordinarily, an argument not raised in the district court is forfeited. But here, in a footnote, Thomas stated that the Supreme Court has “discretion to forgive any forfeiture” and because deciding the issue would reduce the likelihood of future litigation, “we choose to forgive the State’s forfeiture before the District Court.”

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