Conservative Jurisprudence: Evaluating Ineffective Counsel Claims in the Supreme Court (2020-2023)

*Reem Haikal**

Introduction

In Gideon v. Wainwright, Justice Hugo Black stated:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.[1]

In June 2020, the United States Supreme Court decided *Andrus v. Texas*.[2] A notable ruling where the Court overturned an appellate decision on ineffective assistance of counsel under *Strickland v. Washington*.[3]

This period coincides with a significant shift toward a conservative majority, particularly following the confirmation of Justice Amy Coney Barrett in October 2020.[4] Barrett has demonstrated a strict adherence to procedural rules—such as enforcing 28 U.S.C. § 2255(f)'s statute of limitations—and a skepticism toward postconviction claims, regardless of their potential merit.[5] This Article examines cases decided by

* Assistant Professor of Law at Thurgood Marshall School of Law. The author thanks Texas Southern University Thurgood Marshall School of Law for generously supporting this work. Special thanks to Professor Ana M. Otero for her invaluable mentorship and guidance. The author also extends sincere appreciation to the Editorial Board of the *George Mason University Civil Rights Law Journal* for their thoughtful edits and dedication throughout the publication process. Additional thanks to Krystell Morales for her exceptional research assistance. The author dedicates this Article to her Legal Writing students, Class of 2027, whose passion for learning is a continuous source of inspiration. It is also dedicated to Inaam, the reason behind it all.

1 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

2 *See* Andrus v. Texas, 590 U.S. 806, 806 (2020).

3 *Id*. at 813.

4 *See* Trump Whitehouse Archives, *infra* note 305.

5 *See* Schmidt v. Foster, 891 F.3d 302, 321–30, 326–26. (7th Cir. 2018); Schmidt v. Foster, 911 F.3d 469, 469, 476, 480, 481 (7th Cir. 2018) (before Wood, C.J., and Flaum, Easterbrook, Kanne,

the Supreme Court between 2020 and 2023, focusing on ineffective assistance of counsel claims within this evolving judicial landscape. This Article argues that the Supreme Court's conservative majority has reshaped ineffective assistance of counsel jurisprudence by prioritizing procedural finality and deference to state courts over fairness and justice, significantly undermining the Sixth Amendment's promise of effective representation.

Part I examines the American Bar Association (ABA) Guidelines for Representation in Capital Cases. These guidelines provide a blueprint for effective representation in death penalty cases, emphasizing specialized training, thorough pretrial investigations, and meaningful communication with clients to foster trust. By setting clear standards for effective representation, the ABA guidelines highlight the significant gap between best practices and the procedural and resource constraints imposed by the Court's restrictive framework.

Part II explores the role of AEDPA in shaping ineffective assistance jurisprudence. This section highlights how AEDPA's procedural limitations restrict federal review and constrain defendants' ability to challenge state court rulings, creating significant barriers to justice and raising broader questions about fairness in the application of the law.

Part III examines key cases to demonstrate how the Court has interpreted and applied legal standards concerning ineffective assistance of counsel. These cases reveal the Court's reliance on AEDPA to limit federal review and emphasize deference to state court decisions. This deference raises serious concerns about the Court's willingness to reconsider wrongful convictions or attorney errors, showing a preference for upholding prior judgments over correcting judicial oversights.

Part IV analyzes the impact of the conservative majority on claims of ineffective assistance of counsel, focusing on two critical aspects: the growing public disapproval of the Court's rightward shift and the heightened risks faced by capital defendants. Public trust in the Court has declined sharply, with perceptions of its alignment with partisan interests eroding its legitimacy. Additionally, the Court's rulings have reinforced procedural barriers,[6] creating significant obstacles for death row inmates seeking relief and discouraging robust defense advocacy.[7]

Rovner, Sykes, Hamilton, Barrett, Scudder, and St. Eve, JJ.) (Hamilton, J., dissenting, joined by Wood, C.J., and Rovner, J.).

[6] *See* Mays v. Hines, 592 U.S. 385, 391, 393–94 (2021).

[7] *Id.*; *see also* Shinn v. Ramirez, 596 U.S. 366, 376, 382 (2022).

These developments also reflect how the Court's conservative jurisprudence undermines fairness and justice in capital cases.

The final section evaluates Justice Amy Coney Barrett's originalist judicial philosophy and its influence on claims of ineffective assistance of counsel. It explores cases such as *Schmidt v. Foster*,[8] which illustrates how Justice Barrett's views on the Sixth Amendment reflect a narrower interpretation of the right to counsel.

This Article contributes to the existing literature by comprehensively analyzing recent Supreme Court rulings on ineffective assistance of counsel claims and procedural defaults. This Article provides valuable insights into how these trends reshape the constitutional promise of fair representation and challenge the broader principles of justice.

BACKGROUND

I. OVERVIEW OF THE AMERICAN BAR ASSOCIATION (ABA) GUIDELINES FOR REPRESENTATION IN CAPITAL CASES

Ineffective assistance of counsel claims focus solely on the actions (or inactions) of a particular defense attorney (or attorneys) in a specific case and their impact on a specific defendant.[9] When the prosecution has significantly more resources than the defense, it can more effectively portray the defendant as deserving of the death penalty.[10] This disparity in resources can twist the jury's perception, making it more likely the jury will view the defendant as worthy of death, even if a complete and accurate presentation of the case might suggest otherwise.[11] The following sections will provide a summary of the ABA Guidelines for capital case representation, highlighting the essential requirements for specialized training, comprehensive investigation, and the establishment of a trust-based relationship with the client to ensure an effective and fair defense in death penalty cases.

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[8] *See Schmidt*, 891 F.3d at 326–27.

[9] *See generally* Strickland v. Washington, 466 U.S. 668, 687 (1984).

[10] Cory Isaacson, *How Resource Disparity Makes the Death Penalty Unconstitutional: An Eighth Amendment Argument Against Structurally Imbalanced Capital Trials*, 17 BERKLEY J. CRIM. L. 297, 300 (2012).

[11] *Id.*

A. *Importance of Thorough Pretrial Investigation*

The commentary under ABA Guideline 1.1—Objective and Scope of Guidelines—emphasizes the vital need for thorough and proactive legal representation in death penalty cases due to the serious and irreversible consequences.[12] Lawyers must conduct a detailed investigation of all pertinent facts, as they essentially prepare for two separate trials: one to determine guilt and another for sentencing.[13] Preparation must begin immediately upon taking the case, even before the prosecution has decided to pursue the death penalty.[14] The commentary further emphasizes that to provide effective representation, attorneys must obtain necessary resources, including a professional investigator and a mitigation specialist, along with any other relevant experts.[15] Thorough pretrial investigation is essential for trial readiness for negotiating a lesser sentence, persuading the prosecution to avoid the death penalty, or uncovering evidence that could disqualify the defendant from receiving a death sentence.[16]

B. *Qualifications and Training of Defense Counsel*

According to ABA Guideline 8.1 on the qualifications of defense counsel in capital cases, the pool of defense attorneys must be adequately equipped to provide high-quality legal representation to every capital defendant within the jurisdiction.[17] Furthermore, ABA Guideline 8.1(B) mandates that attorneys who seek appointments in capital

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[12] GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 913, 923 (AM. BAR A'SSN., rev. ed. 2003), *available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf [hereinafter ABA GUIDELINES].

[13] *Id.* at 925.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] ABA GUIDELINES, *supra* note 12, § 5.1(B)(2), at 961–62 ("[T]he qualification standards should guarantee that the pool includes a sufficient number of attorneys who have demonstrated: (a) Substantial knowledge and understanding of relevant state, federal, and international law, both procedural and substantive, governing capital cases; (b) Proficiency in managing and conducting complex negotiations and litigation; (c) Expertise in legal research, analysis, and the drafting of litigation documents; (d) Competence in oral advocacy; (e) Skill in utilizing expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; (f) Ability to investigate, prepare, and present evidence related to mental status; (g) Capability in the investigation, preparation, and presentation of mitigating

cases should be required to complete an extensive training program successfully focused on the defense of capital cases.[18] The commentary on ABA Guideline 8.1(B) highlights that effective representation in capital cases requires unique skills, necessitating specialized training in both law and related areas like mitigation and forensic science.[19] Attorneys must complete this comprehensive training before qualifying for death penalty cases, and ongoing education is required to maintain their expertise.[20]

ABA Guideline 10.5 sets forth the rules and responsibilities governing a lawyer's relationship with their client as follows: "Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client."[21] The commentary under Guideline 10.5 stresses the importance of building trust with the client throughout all stages of a death penalty case.[22] Establishing this trust is essential for encouraging the client to share necessary personal details and to follow legal advice on key decisions.[23] Consistent and meaningful contact with the client, including spending time at the prison, is crucial.[24] Rushed or infrequent meetings are inadequate for gathering all relevant facts or building trust.[25] Counsel should also engage with the client's family or support network.[26] Additionally, the commentary advises addressing the client's feelings of hopelessness by seeking mental health support

evidence; and (h) Proficiency in trial advocacy elements, such as jury selection, cross-examination of witnesses, and delivering opening and closing statements.").

18 *Id.* § 8.1, at 976–77 ("This training program should cover a broad range of topics, including but not limited to: (1) relevant state, federal, and international law; (2) pleading and motion practice; (3) pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; (4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations particular to capital defense representation; (7) preservation of the record and of issues for post- conviction review; (8) counsel's relationship with the client and his family; (9) post-conviction litigation in state and federal courts; (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science; (11) the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.").

19 *Id.* at 979.

20 *Id.*

21 ABA GUIDELINES, *supra* note 12, § 10.5(a), at 1005.

22 *Id.* at 1008.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

and consulting with other death row attorneys who have experience representing death row inmates.[27] Continuous availability and support from the defense team and the client's network can help the client maintain hope and consider his or her future.[28]

II. AEDPA'S IMPACT ON ACCESS TO FEDERAL RELIEF AND INEFFECTIVE ASSISTANCE CLAIMS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) has significantly shaped the legal landscape for ineffective assistance of counsel claims.[29] Congress enacted AEDPA to limit "retrials" in federal habeas proceedings by ensuring deference to state court determinations.[30] The following sections briefly explore how AEDPA's procedural barriers and substantive standards constrain federal oversight over state court decisions.

A. *Procedural Barriers to Federal Review*

The AEDPA restricts federal courts' authority over habeas petitions[31] by forbidding federal courts from invalidating state courts'

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[27] ABA GUIDELINES, *supra* note 12, § 10.5, at 1010.

[28] *Id.*

[29] *See* 28 U.S.C. §§ 2244, 2254 (2006); Garrett & Phillips, *infra* note 37.

[30] *See* Williams v. Taylor, 529 U.S. 362, 386–88 (2000). AEDPA does not use the word "deference," and neither its text nor legislative history suggests varying levels of deference based on different provisions. *Id.* at 386–87. Whatever "deference" Congress intended, it does not compel federal courts to accept state court interpretations of federal law that are incorrect in their independent judgment. *Id.* at 387. Federal courts must carefully review state court rulings, and when a state decision—such as a death sentence—violates the Constitution, federal courts must assert their judgment to ensure federal law is applied uniformly across states, as Congress intended. *Id.*

[31] *See* 28 U.S.C. § 2254(d) (2017) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."); *see also* 28 U.S.C. § 2254(e) (2017) ("(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on— (i) a new rule of

decisions unless those decisions "were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[32] It amplifies the deference given to state court decisions by requiring federal courts to presume that a state court's factual determinations are correct.[33] To challenge this presumption, the applicant must provide clear and convincing evidence to rebut it.[34]

The AEDPA significantly restricted access to federal habeas relief by imposing several limitations: a strict one-year statute of limitations with very narrow exceptions, a prohibition on second or successive petitions without specific authorization, and a requirement for prisoners to obtain a "certificate of appealability" before appealing.[35] These restrictions were applied to state prisoners seeking federal relief under § 2254, with additional limitations that further narrowed the pathways for federal review.[36] Among these, the one-year statute of limitations has been criticized for creating confusion and inconsistency as courts grapple with determining when the clock starts, when tolling applies during state post-conviction proceedings, and whether equitable tolling is justified.[37] These uncertainties lead to delays and inconsistent outcomes and discourage effective litigation, compromising fairness and justice.[38]

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constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK L. REV. 411, 427 (2001). AEDPA imposed substantial restrictions on the availability of federal habeas corpus for state prisoners. The AEDPA established strict deadlines for the filing of a federal habeas petition, limits on the scope of review of state court decisions, restrictions on the availability of evidentiary hearings to develop facts in support of constitutional claims, and placed stringent constraints on federal courts' consideration of additional applications for review by the petitioner. There is significant cause for concern that these provisions may "greatly diminish the reliability of the capital system's review process and of the capital verdicts that the system produces." *See generally* 28 U.S.C. §§ 2244–55, 2261–64 (2000).

[32] 28 U.S.C. § 2254(d)(1) (2001).

[33] *Id.* § 2254(e)(1) (2001); *see Williams*, 529 U.S. at 386.

[34] 28 U.S.C. § 2254(e)(1) (2001).

[35] *Id.* §§ 2253, 2255(f)–(h) (2006).

[36] *Id.* §§ 2244, 2254 (2006).

[37] Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1757 (2022).

[38] *Id.*

B. *Federal Habeas Relief Under Increasingly Restrictive Standards: Prioritizing Procedure Over Justice*

In *Shinn v. Ramirez*, the Supreme Court, in a sharply divided decision,[39] held that federal courts are bound by the evidence introduced in prior state proceedings, even if the prisoner had no effective post-conviction counsel — or no counsel at all.[40] The Court further ruled that a prisoner is "at fault" even when state postconviction counsel is negligent,[41] limiting federal courts to consider only the existing state-court record unless the prisoner satisfies the strict requirements of §2254(e)(2).[42]

Post-conviction litigation is chaotic, often due to unresolved constitutional violations, ineffective counsel, and undisclosed evidence that persist through trial, appeal, and beyond.[43] This chaos is further intensified by AEDPA barriers and the Supreme Court's increasingly restrictive interpretation of such barriers, which have denied many petitioners the chance to seek remedies for clear constitutional violations.[44] Compounding these challenges is the flawed assumption that state and federal authorities enforce federal law equally, allowing injustices to persist under rigid procedural rules.[45] Yet, federal habeas proceedings remain the only available avenue to address these failures

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[39] *Ramirez*, 596 U.S. at 369–70 (Thomas, J.) (6–3 decision) (Sotomayor, J., dissenting).

[40] *Id.* at 382.

[41] *Id.* at 382, 384.

[42] 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); 28 U.S.C. § 2254(e)(2)(A)–(B) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on— (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."); *see also Ramirez*, 596 U.S. at 381. Even if a prisoner meets one of the two exceptions under § 2254(e)(2), they must also prove with clear and convincing evidence that no reasonable factfinder would have convicted them. *Id.* Additionally, satisfying these conditions does not guarantee a federal court will hold a hearing or consider new evidence, as principles of comity and finality guide such decisions in federal habeas cases. *Id.* at 381–82.

[43] Garrett & Phillips, *supra* note 37, at 1764.

[44] *Id.* at 1763–64.

[45] *Id.* at 1764.

and ensure access to the Sixth Amendment right to counsel under the U.S. Constitution.[46] While some scholars argue that judicial resources should focus on providing competent trial and appellate counsel at the outset, the reality is that errors remain inevitable due to overburdened defense systems and human fallibility.[47]

III. EVOLUTION OF JURISPRUDENCE ON INEFFECTIVE ASSISTANCE OF COUNSEL: A POST-ANDRUS ANALYSIS

The following sections will analyze the Supreme Court's decisions from June 2020 to April 2023, focusing on how these rulings reflect shifts in the Court's interpretation of the constitutional right to effective legal representation. This period, marked by the appointment of Justice Amy Coney Barrett in October 2020,[48] solidified a conservative majority on the Court and further signaled a shift in the adjudication of cases involving ineffective assistance of counsel.

A. *2020 Cases: Early Indicators of a Conservative Shift*

1. *Andrus v. Texas* (June 2020)

In *Andrus v. Texas*, the Supreme Court, with Justices Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh,[49] held that Terence Andrus's defense counsel failed to investigate and present critical mitigating evidence during his capital murder trial.[50] Andrus had been convicted and sentenced to death for a 2008 carjacking that resulted in two deaths.[51] His attorney did not explore crucial evidence, such as Andrus's traumatic childhood, mental health issues, and harsh treatment in juvenile detention.[52] The Court

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[46] Emily G. Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-To-The-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1256 (2012).

[47] *Id.*

[48] *Biographies*, S.C.O.T.U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 27, 2024).

[49] *Andrus*, 590 U.S. at 806.

[50] *See id.* at 815–17.

[51] *Ex parte Andrus*, 622 S.W.3d 892, 893–94 (Tex. Crim. App. 2021).

[52] *Andrus*, 590 U.S. at 815–16.

held that, under the first prong of the *Strickland* standard,[53] Andrus's counsel rendered constitutionally deficient performance.[54] The Court, however, remanded the case to the Texas Court of Criminal Appeals to determine whether this deficient performance prejudiced Andrus.[55]

On remand, the Texas Court of Criminal Appeals, in 2021, reaffirmed its original decision, holding that Andrus failed to establish prejudice under *Strickland*.[56] The court concluded that the mitigating evidence presented was insufficient to prove that the trial outcome would have been different with better representation.[57]

Andrus again petitioned for certiorari before the Court in 2022.[58] By this time, the composition of the Court had changed to include Justices Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and newly appointed Justice Barrett,[59] shifting the Court to a more conservative majority.[60] The Court denied Andrus's certiorari petition with a one-sentence order.[61] Justice Sotomayor dissented, noting that the Texas Court of Criminal Appeals had ignored the Supreme Court's guidance on reconsidering the prejudice prong of *Strickland*.[62] She emphasized the impact of Andrus's abusive upbringing, mental health struggles, and inadequate legal representation, arguing that effective counsel could have altered the jury's perspective.[63] Justice Sotomayor criticized the Texas court's blatant disregard for Supreme

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[53] *See Strickland*, 466 U.S. at 687. According to *Strickland*, the standard for proving ineffective assistance of counsel requires a defendant to satisfy a two-pronged test. First, the defendant must demonstrate that counsel's performance was deficient, meaning that counsel's errors were so serious that they failed to provide the effective assistance guaranteed by the Sixth Amendment. Second, the defendant must show that this deficient performance resulted in prejudice to the defense by depriving the defendant of a fair trial with a reliable outcome. Without establishing both deficiency and prejudice, Strickland holds that a conviction or death sentence will not be overturned, as it cannot be said that the result was rendered unreliable due to a breakdown in the adversarial process.

[54] *Andrus*, 590 U.S. at 813.

[55] *Id.*

[56] *See Ex parte Andrus*, 622 S.W.3d at 899–900 (reaffirming its initial decision and maintaining that Andrus fell short of establishing both deficiency and prejudice under *Strickland*).

[57] *Id.*

[58] *See generally* Andrus v. Texas, 142 S. Ct. 1866 (2022).

[59] *Justices 1789 to Present*, S.C.O.T.U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 27, 2024).

[60] Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html.

[61] *Andrus*, 142 S. Ct. at 1866.

[62] *See id.* at 1870.

[63] *Id.* at 1877–78.

Court precedent[64] and underscored the importance of reliability in capital punishment cases.[65]

1. *Shinn v. Kayer* (December 2020)

After his conviction for the murder of Delbert Haas in 1994,[66] George Kayer consistently demonstrated a lack of cooperation with the mitigation team, refusing its efforts to collect additional evidence that could have been advantageous during his sentencing.[67] He further compounded this refusal by explicitly declining to collaborate with the investigation specialist, clearly stating that his decision would remain firm, regardless of any delays in the proceedings that the judge might impose.[68] The trial judge sentenced Kayer to death.[69]

Kayer filed a petition for post-conviction relief in the Arizona Superior Court.[70] Kayer argued that the delay by his attorney in the probe into mitigating evidence at the commencement of the criminal proceedings amounted to ineffective assistance of counsel.[71] The Arizona Superior Court affirmed Kayer's conviction and death sentence.[72] As to Kayer's ineffective assistance of counsel claim, the Court found that the counsel's performance was not deficient, considering Kayer's refusal to cooperate with the mitigation team's efforts to gather additional evidence that could have been beneficial to his case.[73] Additionally, the Arizona Superior Court found that even if Kayer's counsel's performance was deficient, it would not have affected the outcome of the trial in favor of Kayer because of the overwhelming aggravating evidence against him.[74] Kayer appealed the denial of relief based on the *Strickland* standard to the Arizona Supreme Court.[75] The

64 *Id.* at 1879–80.

65 *See id.* at 1880.

66 Shinn v. Kayer, 592 U.S. 111, 113 (2020).

67 *Id.* at 113–14.

68 *Id.* at 114.

69 *Id.*

70 *Id.*

71 *Id.* at 115 (explaining that Kayer's hearing evidence encompassed alcohol and gambling addiction, a recent heart attack, mental health issues such as a bipolar disorder diagnosis, and a family history indicating similar struggles, impacting his childhood).

72 *Shinn*, 592 U.S. at 115.

73 *Id.*

74 *Id.*

75 *Id.*

Arizona Supreme Court, however, rejected his request to review the denial of his postconviction relief.[76]

In 2009, fifteen years after his conviction, Kayer filed a habeas petition in the Federal District Court for the District of Arizona,[77] which rejected his ineffective assistance of counsel claim.[78] Eventually, the Ninth Circuit granted Kayer's habeas petition, determining that if his mitigating evidence had been presented to the Arizona Supreme Court, his sentence would have been less than death.[79] In December 2020, the Supreme Court agreed with the opinion of the Arizona Supreme Court and overturned the Night Circuit's ruling.[80] Echoing the ruling of Arizona's highest court, the Court held that Kayer failed to show his counsel's performance was deficient, and even if he could prove such deficiency, he did not demonstrate any resulting prejudice.[81]

The Court explicitly grounded its decision in the AEDPA.[82] Under the AEDPA, a federal court can only grant a habeas corpus writ for a state prisoner if the state court's decision either contradicts or misapplies the Court's precedent or is based on an unreasonable assessment of the facts.[83] According to the Court, the Ninth Circuit overstepped its bounds by not deferring to the state court's ruling on Kayer's claim of ineffective assistance of counsel.[84] The Court emphasized that the state court's decision was not so clearly erroneous as to be beyond agreement by any reasonable jurist.[85] Consequently, the Court reinstated Kayer's death sentence.[86]

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[76] *Id.*

[77] Kayer v. Schriro, No. CV-07-2120-PHX-DGC, 2009 U.S. Dist. LEXIS 104287, at *11 (D. Ariz. Nov. 9, 2009).

[78] *Id.* at *12.

[79] Kayer v. Ryan, 923 F.3d 692, 723 (9th Cir. 2019).

[80] *Shinn*, 592 U.S. at 119.

[81] *See id.* at 120.

[82] *See* Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 695–96 (1998) (noting that one significant and controversial provision to federal habeas corpus procedures sets a one-year limit on federal review of state court decisions and discourages repeat petitions).

[83] ABA GUIDELINES, *supra* note 12, at 929 n. 34.

[84] *Shinn*, 592 U.S. at 124.

[85] *Id.* at 123–24.

[86] *Id.* at 124; *see also* Richie Taylor, *SCOTUS Reinstates Death Sentence for Arizona Man Who Murdered a Friend*, ARIZ. ATT'Y GEN. (Dec. 15, 2020), https://www.azag.gov/press-release/scotus-reinstates-death-sentence-arizona-man-who-murdered-friend.

A. *2021 Cases: Increasing Barriers to Habeas Relief*

1. *Mays v. Hines* (March 2021)

Anthony Hines was sentenced to death for the 1985 murder of Katherine Jenkins, a hotel maid.[87] Hines had traveled from North Carolina to Kentucky, carrying a concealed knife.[88] After Hines checked into a Nashville motel where Jenkins worked, Jenkins was found murdered with multiple stab wounds.[89] Hines was seen leaving the motel in Jenkins' car, and later found with blood on his shirt.[90] Despite attempts by Hines's counsel to shift suspicion onto the key witness, Ken Jones, who found Jenkins' body, the jury ultimately found Hines guilty.[91] Years later, during Hines' post-conviction review, Jones revealed that he was at the motel with a woman he was having an affair with, a fact he had hidden.[92] Hines's attorney knew about the affair but chose not to reveal it to avoid embarrassing Jones.[93] Despite Hines's claim that this decision amounted to ineffective assistance of counsel, however, the Tennessee post-conviction court found no prejudice under *Strickland*.[94]

Thirty-five years later, in his habeas petition filed before the Sixth Circuit, Hines asserted ineffective assistance of counsel,[95] arguing that his attorney failed to thoroughly investigate Jones, the very individual who reported the murder and who had a potential motive.[96] The Sixth Circuit acknowledged that there was no clear motive for Hines to have committed the brutal murder of a woman he did not know, while Jones had a potential motive to hide his affair and time to dispose of evidence.[97] The Sixth Circuit stated that Hines's counsel should have gathered evidence to show the jury why Jones's behavior on the day

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87 Brad Kutner, *Supreme Court Reinstates Death Sentence in Tennessee Murder Case*, COURTHOUSE NEWS SERV. (Mar. 29, 2021), https://www.courthousenews.com/supreme-court-reinstates-death-sentence-in-tennessee-murder-case/.

88 *Mays*, 592 U.S. at 387.

89 *Id.*

90 *Id.*

91 *See id.* at 388–89.

92 *Id.* at 389.

93 *Id.*

94 *Mays*, 592 U.S. at 389.

95 Hines v. Mays, 814 F. App'x 898, 933 (6th Cir. 2020).

96 *Id.*

97 *Id.* at 939.

of the murder and his relationship with the victim were suspicious.[98] According to the Sixth Circuit, this approach would likely have significantly strengthened Hines's defense.[99] The Sixth Circuit noted that Hines's trial counsel was deficient for failing to investigate or interview Jones, relying solely on the sheriff's assurance that Jones was not involved in Jenkins's murder.[100] The Sixth Circuit acknowledged that Hines also demonstrated prejudice as a result of this failure, as it hindered his ability to challenge the prosecution's case and present Jones as a possible alternative suspect.[101] The Tennessee court's determination that there was no prejudice was found by the Sixth Circuit to be an unreasonable application of *Strickland*.[102] The lack of investigation left the defense without crucial information about Jones' relationship with Jenkins and his activities at the motel, which could have undermined his testimony or cast him as a suspect.[103] Thus, the Sixth Circuit granted Hines's writ of habeas corpus.[104]

In 2021, underscoring the formidable challenges associated with satisfying the exacting standards of AEDPA's §2254(d) standard, the Supreme Court overturned the Sixth Circuit's decision.[105] The Court explained why it is challenging for defendants to meet this exacting provision of the Act.[106] The Court reasoned that the term "unreasonable" does not refer to ordinary mistakes or even to cases where the petitioner presents a compelling case for relief, but rather to extreme failures in the state criminal justice system.[107] In this per curiam decision, the Court found that the Tennessee post-conviction court carefully considered the compelling evidence pointing to Hines's guilt.[108] Instead of focusing on the evidence of Hines's guilt, however, such as Hines's flight in a bloody shirt and his possession of the victim's

98 *Id.* at 940.
99 *Id.*
100 *Id.* at 937.
101 *Hines*, 814 F. App'x at 937.
102 *Id.*
103 *Id.* at 938.
104 *Id.* at 942.
105 *Mays*, 592 U.S. at 393–94.
106 *Id.* at 391.
107 *Id.*
108 *Id.* at 390–91.

keys, wallet, and car, the Sixth Circuit concentrated on all the reasons why it thought Jones "could have" been a viable alternative suspect.[109]

In essence, the Court determined that the Tennessee post-conviction court's conclusions were based on a practical analysis, unlike the Sixth Circuit's decision.[110] The Sixth Circuit, it held, overstepped its authority by devising an alternative crime theory where Jones became a suspect 35 years later, delving into speculative territory and relying on this imaginative theory as the basis for granting relief.[111] Relying on a hypothetical scenario, divorced from the original trial's context, lacked a foundation in the solid reasoning employed by the Tennessee court.[112] Building on a state sovereignty theory, the Court asserted that a federal court might intrude on a state's sovereign power to punish offenders only when a decision was so lacking in justification beyond any possibility for fair-minded disagreement.[113]

2. *Whatley v. Warden, Ga. Diagnostic & Classification Prison* (April 2021)

Whatley was convicted of killing the owner of a liquor store in Georgia.[114] The prosecution asserted that after the store owner gave him the money, Whatley attempted to eliminate witnesses by shooting the owner in the chest and nearly hitting an employee, instead striking the counter.[115] Whatley was shackled during the guilt phase of the trial, but the court ensured the jury never saw the restraints.[116] During cross-examination, the prosecutor instructed Whatley to reenact the armed robbery and shooting, telling him to show the jury how he held the gun and demanded money.[117] Shackled and cuffed, Whatley shuffled around the courtroom, waving the gun while the prosecutor provided commentary.[118] The cross-examination concluded with Whatley's

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109 *Id.* at 392.

110 *Id.* at 392–93.

111 *Mays*, 592 U.S. at 393.

112 *Id.* at 392–93.

113 *Id.* at 391.

114 Whatley v. Warden, Ga. Diagnostic & Classification Prison, 141 S. Ct. 1299, 1299 (2021) (Sotomayor, J. dissenting from denial of cert.).

115 *Id.* at 1300.

116 *Id.* at 1299.

117 *Id.*

118 *Id.* at 1300.

counsel once again failing to object to the restraints placed on Whatley.[119] During sentencing, bound by leg irons and cuffs, Whatley shuffled to the witness stand in full view of the jury with no objection from his own counsel.[120]

Whately testified for several hours in shackles, challenging the prosecution's version of the shooting.[121] Even the prosecution inquired about the restraints, to which Whatley's counsel responded, "Well, he's convicted now."[122] The next day, after deliberating for only 90 minutes, the jury sentenced Whately to death.[123]

The Georgia Supreme Court held that Whatley forfeited his claim that visible shackling violated his due process rights because his lawyer waived any objection.[124] Whately filed a state habeas petition, which was denied.[125] Whatley then filed a federal habeas petition, asserting a claim of ineffective assistance of counsel.[126] Whately argued that during the trial, he was visibly handcuffed and shackled in the presence of the jury, a circumstance to which his trial counsel failed to object.[127] The Eleventh Circuit did not agree.[128] It stated that, considering Whately's violent criminal history and the crime at issue, his restraints during trial were trivial.[129] Subsequently, the Supreme Court denied Whatley's petition for certiorari, with Justice Sotomayor dissenting.[130]

According to Justice Sotomayor, if Whatley had testified without constraints, it is reasonably likely that at least one juror would have spared Whately the death penalty.[131] Justice Sotomayor also stressed that this case should be perceived in light of Whatley's relatively minor criminal history, mostly from his teenage years, and the less severe statutory aggravating factors in his case compared to many other capital

119 *Id.*
120 *Whatley*, 141 S. Ct. at 1300.
121 *Id.*
122 *Id.* at 1299–300.
123 *Id.* at 1300.
124 *Id.*
125 *Id.*
126 *Whatley*, 141 S. Ct. at 1300–01.
127 *Id.* at 1300.
128 *Id.* at 1301.
129 *Id.*
130 *Id.* at 1299.
131 *Id.* at 1303.

cases.[132] Besides, the sentencing proceedings brought forth additional complexities, revealing that Whatley's mother had abandoned him, he remained ignorant of his father's identity, and he faced homelessness at the time of the crime.[133] These circumstances, according to Justice Sotomayor, when considered together, paint a picture of a challenging life.[134] The friends' and family's testimonies emphasized Whatley's redeeming qualities, imploring the jury to show mercy.[135] She emphasized the negative impact of his physical appearance in court, stating:

> Chains paint a defendant as an immediate threat. Jurors faced with a defendant in shackles will find it more difficult to consider the defendant as a whole person and to weigh mitigating evidence impartially. If jurors think the court does not trust a capital defendant to avoid violence at his own sentencing proceeding, with his life on the line, they are unlikely to trust him to do so while serving a life sentence with no hope of parole.[136]

Justice Sotomayor argued that this portrayal could undermine the jury's ability to see Whatley in a compassionate light, thereby affecting their decision on whether to show mercy.[137]

3. *Thomas v. Payne* (October 2021)

In the case of *Thomas v. Payne*, Justice Sotomayor shifted from dissenting to concurring.[138] Thomas received a death sentence for capital murder.[139] Thomas appealed his convictions to the Arkansas Supreme Court, raising several grounds for reversal, including errors in the trial's location, jury pool composition, and the constitutionality of the death penalty sentencing scheme.[140] The Arkansas Supreme Court upheld the convictions.[141] Thomas then filed a petition for postconviction relief

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132 *Whatley*, 141 S. Ct. at 1303.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 1302–03.

138 *See generally* Thomas v. Payne, 142 S. Ct. 1 (2021).

139 *Id.*

140 Thomas v. Kelley, No. 6:14-CV-6038, 2017 U.S. Dist. LEXIS 50059, at *1–2 (W.D. Ark. Mar. 31, 2017).

141 *Id.* at *2.

in the Circuit Court of Sevier County, Arkansas, which was denied.[142] He then appealed to the Arkansas Supreme Court, arguing that his trial counsel was ineffective for not objecting to a venue change and for failing to present key testimony.[143] The Arkansas Supreme Court rejected his arguments and denied relief.[144]

Thomas ultimately filed a federal habeas petition in the U.S. District Court for the Western District of Arkansas, claiming ineffective assistance of counsel due to his attorney's failure to conduct a proper investigation.[145] The District Court noted that "Thomas's experts in mitigation relied on inaccurate and incomplete background information."[146] Furthermore, trial counsel "presented a total of three rather insignificant, single-page documents into evidence for jury consideration."[147] The defense also failed to adequately prepare or meaningfully engage family members and other lay witnesses, resulting in testimony that did little to support mitigation efforts.[148] Initially, the trial counsel reached out to Thomas's family and gathered valuable information through a questionnaire completed by Thomas's mother, but counsel failed to conduct a thorough follow-up investigation regarding mitigation.[149] The evidence presented during the district court's evidentiary hearing included, among other things, Oklahoma Department of Human Services ("DHS") records and medical records.[150] Few mitigation witness interviews were conducted, many of which occurred shortly before the trial and were carried out ineffectively, either with multiple parties present or over the phone.[151] According to the District Court, Thomas's attorneys were already aware of the existence of this crucial information, yet they still failed to obtain it.[152] The result of the trial counsel's lack of investigation and preparation was an entirely unconvincing case in mitigation that failed

142 *Id.* at *2–3.
143 *Id.* at *3.
144 *Id.*
145 *Id.* at *3–4.
146 *Kelley*, 2017 U.S. Dist. LEXIS 50059 at *70.
147 *Id.*
148 *Id.*
149 *Id.* at *66–67.
150 *Id.* at *67.
151 *Id.* at *67–68.
152 *Kelley*, 2017 U.S. Dist. LEXIS 50059 at *67.

to tell Thomas's whole life story.[153] The District Court determined that Thomas was prejudiced during the sentencing phase of his trial due to his trial counsel's presentation of mitigation evidence.[154] It held that the evidence supported a reasonable probability of a life sentence when weighed against the aggravating circumstances presented at trial.[155] The Eighth Circuit overturned the district court's decision granting Thomas the habeas petition.[156] The Circuit Court maintained that Thomas's procedural default on both guilt-and-penalty ineffective-assistance claims was inexcusable.[157]

The Supreme Court subsequently declined certiorari, thereby concluding the legal trajectory of Thomas's plea.[158] Sotomayor's concurrence was unequivocal: if a state chooses not to raise a procedural default on appeal, the court of appeals must allow the capital petitioner to respond before adopting the state's argument.[159] The denial of certiorari, according to Sotomayor, should not be misconstrued as endorsing the court of appeals' failure to adhere to this crucial procedure in this case.[160]

B. *2022 Cases: State Sovereignty and Limits on Federal Review*

1. *Holcombe v. Florida* (February 2022)

In *Holcombe v. Florida*, the Supreme Court once more declined to grant certiorari in a case pertaining to the Sixth Amendment right to counsel.[161] Holcombe, Dale, and two codefendants were initially represented by the same attorney, who confirmed during a pretrial conference that all defendants had been advised to seek independent legal advice and chose to waive any conflict of interest, which the court accepted.[162] As the trial neared, two codefendants accepted plea deals and agreed to testify against Holcombe and Dale while still

153 *Id.* at *70.
154 *Id.* at *65–66, 74.
155 *Id.* at *65–66.
156 Thomas v. Payne, 960 F.3d 465, 478 (8th Cir. 2020).
157 *Id.*
158 *Thomas*, 142 S. Ct. at 1.
159 *Id.* at 2.
160 *Id.*
161 Holcombe v. Florida, 142 S. Ct. 955, 958 (2022).
162 *Id.* at 956.

represented by the same attorney, creating a conflict since the plea deals hinged on the quality of their testimony, and the defense attorney would need to cross-examine his own clients, potentially compromising his representation of Holcombe and Dale.[163] Even the prosecutor highlighted this conflict, asserting it was unwaviable, leading the defense attorney to offer to withdraw from representing the testifying codefendants.[164] Despite the conflict, the trial judge did not question the defendants or advise them of their right to separate representation, and rejected the attorney's offer to withdraw.[165] The trial continued, the codefendants testified against Holcombe and Dale, and Holcombe was convicted and sentenced to 10 years in prison.[166]

In her dissent, Justice Sotomayor explained that the codefendants' plea deals created an untenable conflict for defense counsel. Aiding Holcombe would jeopardize the codefendants' chances for lenient sentences, while holding back would enable damaging evidence against Holcombe.[167] Sotomayor further explained that the trial court failed to investigate the conflict further or advise the defendants to seek unconflicted counsel.[168] According to Sotomayor, the situation did not just present a potential conflict but rather an actual one, warranting an automatic reversal of Holcombe's conviction upon appeal.[169]

2. *Shinn v. Ramirez* (May 2022)

More than a year after the Supreme Court rejected certiorari in *Thomas v. Payne*,[170] the Court, in its 6-3 opinion in *Shinn v. Ramirez*,[171] provided clarification on procedural default in ways that were not addressed in *Thomas v. Payne*. *Shinn v. Ramirez* consolidated two cases brought by the State of Arizona,[172] both involving claims of ineffective assistance of trial counsel and the procedural barriers

163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* at 957.
167 *Holcombe*, 142 S. Ct. at 958.
168 *Id.*
169 *Id.*
170 *See generally Thomas*, 142 S. Ct. 1.
171 *See Ramirez*, 596 U.S. 366.
172 *Id.* at 372.

imposed by AEDPA.[173] The cases—*Ramirez v. Ryan* and *Jones v. Shinn*—originated in the Ninth Circuit, where both defendants sought to excuse procedural default on the grounds of ineffective postconviction counsel.[174]

In *Shinn*, Ramirez was found guilty by the jury on two counts of premeditated first-degree murder.[175] Subsequently, the trial court imposed a death sentence, a decision that was upheld by the Arizona Supreme Court during the direct review process.[176] Notably, Ramirez did not raise his ineffective assistance of counsel claim in his initial state post-conviction relief petition.[177] In a subsequent filing—a successive state habeas petition—Ramirez introduced the specific ineffective-assistance claim at issue, which the state court summarily dismissed, citing its untimeliness as per Arizona law.[178] Ramirez then petitioned the U.S. District Court for the District of Arizona for a writ of habeas corpus, asserting his claim of ineffective assistance of counsel.[179] The District Court held that Ramirez had procedurally defaulted his ineffective assistance claim by not raising it in a timely manner before the court.[180] Ramirez argued that the default should be excused because his state postconviction counsel was ineffective for failing to raise the claim and develop supporting evidence.[181] The District Court excused the procedural default but ultimately rejected Ramirez's ineffective assistance of counsel claim on its merits.[182] Ramirez appealed the district court decision to the Ninth Circuit, which held that the procedural default could be excused and remanded the case for further evidentiary development.[183]

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173 *Id.* at 371.

174 *Id.* at 374.

175 *Id.* at 372.

176 *Id.*

177 *Ramirez*, 596 U.S. at 372.

178 *Id.* (explaining Ramirez's argument that his trial counsel was ineffective for failing to conduct a thorough mitigation investigation or present available mitigation evidence during sentencing).

179 *Id.*

180 *Id.*

181 *Id.* at 372–73.

182 *Id.*

183 *Ramirez*, 596 U.S. at 373.

Similarly, in *Jones*, the defendant's federal habeas petition presented new evidence following procedural default in state court.[184] The Ninth Circuit affirmed that the failure of postconviction counsel to develop the state-court record excused the procedural default, permitting further evidentiary hearings.[185]

The issue in *Shinn v. Ramirez* was whether a federal habeas court is permitted to hold an evidentiary hearing under AEDPA §2254(e)(2) or examine evidence beyond the state-court record in cases where the claim is rooted in the ineffective assistance of state postconviction counsel.[186] The Court answered this question in the negative.[187]

Writing for the Court, Justice Thomas emphasizes that criminal law enforcement is fundamentally a state responsibility.[188] States hold the primary authority to define and enforce criminal law and to adjudicate constitutional challenges to state convictions.[189] Federal habeas review, which overrides this state authority, imposes significant costs on the federal system and can disrupt the finality of state court decisions, thereby undermining the perception of state trials as definitive.[190] The Court overturned the Ninth Circuit decision and provided an elaborate holding that "[u]nder §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."[191]

The Court's clarity resonates: there's no constitutional right to counsel in state postconviction proceedings, and since an attorney serves as the petitioner's agent, the petitioner assumes the risk of the attorney during those proceedings.[192] Ineffective assistance of counsel cannot excuse the petitioner's procedural default because, under the

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184 *Id.* at 374. Jones filed a habeas petition in the U.S. District Court, which found his ineffective-assistance claim procedurally defaulted. *Id.* Like Ramirez, Jones argued that his postconviction counsel's ineffectiveness excused the default and sought to supplement the incomplete state-court record. *Id.* The District Court held a seven-day evidentiary hearing, ultimately excusing the procedural default and concluding, based on new evidence, that Jones' trial counsel had been ineffective. *Id.* Arizona appealed, arguing that §2254(e)(2) barred the evidentiary hearing. *Id.*

185 *Id.* at 374.

186 *Id.*; *see* 28 U.S.C. § 2254(e)(2).

187 *Ramirez*, 596 U.S. at 381–82.

188 *Id.* at 376.

189 *Id.*

190 *Id.* at 382.

191 *Id.*

192 *Id.* at 368–69, 382.

assumption of risk theory, the attorney is considered the petitioner's agent during litigation.[193] As a result, the petitioner must accept responsibility for the attorney's actions or inactions.[194] In other words, even if the postconviction attorney is negligent, the petitioner will not be entitled to relief unless the specific conditions outlined in §2254(e)(2) are met.[195] The narrow exception to this rule is when the State requires prisoners to raise ineffective assistance of counsel claims for the first time during state collateral proceedings.[196] Otherwise, attorney error, when there is no right to counsel, is not enough to show cause.[197]

Justices Sotomayor, Breyer, and Kagan dissented.[198] Justice Sotomayor, writing for the dissent, emphasized several key points regarding Ramirez's case, noting that his counsel failed to provide vital evidence of his intellectual disability to a psychologist and did not develop this claim to argue against a death sentence, resulting in Ramirez being sentenced to death.[199] His postconviction counsel also did not argue that his trial counsel had been ineffective.[200]

After Arizona courts denied Ramirez's post-conviction petition, a federal district court appointed the Arizona Federal Public Defender for his federal habeas proceedings due to concerns about his previous representation.[201] In his habeas petition, Ramirez presented new evidence from family members detailing severe childhood abuse and neglect, which neither his trial nor postconviction counsel had uncovered.[202] This included evidence of his harsh living conditions, abuse by his mother, and developmental delays.[203] A psychologist who evaluated Ramirez during his trial stated that with access to his school

193 *Ramirez*, 596 U.S. at 380.

194 *Id.* at 379–80 (explaining that to excuse procedural default in the federal courts, a prisoner must prove "cause and actual prejudice" from the alleged violation of federal law; for cause, the prisoner must demonstrate some external obstacle that tripped up the defense in following the state's procedural rule; for prejudice, it is not just about having a strong federal claim: the prisoner needs to show that the constitutional violation worked to their actual and substantial disadvantage).

195 *Id.* at 384.

196 *Id.*

197 *Id.* at 379.

198 *Id.* at 391.

199 *Ramirez*, 596 U.S. at 395.

200 *Id.* at 395–96.

201 *Id.* at 396.

202 *Id.*

203 *Id.*

records and IQ scores, he would have suspected intellectual disability and recommended further testing.[204] Ramirez's trial counsel also admitted in an affidavit that she was unprepared to represent someone as mentally disturbed as Ramirez and that the new evidence would have significantly changed her approach to the case.[205]

Justice Sotomayor argued that developing an ineffective assistance of counsel claim inherently requires evidence beyond the trial record.[206] She noted that if states like Arizona reserve such claims for collateral proceedings to develop their factual basis, it is unfair to penalize a petitioner for not developing this basis due to postconviction counsel's ineffectiveness.[207] Such a rule, she argued, would undermine the evidentiary development necessary for many valid claims and conflict with the principles established in *Martinez*.[208]

3. *Shoop v. Twyford* (June 2022)

In *Shoop v. Twyford*, the Supreme Court delivered a 5-4 opinion, with the conservative majority prevailing.[209] Twyford pursued post-conviction relief in Ohio state court, asserting that his trial counsel was ineffective for not presenting evidence of a head injury he suffered as a teenager during a suicide attempt.[210] The Ohio Court of Appeals, however, found that the psychologist who testified during the penalty phase attributed the appellant's behavior to childhood difficulties rather

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204 *Id.*

205 *Ramirez*, 596 U.S. at 396–97.

206 *Id.* at 402.

207 *Id.* at 403.

208 *Id.* ("[W]here, under state law, claims of ineffective assistance of trial counsel had to be raised in an initial-review collateral proceeding, a procedural default would not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.") (quoting *Martinez v. Ryan*, 566 U.S. 1, 17 (2012)); *Id.* at 11 (explaining that an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal was ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims).

209 Shoop v. Twyford, 596 U.S. 811, 814 (2022) (Roberts, J., delivering the opinion of the Court, joined by Thomas, Alito, Kavanaugh, and Barrett, JJ.; Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.; Gorsuch, J., dissenting).

210 *Id.* at 815.

than a head injury.[211] Therefore, the trial counsel was not ineffective for relying exclusively on this psychologist's theory.[212] Two decades later, Twyford initiated a habeas relief petition in federal district court.[213] Taking it a step further, Twyford pursued an order demanding that the State escort him to the Ohio State University Medical Center for medical testing.[214]

The Court rejected the decision of the U.S. District Court, which had been affirmed by the Sixth Circuit.[215] The Court ruled that prisoners are not allowed to undertake fishing expeditions for new evidence under the All-Writs Act, given that the prisoner has not demonstrated that the desired evidence would be admissible in relation to a specific claim for relief.[216]

4. *Canales v. Lumpkin* (June 2022)

Canales claimed ineffective assistance of counsel due to the attorney's failure to investigate mitigating evidence.[217] Once again, in dissent, Justice Sotomayor noted that Canales was convicted of a gang-related killing in prison and sentenced to death.[218] During sentencing, the State presented evidence of his prior convictions for theft and sexual assault, including a victim's testimony and letters he wrote asking the Texas Mafia to murder a cooperating inmate.[219] Defense counsel admitted they did not investigate mitigating evidence and offered a

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211 State v. Twyford, No. 98-JE-56, 2001 Ohio App. LEXIS 1443, at *30 (Ohio Ct. App. 7th Dist. Mar. 19, 2001).

212 *Id.*

213 *Shoop*, 596 U.S. at 815.

214 *Id.* at 816 (arguing that medical testing cannot be performed in prison and contending that it was crucial to ascertain whether he had neurological defects resulting from childhood physical abuse, alcohol and drug use, and a self-inflicted gunshot wound to his head).

215 *Id.*

216 *Id.* at 817.

217 Canales v. Lumpkin, 142 S. Ct. 2563, 2565–66 (2022) (Sotomayor, J., dissenting) (arguing that a competent counsel would have informed the jury about the tragic circumstances of Canales's upbringing, including a harrowing childhood marked by violence, sexual abuse, poverty, neglect, and homelessness, noting that amid such adversity, a glimmer of humanity emerged as Canales showed kindness towards his mother and sisters and that this information, woven into the fabric of his background, could have presented a compelling narrative challenging the idea of condemning him to the ultimate punishment of death).

218 *Id.* at 2565.

219 *Id.*

minimal response.[220] According to Justice Sotomayor, they failed to present evidence of Canales' difficult past or protective actions towards his sisters, instead calling witnesses who spoke about his good behavior in prison and artistic talent.[221] Given the severity of the death sentence imposed upon him, however, Justice Sotomayor contended that a fair and just hearing should have delved into every aspect of his character, not solely focusing on his criminal acts.[222]

To show prejudice, Canales must prove there was a reasonable probability the jury would have given a different sentence if his counsel had been effective.[223] Since a death sentence requires a unanimous jury in Texas,[224] Justice Sotomayor contended that Canales only had to show that one juror might have voted differently with the mitigating evidence.[225] The jury sentenced Canales to death, however, without seeing the full picture of his life.[226] This evidence included more than just his artistic talent; it encompassed his entire life story.[227] If the jury had a fuller understanding of Canales, Justice Sotomayor noted that there is a reasonable probability that at least one juror would have chosen a life sentence over the death penalty.[228]

5. *Thomas v. Lumpkin* (October 2022)

In late 2022, the Supreme Court, for the second time that year,[229] denied certiorari in the case of *Thomas v. Lumpkin*, once again originating from the Fifth Circuit.[230] The case involves the conviction of Thomas, an African American, for the homicide of his white wife and her daughter.[231] In this particular instance, Justice Sotomayor

220 *Id.*
221 *Id.*
222 *Id.*
223 *Canales*, 142 S. Ct. at 2567.
224 TEX. CODE CRIM. PROC. ANN., art. 37.071 (Vernon 2000).
225 *Canales*, 142 S. Ct. at 2568.
226 *Id.* at 2569.
227 *Id.*
228 *Id.* at 2569.
229 Thomas v. Lumpkin, 143 S. Ct. 4 (2022) (denying cert.).
230 *Id.*
231 *Id.*

reiterated her dissent, highlighting the failure of Thomas's attorney to exercise peremptory challenges.[232]

While awaiting trial, Thomas removed both of his own eyeballs over time.[233] He pleaded not guilty by reason of insanity, and although the State agreed he was psychotic, they argued his psychosis was induced by consuming cough medicine.[234] Due to the interracial nature of the crime, both sides questioned jurors about their views on interracial marriage.[235] Thomas's attorney was aware that three members of this all-white jury held biases against interracial marriage, yet failed to address this crucial matter.[236] Thomas was sentenced to death.[237]

The state habeas court denied Thomas's claims without an evidentiary hearing, finding no evidence of racial bias in the jury's decision and dismissing his ineffective assistance claim.[238] The Court of Criminal Appeals of Texas upheld these findings.[239] Thomas then filed a federal habeas petition, which was denied by the U.S. District Court for the Eastern District of Texas, labeling the juror-bias claim as "speculative" and the defense counsel's decisions as a trial strategy.[240] The Fifth Circuit affirmed this decision.[241] Thomas's lead trial counsel admitted he unintentionally failed to question jurors about interracial marriage.[242] The second-chair counsel, inexperienced with capital trials, described the voir dire process as a "nightmare."[243]

According to Justice Sotomayor, Thomas's counsel failed to meet the objective standard of reasonableness.[244] Four prospective jurors opposed interracial marriage; only one was questioned about racial views, and he did not change his stance.[245] The other three jurors were not questioned at all.[246] The Court requires specific questioning on

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232 *Id.*
233 *Id.*
234 *Id.*
235 *Lumpkin*, 143 S. Ct. at 4–5.
236 *Id.* at 4–6.
237 *Id.* at 4.
238 *Id.* at 7.
239 *Id.*
240 *Id.*
241 *Lumpkin*, 143 S. Ct. at 10.
242 *Id.* at 7.
243 *Id.*
244 *Id.* at 8.
245 *Id.*
246 *Id.*

racial bias when there is a significant likelihood of prejudice, especially in capital cases involving interracial crimes.[247] In this case, three seated jurors and an alternate held prejudicial views.[248] As noted by Justice Sotomayor, counsel's failure to request individual voir dire (with no excuse) was constitutionally ineffective.[249]

C. *2023 Cases: Continued Refusals to Intervene in Death Penalty Cases*

1. *Davis v. United States* (February 2023)

The Supreme Court, with a notable dissent by Justice Jackson, denied certiorari in *Davis v. United States*.[250] *Davis* revolved around an issue that various circuit courts have addressed differently:[251] whether a defendant must assert and demonstrate the existence of an actual plea offer to establish prejudice under *Strickland* due to counsel's failure to negotiate a favorable plea deal.[252] Davis went to trial, and his attorney opted for that path.[253] Consequently, Davis received a 160-year prison sentence for offenses committed during his late teens, specifically at the ages of 18 to 19.[254] While Davis faced a staggering 160-year sentence after going to trial, his five co-defendants, who accepted the plea offer, received a comparatively lesser 40-year sentence.[255] Adding to the disparity, Davis's co-defendants had lawyers who successfully negotiated favorable plea deals.[256]

2. *Burns v. Mays* (April 2023)

The Supreme Court denied certiorari in this case, where Burns was condemned to death, with Justice Sotomayor dissenting.[257] When

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247 *Lumpkin*, 143 S. Ct. at 8–9.
248 *Id.* at 9.
249 *Id.* at 8–9.
250 Davis v. United States, 143 S. Ct. 647, 647 (2023).
251 *Id.*
252 *Id.*
253 *Id.* at 648.
254 *Id.*
255 *Id.*
256 *Davis*, 143 S. Ct. at 648.
257 *See* Burns v. Mays, 143 S. Ct. 1077, 1077 (2023).

Burns was 22, he and five others robbed a group of young men in a car, resulting in two deaths.[258] It was unclear who fired the shots.[259] Burns and two others were charged with premeditated murder and felony murder.[260] His co-defendants were convicted of felony murder and sentenced to life in prison.[261] Burns was found guilty of two counts of felony murder, as the jury only needed to determine his participation in the robbery.[262]

According to Justice Sotomayor, penalty-phase counsel failed to challenge the State's narrative crucial to life-or-death decisions.[263] Despite Burns providing powerful impeachment evidence in postconviction proceedings, showing the inconsistency of eyewitnesses, counsel failed to utilize it, leading to Burns being identified as the shooter.[264] The jurors, influenced by incomplete information, sentenced him to death.[265] Justice Sotomayor argued that the Court's denial of certiorari condemns Burns to execution, even though there is a strong possibility that he may not have been the one to shoot the victim.[266]

ANALYSIS

I. IMPACT OF THE CONSERVATIVE MAJORITY ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

When asked by his law clerks how legal change occurs, Justice Thurgood Marshall would hold up his hand with five fingers spread and reply, "Five. Five votes—that's how."[267] Marshall's response underscores a simple yet profound truth: legal change happens only when there are enough votes to make it happen.[268] The following sections explore the Supreme Court's sharp ideological shift and its

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258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*

263 *Burns*, 143 S. Ct. at 1078.

264 *Id.*

265 *Id.* at 1080.

266 *Id.*

267 CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 258 (photo. reprt. 2022) (2016).

268 *Id.*

broader consequences. First, by examining the heightened risks for capital defendants, the Court's decisions have reinforced procedural barriers, limited relief, and distanced the judiciary from addressing critical issues in death penalty cases. Then, by considering the growing public disapproval of the Court, driven by its alignment with partisan interests and conservative jurisprudence.

A. *Heightened Risks and Limited Relief for Capital Defendants*

Capital cases involve two main phases: determining guilt and sentencing.[269] After a conviction, the jury evaluates aggravating and mitigating factors to decide between the death penalty and life imprisonment.[270] The process involves presenting evidence and deliberating on the appropriate sentence.[271] After sentencing, capital cases often involve lengthy appeals, focusing on trial errors, constitutional violations, and ineffective counsel.[272]

When pursued thoroughly, a significant portion of death penalty cases are overturned or modified, highlighting the importance of rigorous postconviction review.[273] A Bloomberg Law analysis, however, concluded that death-sentenced prisoners have fewer opportunities for relief at the Supreme Court than ever before; of 270 emergency requests to stay executions filed since 2013, the Court granted only 11, with just two approved since the establishment of the conservative 6-3 majority in 2020.[274] Justice Gorsuch appears to further distance the Court from capital punishment issues by asserting that decisions about capital punishment are for the people and their representatives to resolve, stating that the Court's role is limited to ensuring method-of-execution challenges are addressed fairly and expeditiously.[275] Justice Gorsuch further emphasized the Court's limited role in capital punishment cases by cautioning against the misuse of execution challenges to cause

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269 VICTOR STREIB, DEATH PENALTY IN A NUTSHELL 119 (3d ed. 2008).

270 *Id.* at 120.

271 *Id.* at 120–21.

272 *Id.* at 121.

273 *Id.*

274 Leah Roemer, *Analysis Shows Supreme Court's Changing View of Death Penalty Cases*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/analysis-shows-supreme-courts-changing-view-of-death-penalty-cases (Mar. 14, 2025).

275 Bucklew v. Precythe, 587 U.S. 119, 150 (2019).

unnecessary delays.[276] He argued that last-minute stay requests should be rare exceptions rather than the norm, noting that delays caused by untimely applications or attempts at manipulation could justify denying a stay.[277]

B. *Public Disapproval and the Court's Rightward Shift*

The Supreme Court's sharp rightward shift is undeniable, with its landmark decision to dismantle abortion rights in *Dobbs v. Jackson Women's Health Organization* serving as a powerful testament.[278] In a 2022 Pew Research Center survey, nearly six in ten Americans (57%) expressed disapproval of the Supreme Court's landmark *Dobbs* decision, with 43% strongly disapproving.[279] The survey, conducted from June 27 to July 4 of 2022, highlights the widespread public backlash against the Court's ruling.[280]

The Annenberg Public Policy Center's August 2022 survey reveals a significant decline in public trust in the Supreme Court.[281] The Annenberg Public Policy Center's survey was conducted two months after the Court's decision to overturn *Roe v. Wade*, and found that only 39% adults approve of how the Court is handling its responsibilities, while 53% disapprove.[282] According to the survey, "[o]ver half (53%)" also report "little or no trust in the . . . Court to operate in the best interests of the American people," a sharp 22-point increase "since

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276 *Id.*

277 *Id.* (citing Hill v. McDonough, 547 U.S. 573, 584 (2006)).

278 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

279 *See Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade*, PEW RESEARCH (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/.

280 *Id.* (discussing that "to better understand Americans' attitudes about abortion and their . . . [response] to the Supreme Court's June 24, 2022 decision overturning *Roe v. Wade*[,]" Pew Research Center conducted a survey of "6,174 U.S. adults between June 27 and July 4, 2022." Participants were drawn from the Center's American Trends Panel (ATP), "an online survey panel . . . "recruited through national, random sampling of residential addresses[,]" ensuring "nearly all U.S. adults had a chance of selection." "The survey . . . [was] weighted to" accurately represent the "U.S. adult population" across categories such as "gender, race, ethnicity, partisan affiliation, . . . [and] education[.]").

281 *See Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POLICY CTR. (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets. The Annenberg Constitution Day Civics Survey, conducted annually by the Annenberg Public Policy Center of the University of Pennsylvania, surveyed 1,113 U.S. adults by phone from August 2–13, 2022.

282 *Id.*

2019."[283] Trust in the Court is deeply divided along party lines, with 70% of Republicans expressing a fair amount or great deal of trust, compared to just 32% of Democrats.[284] The results also highlight a growing perception that Supreme Court justices are partisan actors, with a stark contrast between the fairness and impartiality Americans expect from judges and the qualities they perceive in the Court's current members.[285] While 90% of respondents believe it is essential or very important for judges to rule based on the Constitution, the law, and the facts of the case, only 40% believe Supreme Court justices are likely to set aside their personal and political beliefs to do so.[286]

Finally, Gallup's September 2023 survey highlights further erosion of public trust in the judicial branch, with only 49% of Americans expressing "a great deal" or "a fair amount" of trust in the Court—a slight recovery from 2022 record-low of 47%, but well below the historical average of 68% prior to 2022.[287] Additionally, perceptions of the Court's ideology remain polarized, with 39% of Americans viewing it as "too conservative," the second-highest percentage ever recorded, while 42% believe the Court's ideology is "about right."[288] Meanwhile, only 17% see the Court as "too liberal," matching the historical low recorded in 2019.[289] These findings reflect a continuing shift in public opinion, with trust and ideological balance at historically low levels.[290] Gallup also found significant partisan divides in trust toward the judicial branch, with 63% of Republicans expressing trust compared to just 46% of independents and 34% of Democrats.[291] This pattern closely mirrors the Annenberg survey's findings on partisan differences in confidence in the Supreme Court.[292]

According to Harvard public policy professor Maya Sen, public disapproval of the Supreme Court has surged to a historic 58%, up from 40% in 2020, with the perception of the Court as "too conservative"

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283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*

287 *See* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.*

292 *See* ANNENBERG PUB. POLICY CTR., *supra* note 281.

doubling from 20% in 2016 to 42% in 2022.[293] This ideological shift has polarized approval ratings: 60% of Republicans still back the Court, compared to just 36% of independents and 23% of Democrats.[294]

Professor Sen further attributes this dramatic decline in approval to the Court's rapid ideological shift, which she says began with the confirmation of Amy Coney Barrett.[295] Rather than reflecting the average American, the Court now aligns more closely with the views of the Republican Party's voter base.[296] This shift, Professor Sen explains, corresponds with a surge in public disapproval, marking a stark departure from the Court's traditional role in a constitutional democracy.[297] This shift in public perception aligns with broader concerns about systemic failures in legal representation.[298] One key concern is inadequate legal defense, especially in death-penalty cases. A study by the Death Penalty Information Center found that between 2007 and 2017, 23.5% of wrongful death-row convictions involved inadequate legal defense.[299]

II. ANALYZING THE JUDICIAL PHILOSOPHIES OF JUSTICE AMY CONEY BARRETT

Justice Amy Coney Barrett's judicial philosophy, particularly her originalist approach, offers significant insights into how she may influence future rulings on the Sixth Amendment right to counsel. Citizens can better understand her perspective by examining her decisions, especially during her tenure on the Seventh Circuit. When Senator Graham, aware of her identification as an originalist,[300] asked

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293 Jeff Neal, *Why Has the Supreme Court Come Under Increased Scrutiny?*, HARVARD L. TODAY (Nov. 16, 2022), https://hls.harvard.edu/today/why-has-the-supreme-court-come-under-increased-scrutiny/.

294 *Id.*

295 *Id.*

296 *Id.*

297 *See id.*

298 *See generally DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions (last visited Jan. 21, 2025).

299 *Id.*

300 *Chairman Graham Questions Judge Barrett*, U.S. SENATE COMM. ON THE JUDICIARY (Oct. 13, 2020), https://www.judiciary.senate.gov/press/rep/releases/chairman-graham-questions-judge-barrett.

her to explain what originalism means as a judicial philosophy,[301] she responded:

> I interpret the Constitution as a law, that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time. And it's not up to me to update it or infuse my own policy views into it.[302]

Daniel L. Kaplan suggested that Justice Coney Barrett will likely "share views similar to Scalia's but presented at a cooler temperature."[303] Unlike Justice Scalia, who was well-known for his assertive and frequent separate opinions, Justice Barrett has been less inclined to write concurrences or dissents.[304] Reflecting on how the late Justice Scalia's philosophy influenced her, Justice Barrett, after President Trump announced her nomination, stated, "His judicial philosophy is mine, too: a judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold."[305]

The following sections analyze Justice Amy Coney Barrett's judicial philosophy through her opinions in key Seventh Circuit cases, illustrating her narrow interpretation of the Sixth Amendment's right to counsel and her focus on procedural rigor in ineffective assistance claims.

A. *Case Study: Impact of Barrett's Judicial Philosophy on the Seventh Circuit*

This section examines Justice Amy Coney Barrett's judicial philosophy through her rulings in key Seventh Circuit cases, focusing on how her interpretation of legal principles has influenced outcomes in ineffective assistance of counsel and Sixth Amendment challenges. Perrone v. United States illustrates Barrett's strict adherence to procedural rules, regardless of potential merit, as she barred an ineffective assistance of counsel claim under 28 U.S.C. § 2255(f)'s

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301 *Id.*

302 *Id.*

303 Daniel L. Kaplan, *Amy Coney Barrett: A Mellower Scalia*, 38 CRIM. JUST. 8, 12 (Fall 2023).

304 *Id.*

305 *Supreme Court Nominee Amy Coney Barrett: Judges Are Not Policymakers*, TRUMP WHITE HOUSE ARCHIVES (Sept. 29, 2020), https://trumpwhitehouse.archives.gov/articles/supreme-court-nominee-amy-coney-barrett-judges-not-policymakers/.

statute of limitations.[306] *Schmidt v. Foster* follows, where Barrett dissented in a case concerning the right to counsel in nontraditional adversarial settings,[307] arguing for a more limited application of the Sixth Amendment.[308] Justice Barrett's dissent in the initial panel decision, advocating for a narrower view of the right to counsel,[309] ultimately prevailed when the Seventh Circuit, on en banc rehearing, adopted her reasoning.[310] The Seventh Circuit held that Schmidt's partial deprivation—counsel's presence without participation during the in camera examination—did not constitute a complete denial sufficient to invoke a presumption of prejudice.[311]

1. *Perrone v. United States*

In the early morning hours of April 17, 2008, Terry Learn spent several hours using heroin and cocaine with her co-worker.[312] Later that day, she met her boyfriend, Joseph Perrone, and the two made a suicide pact.[313] Perrone witnessed Learn inject herself with a small, non-lethal dose of cocaine and water and told her that it was not enough to be fatal.[314] He then prepared and administered an additional dose of cocaine, causing her to convulse and die immediately.[315] Perrone moved her body to her apartment, wiped his fingerprints from the syringe, and staged the scene to make it appear as if she had died alone.[316] The coroner reported that Learn's death was caused by a combination of cocaine, ethanol, and opiates.[317] Months later, Perrone was arrested on unrelated charges and confessed to killing Learn.[318] He admitted

306 Perrone v. United States, 889 F.3d 898, 909 (7th Cir. 2018).

307 *Schmidt*, 891 F.3d at 321–30.

308 *Id.*

309 *Id.; see also Schmidt*, 891 F.3d at 325–26.

310 *See* Schmidt v. Foster, 911 F.3d 469, 469, 476, 480 (7th Cir. 2018) (before Wood, C.J., and Flaum, Easterbrook, Kanne, Rovner, Sykes, Hamilton, Barrett, Scudder, and St. Eve, JJ.) (Hamilton, J., dissenting, joined by Wood, C.J., and Rovner, J.).

311 *Schmidt*, 911 F.3d at 481.

312 *Perrone*, 889 F.3d at 901.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 *Perrone*, 889 F.3d at 901.

to injecting her with the fatal dose of cocaine and later pleaded guilty, acknowledging that his actions had directly caused her death.[319]

Perrone was indicted for causing Learn's death through drug distribution, which triggered a 20-year minimum sentence under U.S. Code Offenses and Penalties § 841(b)(1)(C).[320] The day before his sentencing, *United States v. Hatfield* established that the "death results" enhancement required proof that the drugs were the direct cause of death.[321] Perrone's attorney, however, did not raise this issue, and Perrone was sentenced to 240 months in prison.[322] He did not appeal but later received an 80-month sentence reduction for assisting the government.[323] In 2014, four years after *Hatfield*, the Supreme Court in *Burrage v. United States* confirmed that the 'death results' enhancement requires the government to prove the victim would have survived but for the defendant's drugs.[324]

Perrone filed a petition for habeas corpus in federal court to alter his sentence a month following the *Burrage* decision,[325] arguing that the new interpretation of the "death results" enhancement proved his innocence.[326] He also claimed his attorney was ineffective for not informing him about the *Hatfield* case.[327] Perrone argued that if he had known about *Hatfield*, he might have withdrawn his plea, as he did not realize the "death results" enhancement required proof of but-for causation when he admitted to causing Learn's death.[328] The district court denied Perrone's petition and dismissed his claims with prejudice,[329] but the Seventh Circuit granted a review to decide

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319 *Id.* at 902.

320 *Id.* at 901 (noting the indictment stated that Learn's death was caused by Perrone's drug distribution, which, if proven, would increase his sentence under § 841(b)(1)(C), which required a minimum of 20 years in prison if someone died or was seriously injured from using illegal drugs).

321 *Id.* at 902 (holding that the "death results" enhancement required the government to prove that the victim's death was a direct result of ingesting the defendant's drugs under a "but for" causation standard, rejecting less precise jury instructions that merely required finding the drugs "played a part" in the death, and emphasizing the need for a stricter causal link).

322 *Id.* at 902.

323 *Id.*

324 Burrage v. United States, 571 U.S. 204, 218–19 (2014).

325 Perrone v. United States, No. 14-cv-281-DRH, 2014 U.S. Dist. LEXIS 24879, at *1.

326 Perrone v. DRH United States, No. 14-cv-281-DRH, 2016 U.S. Dist. LEXIS 66194, at *3 (S.D. Ill. May 19, 2016).

327 *Id.*

328 *Perrone*, 889 F.3d at 908.

329 *Perrone*, 2016 U.S. Dist. LEXIS 66194, at *19.

whether Perrone was innocent under *Burrage*, whether his attorney was ineffective, and whether his plea was made knowingly and voluntarily.[330]

Justice Barrett authored the opinion in which the Seventh Circuit affirmed the district court's denial of Perrone's petition.[331] Specifically, Justice Barrett rejected Perrone's ineffective assistance of counsel claim on two grounds.[332] First, the causation evidence was strong, and Perrone's plea agreement secured an 80-month sentence reduction in exchange for his cooperation.[333] According to Justice Barrett, Perrone's current desire to withdraw from the agreement after already receiving the reduction does not suggest he would have done so earlier, even if aware of *Hatfield*.[334] Second, Perrone's ineffective assistance of counsel claim was untimely.[335]

2. *Schmidt v. Foster* (Panel Decision-May 2018)

Schmidt v. Foster is relevant to the Sixth Amendment right to counsel, particularly regarding whether Schmidt was deprived of his right during a critical stage of the proceedings.[336] Schmidt killed his wife and confessed at the scene.[337] He later attempted to use the defense of adequate provocation to reduce the charge to second-degree murder.[338] The Wisconsin trial court required Schmidt to provide proof and participate in an evidentiary hearing to consider this defense; however, while Schmidt provided the proof, he refused to participate in the hearing, fearing it would expose his defense strategy.[339] The trial court then conducted an in-camera examination of Schmidt, with his lawyer present but not allowed to speak.[340] The trial court held that Schmidt did not act with adequate provocation, leading to his conviction for first-degree homicide.[341]

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330 *Perrone*, 889 F.3d at 903.

331 *Id.* at 900, 910.

332 *Id.* at 908–09.

333 *Id.*

334 *Id.* at 909.

335 *Id.* ("Perrone had to bring his claim within one year of his conviction becoming final, which means that his window closed in 2011. He did not file his § 2255 petition until 2014.").

336 *Schmidt*, 891 F.3d at 305.

337 *Id.* at 306.

338 *Id.* at 305.

339 *Id.* at 307.

340 *Id.* at 305.

341 *Id.*

Schmidt sought a new trial, arguing that his due process rights and Sixth Amendment right to counsel were violated during an in-camera examination.[342] The Wisconsin trial court denied his motion and found no denial of his right to counsel.[343] Schmidt appealed, and the Wisconsin Court of Appeals rejected his right-to-counsel claim, viewing the examination as a supplementary proceeding for Schmidt's benefit.[344]

When Schmidt petitioned for habeas corpus in federal court, the district court also denied his request, finding no violation of his due process rights and concluding that the state courts had not misapplied Supreme Court law.[345] Schmidt's main argument was that his lawyer's enforced silence during the examination deprived him of counsel at a critical stage, which should automatically presume prejudice rather than requiring proof of ineffective assistance.[346]

A divided Seventh Circuit Court sided with Schmidt,[347] emphasizing that he had a right to legal counsel during critical stages, especially the in-camera examination, which was crucial to his defense.[348] According to the majority, Schmidt faced complex legal issues in this critical hearing and had to defend his position without counsel.[349] His right to counsel was essential, regardless of the prosecutor's lack of presence or the judge's tone, as he was navigating a key stage of the criminal justice process.[350] As the majority asserted, while Schmidt's guilt was not in question, the ex parte hearing represented his only opportunity to present a defense.[351] Without the guidance of counsel during this critical stage, Schmidt's explanation was incoherent, ultimately undermining his ability to effectively present his mitigation argument.[352]

Justice Barrett dissented, arguing that Schmidt's ex parte hearing was not adversarial since the prosecutor was absent.[353] Since the

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342 *Schmidt*, 891 F.3d at 308.

343 *Id.*

344 *Id.*

345 *Id.*

346 *See id.*

347 *Id.* at 305, 321 (Hamilton, J., joined by Wood, C.J.; Barrett, J., dissenting).

348 *See Schmidt*, 891 F.3d at 316.

349 *Id.*

350 *Id.*

351 *Id.* at 318.

352 *Id.*

353 *Id.* at 321.

prosecution was barred from the hearing, the court instructed the defense counsel to act solely as an observer.[354] The prosecutor agreed to this condition, and Schmidt, preferring the prosecutor's absence, accepted that his counsel would not actively participate.[355] Justice Barrett rejected the majority's stance, emphasizing that the judge did not fill the prosecutor's role.[356] On the contrary, according to Justice Barrett, the judge primarily listened to Schmidt's testimony and even attempted to help him by calling a recess so Schmidt could review the offer of proof with his counsel.[357] Justice Barrett rejected the broad level of generality proposed by the majority.[358] She argued that the controlling precedent should not be read as establishing a general right to counsel in any post-indictment proceeding where legal assistance might prevent substantial prejudice.[359] Instead, she asserted that the right to counsel should be more narrowly interpreted, applying only in "trial-like confrontation" between an individual and agents of the State, where legal assistance would help the accused face their adversary.[360]

3. *Schmidt v. Foster* (En Banc Rehearing – July 2018)

Following the Seventh Circuit panel's decision, the warden requested a rehearing en banc.[361] The Seventh Circuit, after the rehearing, reversed the panel's ruling and affirmed the district court's judgment.[362] The judges, including Justice Barrett,[363] concluded that Schmidt did not suffer a total lack of legal representation.[364] They noted that his lawyer was actively involved in other parts of the defense, such as filing motions, making legal arguments, and preparing a comprehensive offer of proof.[365] While Schmidt's lawyer was not allowed to participate during the in-camera examination, Schmidt did consult with his attorney both

354 *Schmidt*, 891 F.3d at 327.

355 *Id.*

356 *Id.* at 327–28.

357 *Id.* at 328.

358 *Id.* at 325.

359 *Id.*

360 *Schmidt*, 891 F.3d at 325–26.

361 *Schmidt*, 911 F.3d at 476.

362 *Id.*

363 *Id.* at 469 (before Wood, C.J., and Flaum, Easterbrook, Kanne, Rovner, Sykes, Hamilton, Barrett, Scudder, and St. Eve, JJ.) (Hamilton, J., dissenting, joined by Wood, C.J., and Rovner, J.).

364 *Id.* at 480.

365 *Id.* at 481.

before the examination and during a break.[366] Because Schmidt was not completely without legal assistance, the Seventh Circuit Court held that the circumstances did not justify assuming automatic prejudice, as required by Supreme Court standards.[367]

CONCLUSION

This Article concludes that the Supreme Court's recent decisions regarding the constitutional right to effective legal representation, particularly following the confirmation of Justice Amy Coney Barrett in October 2020, reflect a significant shift towards a more conservative judicial approach. This shift is characterized by a strict adherence to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and a pronounced deference to state court rulings, signaling a restrictive interpretation of the Sixth Amendment.

As for the legal landscape from 2020 to 2023, the Supreme Court grappled with various cases related to ineffective assistance of counsel and procedural default. An analysis of key cases reveals this trend. In *Andrus v. Texas* (June 2020), the Court overturned an appellate decision on ineffective assistance of counsel, but subsequent cases demonstrate a tightening of standards. *Shinn v. Kayer* (December 2020) and *Mays v. Hines* (March 2021) illustrate the Court's stringent application of AEDPA, emphasizing the difficulty of overturning state court decisions under the Act's unreasonable assessment threshold. The decisions in *Whatley v. Warden, Ga. Diagnostic & Classification Prison* (April 2021) and *Thomas v. Payne* (October 2021) further underscore this approach.

Justice Sotomayor's dissents in these cases highlight concerns about the prejudicial impacts of ineffective legal representation, contrasting with the majority's decisions, which often bar federal courts from holding evidentiary hearings based on postconviction counsel's deficiencies. The Court's ruling in *Shinn v. Ramirez* in May 2022 exemplifies this by barring federal courts from considering new evidence outside the state-court record in cases of ineffective postconviction counsel. Further illustrating the Court's restrictive stance, cases like *Shoop v. Twyford* and *Canales v. Lumpkin,* both decided in June 2022, highlight the denial of expansive evidentiary pursuits, emphasizing the

366 *Id.*

367 *Foster*, 911 F.3d at 481.

significance of initial state court proceedings. Similarly, by denying certiorari in *Thomas v. Lumpkin* in October 2022, *Davis v. United States* in February 2023, and *Burns v. Mays* in April 2023, the Court has reinforced its trend toward limiting federal habeas interventions and prioritizing the finality of state court judgments.

These decisions collectively illustrate the Court's evolving interpretation of the right to effective counsel. The emphasis on state court deference, stringent AEDPA standards, and procedural limitations significantly impacts the landscape of Sixth Amendment jurisprudence. This shift potentially limits defendants' ability to challenge ineffective legal representation in federal courts, indicating a new direction in the Court's approach to the constitutional right to effective legal representation.

Moreover, Justice Barrett's judicial philosophy has further cemented this trend, especially regarding ineffective assistance of counsel claims. As a judge on the Seventh Circuit, her originalist interpretation of the Constitution was demonstrated in key rulings such as *Perrone v. United States* and *Schmidt v. Foster.* In these cases, Barrett's decisions reflected a narrow view of the Sixth Amendment's right to counsel. She emphasized strong evidentiary standards and procedural timeliness, rejecting ineffective assistance claims. Her approach suggests that future rulings will likely continue to limit the scope of these claims, solidifying the conservative majority's influence on this area of law.

The Court's current trajectory, driven by its conservative majority, raises pressing concerns about the balance between state sovereignty, judicial efficiency, and the constitutional guarantee of fair representation. Recent surveys by institutions like the Annenberg Public Policy Center and Gallup reflect a steady decline in approval and confidence, with growing skepticism about the Court's impartiality.[368] Increasingly, Americans perceive the Court's decisions as ideologically driven rather than grounded in neutral legal principles.[369]

By narrowing avenues for relief and prioritizing procedural barriers, the Court risks undermining the Sixth Amendment's core promise: the right to meaningful and effective legal representation.

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[368] *Id.*; *see also* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.

[369] *See* Brenan, *supra* note 287.

This evolving jurisprudence not only limits the ability of defendants to challenge inadequate representation but also underscores a broader tension within the justice system: the pursuit of procedural finality at the expense of substantive fairness. As the conservative majority continues to shape the Court's direction, these issues remain critical to the ongoing dialogue about justice, equity, and the role of the judiciary in protecting constitutional rights.