Dropping the Interpretive Ball: The Supreme Court's Missed Reading of "Applicant" and the Rule of Attribution in *Shinn v. Ramirez*

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ABSTRACT

Last Term, in *Shinn v. Ramirez*, the Supreme Court held that, under the statutory language of 28 U.S.C. § 2254(e)(2), federal habeas petitioners are barred from presenting evidence in federal court to support a trial-counsel-ineffectiveness claim that was not fully developed in state postconviction proceedings due to the incompetence of counsel at those proceedings. This Note argues that the Court's conclusion in *Shinn* was based on an erroneous interpretation of the statute, which precludes an evidentiary hearing in federal court when "the applicant has failed to develop" the underlying claim. The *Shinn* Court dropped the interpretive ball by entirely ignoring the statutory word "applicant." Instead, the Court assumed that the term could always be read to mean the applicant or the applicant's lawyer. Through tracing the development of the agency-based rule of attorney attribution throughout the Court's federal habeas jurisprudence, this Note demonstrates that this rule necessarily includes an exception for attorney incompetence. Under this interpretation, a petitioner is not "at fault" for attorney errors unless counsel is competent, as defined by the same standard of competence used in constitutional ineffective-assistance-of-counsel cases. By deviating from prior interpretations of the statutory text and settled understandings of the nature of the attorney-client relationship, the majority in *Shinn* reached an unprecedented result that pushes the bounds of rationality and due process.

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INTRODUCTION

For state prisoners seeking federal review of state-imposed capital sentences, federal habeas corpus provides an essential, final forum for enforcing constitutional rights. Therefore, limiting access to this forum can have fatal consequences. Petitioners face execution when their substantial claims of constitutional error during their state-court proceedings go unreviewed by federal courts. Given the extraordinarily high stakes involved in capital cases, the procedural complexity of federal habeas law, and the increasingly limited avenues for relief as cases progress, the American Bar Association has recognized that "a significantly greater degree of skill and experience on the part of defense counsel is required" in capital cases than in noncapital cases.[1]

[1] GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN

Nonetheless, many scholars have noted that the majority of indigent capital defendants are not receiving the level of effective representation that they need.[2] For these reasons, holding habeas petitioners responsible for the errors of incompetent postconviction counsel raises serious concerns about equity and the fundamental fairness of our adjudicative process.

Shinn v. Ramirez,[3] decided in May 2022 by the Supreme Court, involves two consolidated cases from Arizona concerning the applicability of 28 U.S.C. § 2254(e)(2),[4] a federal habeas corpus

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DEATH PENALTY CASES (AM. BAR ASS'N, rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913, 921 (2003) [hereinafter ABA GUIDELINES].

[2] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841–66 (1994) (describing "the pervasive inadequacy of counsel for the poor"); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("[W]hat I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, *in* 122 YALE L.J. 2150, 2152–55 (2013) (describing how the right to effective assistance of counsel in criminal cases is routinely violated around the country); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1925–30 (1994) (reviewing the "dismal quality" of representation in capital cases, despite the heightened need for effective counsel); Michael Tigar, *Lawyers, Jails, and the Law's Fake Bargains*, 53 MONTHLY REV., July–Aug. 2001, at 34 ("[T]he right to effective counsel is ignored in the cases where the stakes are highest . . . ."); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 431–32 (1988) (collecting data from judicial surveys indicating that many judges believe that a high number of the criminal defense attorneys who appear in their courtrooms are "incompetent").

Even Supreme Court justices themselves have commented on the state of inadequate representation in capital cases. Justice Ginsburg, for example, said that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, ASSOCIATED PRESS, Apr. 10, 2001; *see also* Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (describing "the inadequacy of representation in capital cases" as "a fact that aggravates the other failings" of the death penalty system as a whole); Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.").

[3] 596 U.S. 366 (2022).

[4] 28 U.S.C. § 2254(e)(2). Section 2254 of Title 28 was enacted as part of the

provision. The Court's interpretation of § 2254(e)(2) in *Shinn* drastically limits the availability of federal habeas relief with respect to petitioners who received ineffective assistance of counsel at trial and in state postconviction proceedings. The majority held that two men on Arizona's death row, respondents Barry Lee Jones[5] and David Ramirez, were not entitled to present evidence in federal court to support their trial-counsel-ineffectiveness claims.[6] Instead, the respondents were bound by evidence introduced in state postconviction proceedings, where they also received ineffective representation.[7]

In both cases, the Supreme Court considered whether "the applicant ha[d] failed to develop the factual basis of a claim in State court proceedings," thus barring the federal habeas court from holding an evidentiary hearing under § 2254(e)(2).[8] Manifestly, neither "*applicant*" failed to develop evidentiary support for the claim; it was their trial and state postconviction lawyers who did so. Yet, the Court concluded by a 6-3 vote that the lower federal courts erred in granting Jones and Ramirez evidentiary hearings and considering other evidence beyond the state-court record to support their trial-counsel-ineffectiveness claims.[9] Notwithstanding their state postconviction lawyers' failure to develop the claims, the "fail[ure] to develop the factual basis of a claim" is "attributable to the prisoner *or the prisoner's counsel*."[10] Nowhere did the Court explain how the word "applicant" in Section 2254(e)(2) transformed into "prisoner *or . . . counsel*." That logical and linguistic gap forced the Court to misread federal habeas corpus doctrine to support a

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Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

[5] In the time between the completion and publication of this Note, Barry Jones was released from prison. Although the Supreme Court's decision in *Shinn v. Ramirez* left Jones on death row, it did not prevent the State of Arizona from reconsidering the compelling evidence of his innocence. *See* Elena Santa Cruz & Miguel Torres, *Wrongfully Convicted, Death Row Inmate Freed After 29 Years*, ARIZ. REPUBLIC, June 16, 2023, at A1. After careful review, new Arizona Attorney General Kris Mayes negotiated a plea agreement with Jones, which allowed him to be resentenced to time served if he pleaded guilty to second-degree murder, and joined Jones in asking the Pima County Superior Court to vacate his convictions and death sentence. On June 15, 2023, the court accepted the parties' agreement and ordered for Jones' immediate release. Ord. Granting Postconviction Relief, Accepting Change of Plea, & Imposing Sentence at 1–6, State v. Jones, No. CR 045587, (Ariz. Super. Ct. Pima Cnty. June 15, 2023).

[6] *Shinn*, 596 U.S. at 371.

[7] *Id.* at 381–89.

[8] § 2254(e)(2).

[9] *Shinn*, 596 U.S. at 381–383.

[10] *Id.* at 383 (emphasis in original).

shockingly "perverse"[11] result at—and perhaps beyond—the frontiers of rationality and due process. Under *Shinn*, a state prisoner like Jones or Ramirez, whose trial attorney provided unconstitutionally ineffective representation in a state that forbids raising trial-ineffectiveness claims on appeal and whose state postconviction attorney likewise provided ineffective assistance by failing to raise the claim in the initial-review collateral proceedings, has a statutory right to raise both ineffectiveness claims in federal habeas court but may not present any evidence to prove those claims. This Note explains how the Court's dropping the ball on the first step of any statutory analysis—appropriately interpreting the word "applicant" and the "general attorney-attribution rule"[12] that prior case law establishes—led to this untenable result. Moreover, it demonstrates how a simple plain-meaning reading of the statute in light of precedent governing federal habeas review and incompetent lawyering would—and still could—solve the problem.

After describing the history of respondents' trials and their state postconviction proceedings, Part I applies settled principles of statutory interpretation to determine that the word "applicant," as it is used in Section 2254(e)(2), draws its meaning from agency doctrine and its qualified rule of attribution. Part II then provides an historical account of prior interpretations of the word "applicant" and the development of the attribution rule over time in the Supreme Court federal-habeas case law, demonstrating that the rule extends only to counsel displaying a baseline level of competence. Part II also examines the definition of attorney incompetence as established in the constitutional context. This standard is the most sensible one to apply—and the one the Court had previously assumed would apply—in federal habeas proceedings for purposes of determining when the attribution rule does and does not apply. Part III analyzes how the Court in *Shinn* reached an "illogical" decision that "makes no sense"[13] in light of prior interpretations of the statutory text and settled understandings of the nature of the attorney-client relationship in habeas case law. Ultimately, the Court's mistake was that it dropped the interpretive ball by entirely ignoring the word "applicant." Finally, Part III shows how this Note's proposed reading of the statute, especially in an era of Supreme Court analysis dominated by textualism,[14] may have

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[11] *Id.* at 392 (Sotomayor, J., dissenting).

[12] *Id.* at 400.

[13] *Id.* at 392.

[14] *See* Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015),

won over enough members of the *Shinn* majority to produce an entirely different result if it had been pursued by the respondents' lawyer. This further emphasizes the critical role that counsel plays at every stage of a capital case.

I. THE CASES BELOW AND THE STATUTE AT ISSUE IN *SHINN V. RAMIREZ*

A. Jones' and Ramirez's Cases

Barry Lee Jones and David Martinez Ramirez, the two defendant-respondents at the center of *Shinn v. Ramirez*, both filed federal habeas petitions claiming they twice received ineffective assistance of counsel: first during trial, in violation of the Sixth Amendment, and again in state postconviction proceedings when their attorneys failed to develop evidence in support of their trial-counsel-ineffectiveness claims.[15]

Arizona charged Jones with felony murder for the death of his girlfriend's four-year-old daughter. Trial counsel failed to conduct even a cursory pretrial investigation and failed to uncover readily available medical evidence demonstrating that the girl's injuries were not inflicted while in Jones' care. Such evidence would have negated the prosecution's theory of the case.[16] Absent that evidence, a jury convicted Jones and the trial judge sentenced him to death. After his conviction and sentence were affirmed on appeal, Jones filed a petition for state habeas corpus review.[17] Although state law establishes minimum requirements that attorneys must meet to be appointed in capital cases,[18] the Arizona Supreme Court

https://youtu.be/dpEtszFT0Tg (Justice Elena Kagan declaring, "We're all textualists now").

[15] Brief for Respondents at 1–2, Shinn v. Ramirez, 596 U.S. 336 (2022) (No. 20-1009).

[16] *Id.* at 9. The district court later concluded that such evidence could have been discovered by "reasonably effective counsel," and that had Jones' counsel conducted an adequate investigation, he "could have presented an extremely different evidentiary picture than that shown to the jury." Jones v. Ryan, 327 F. Supp. 3d 1157, 1206 (D. Ariz. 2018).

[17] Arizona state law prohibited Jones from raising an ineffective-assistance-of-trial-counsel claim on direct appeal. *See* State v. Spreitz, 202 Ariz. 1, 3, 39 P.3d 525, 527 (Ariz. 2002) (noting that in Arizona, an ineffective-assistance claim "will not be addressed by appellate courts regardless of merit" and instead must be raised in state postconviction proceedings). Thus, state habeas was his first opportunity to raise this claim.

[18] Ariz. Rev. Stat. Ann. § 13-4041 (2023) states, in relevant part, that to be qualified to represent a capital defendant in postconviction proceedings, counsel must "[h]ave practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment." Rule 6.8(a) and (c) of the Arizona Rules of Criminal Procedure uses similar language in setting forth the standards for

waived the requirements in Jones' case and appointed state postconviction counsel who lacked the requisite experience.[19] Appointed counsel undertook almost no independent investigation, relied almost entirely on the trial record, and failed to raise any claim that trial counsel was ineffective for not investigating or presenting available evidence rebutting the State's theory of the case.[20] In federal habeas corpus proceedings, federal defenders claimed that Jones' trial counsel rendered constitutionally ineffective assistance by "fail[ing] to conduct a sufficient trial investigation."[21] The federal defenders cited Jones' state postconviction counsel's ineffectiveness as "cause" to excuse the default.[22] The district court initially denied Jones relief, holding that postconviction counsel's ineffective representation could not establish "cause."[23] While Jones' appeal of that denial was pending before the Ninth Circuit, however, the Supreme Court decided *Martinez v. Ryan*.[24] *Martinez* held that postconviction counsel's ineffectiveness does establish "cause" to excuse a procedurally defaulted trial-counsel-ineffectiveness claim if the state in question bars convicted defendants from raising ineffective-assistance claims on direct review.[25] The Ninth Circuit then remanded Jones' case to the district court, which held an evidentiary hearing to evaluate the newly discovered evidence—including medical examiner testimony and witness reports that cast serious doubt on the victim's whereabouts when injured and thus on Jones' guilt.[26] On remand,

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appointment of counsel in capital cases. Ariz. R. Crim. P. 6.8.

[19] *Jones*, 327 F. Supp. 3d at 1177; *see also* State v. Jones, No. CR-95-0342-AP (Ariz. Sept. 22, 1999) (order appointing counsel in Jones' state postconviction proceedings) (explicitly waiving the prior experience requirement under state law; finding that counsel's experience litigating multiple felony trials and one capital trial and certification as a Criminal Law Specialist was "compensating experience").

[20] *Id.* at 1216. According to the district court, the claims that state postconviction counsel did raise were "almost completely devoid of any assertion of prejudice, and it is apparent . . . that counsel believed he was not obligated to prove prejudice." *Id.*

[21] *Id.* at 1168.

[22] *Id.* at 1165.

[23] Jones v. Schriro, 2008 WL 4446619, at *5 (D. Ariz. Sept. 29, 2008).

[24] 566 U.S. 1 (2012).

[25] *Id.* at 9. The Court in *Martinez* held that where the state habeas proceeding was the first place in which a claim of trial-counsel-ineffectiveness could be raised, habeas counsel's incompetence in failing to raise that claim would not preclude the petitioner form raising the claim for the first time in federal habeas court. *Martinez*, therefore, sought to ensure that criminal defendants had at least one meaningful opportunity to be heard after having twice received ineffective assistance of counsel.

[26] *See* Brief for Respondents, *supra* note 15, at 12–14 (listing evidence presented at the evidentiary hearing "that effective trial counsel would have easily uncovered" and that

the district court ultimately granted relief on the grounds that both Jones' trial counsel and state postconviction counsel were ineffective.[27] Arizona appealed, and the Ninth Circuit affirmed, concluding that the new evidence showed that the level of deficient representation by Jones' attorneys violated the Constitution, and ordered that he be retried or released.[28] The State petitioned for a rehearing, arguing that § 2254(e)(2) bars federal courts from considering new evidence that was developed to overcome a procedural default under *Martinez*, but the Ninth Circuit denied the petition.[29]

Arizona charged respondent Ramirez with first-degree murder for killing his girlfriend and her daughter.[30] The trial court appointed counsel who had no capital experience, had never observed a capital trial or sentencing, and introduced only a single witness at Ramirez's trial.[31] Counsel knew before trial that Ramirez suffered from an intellectual disability and had a history of severe neglect and abuse.[32] Still, she failed to investigate further, present a mental-impairment defense, or inform the court-appointed psychologist tasked with conducting a mental health evaluation about Ramirez's condition and history.[33] Instead, counsel accepted the psychologist's conclusion that Ramirez was "well within the average range of intelligence"[34] and submitted a sentencing memorandum that severely downplayed the abuse and neglect that Ramirez suffered throughout his childhood.[35] Absent such mitigating evidence, the trial court sentenced Ramirez to death, and the Arizona Supreme Court

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"severely undermin[ed] the State's case").

[27] *Jones*, 327 F. Supp. 3d at 1214–18.

[28] *See* Brief for Respondents, *supra* note 15, at 8. It is worth noting that Jones continued to profess his innocence throughout his case. *See* Marco Poggio, *The Great Writ in Danger: Where is Habeas Corpus Headed?*, LAW360 (July 8, 2022), https://www.law360.com/articles/1509640.

[29] Jones v. Shinn, 971 F.3d 1133, 1133 (9th Cir. 2020).

[30] *See* Ramirez v. Ryan, 937 F.3d 1230, 1235–36 (9th Cir. 2019).

[31] *See id.* Trial counsel later submitted an affidavit, stating that she was unprepared to represent "someone as mentally disturbed as David Ramirez, especially in a capital case." *Id.* at 1244.

[32] For example, trial counsel had information that Ramirez had IQ scores consistent with intellectual disability, "was three to four grades behind his peers, switched schools ten times before completing seventh grade, and never graduated from high school." *Id.*

[33] *Id.* at 1244.

[34] *Id.*

[35] The Ninth Circuit later concluded that "the picture of mitigation presented at sentencing [was] relatively innocuous compared to the details that later emerged about Ramirez's life." *Id*. at 1246.

affirmed.[36]

In state habeas, Ramirez's postconviction counsel neither addressed the deficiencies in trial counsel's case nor raised an ineffective-representation claim based on trial counsel's failure to present mitigation evidence.[37] After exhausting his state appeals, Ramirez petitioned for federal habeas corpus relief. The district court appointed the Federal Public Defender to represent Ramirez given the court's "concerns regarding the quality of representation" that he previously received.[38] The Federal Defender raised the ineffectiveness-of-trial-counsel claim, but the district court found that the claim was procedurally defaulted.[39] Again, however, while Ramirez's appeal of that ruling was pending, the Supreme Court decided *Martinez*, and the Ninth Circuit subsequently remanded the case for reconsideration under *Martinez*.

On remand, Ramirez's counsel submitted evidence from family members—whom trial counsel never contacted—revealing the extent of the abuse and neglect he suffered as a child and the significant developmental delays he exhibited throughout his life.[40] Despite the new evidence submitted, the district court denied relief on Ramirez's trial-counsel-ineffectiveness claim and declined to allow evidentiary development.[41] On appeal, the Ninth Circuit reversed and concluded that Ramirez had a right to an evidentiary hearing.[42] As in Jones' case, Arizona petitioned for a rehearing, claiming that § 2254(e)(2) precluded further evidentiary development, which the Ninth Circuit denied.[43]

After rehearing was denied in both Jones' and Ramirez's cases, Arizona filed a single petition for a writ of certiorari covering both

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[36] State v. Ramirez, 178 Ariz. 116, 118, 871 P.2d 237, 239 (1994).

[37] *See Ramirez*, 937 F.3d at 1248 (stating that postconviction counsel had evidence of Ramirez's intellectual disability and knew trial counsel had failed to present mitigating evidence of an intellectual disability).

[38] *See id.* at 1239.

[39] Ramirez v. Schriro, 2008 WL 5220936, at *17 (D. Ariz. Dec. 12, 2008).

[40] Brief for Respondents, *supra* note 15, at 19–20. The psychologist who had been appointed for Ramirez's state postconviction proceedings also submitted a declaration, stating that had he received the information that trial counsel had regarding Ramirez's IQ scores and school records, he would have insisted on obtaining additional information and conducting a more comprehensive evaluation, which may have indicated that Ramirez was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (categorically prohibiting the execution of individuals with an intellectual disability).

[41] Ramirez v. Ryan, 2016 WL 4920284, at *1 (D. Ariz. Sept. 15, 2016).

[42] Brief for Respondents, *supra* note 15, at 21.

[43] Ramirez v. Shinn, 971 F.3d 1116, 1116 (9th Cir. 2020).

judgments.[44] On May 17, 2021, the U.S. Supreme Court granted certiorari in the two consolidated cases.[45]

B. Interpreting the Statutory Meaning of "Applicant"

The writ of habeas corpus has played a prominent role in American jurisprudence since the nation's founding.[46] Based on the principle that "no man would be imprisoned contrary to the law of the land,"[47] the Supreme Court has long described the "Great Writ"[48] as a vital instrument to protect individual liberty.[49] Today, federal habeas corpus provides a means by which people convicted at the state level can challenge their detention in federal court by raising federal constitutional claims.[50] However, the Court's decision in *Shinn* adds to a recent and much-criticized trend, beginning with Congress's amendments to the federal habeas statute via the Antiterrorism and Effective Death Penalty

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[44] Petition for Writ of Certiorari at 1, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).

[45] Shinn v. Ramirez, 141 S. Ct. 2620, 2620 (2021).

[46] A comprehensive review of the history and application of the writ of habeas corpus is beyond the scope of this Note. For a more detailed discussion, see 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 2.4, 2.6 (2021) (surveying the history and function of habeas corpus from 1789 to the present, and discussing the writ's role in capital cases). *See also* Boumediene v. Bush, 533 U.S. 723, 739–45 (2008) (providing a brief overview of the origins and development of the writ).

[47] *Boumediene*, 533 U.S. at 340; *see also* Fay v. Noia, 372 U.S. 391, 402 (1963) ("[The Writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.").

[48] *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES 129 (describing habeas corpus as "the most celebrated writ in the English law").

[49] *See, e.g.*, Bowen v. Johnston, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."); *Fay*, 372 U.S. at 402 ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

[50] *See* 28 U.S.C. § 2254(a) ("[Federal courts] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1316 (1961) (explaining that "a fundamental purpose of the habeas corpus jurisdiction [is] to secure the federal rights of state prisoners through an independent proceeding in a federal forum").

Act of 1996 ("AEDPA"),[51] toward restricting access to federal habeas corpus. The Court has facilitated this trend through its restrictive interpretations of AEDPA provisions in subsequent cases.[52] Such interpretations have "increasingly narrowed" the scope of the writ and undermined its value by miring litigants in procedural technicalities and leaving constitutional errors virtually unchecked.[53] Moreover, as this Section explains, *Shinn*'s addition to that trend was needless and contrary to the statutory language of AEDPA itself. This Section outlines the ordinary interpretive approach taken to understand the meaning of statutory terms. Drawing from accepted rules of statutory interpretation, this Section explains what § 2254(e)(2) means by the word "applicant."

1. Plain-Meaning Doctrine

Section 2254(e)(2) prohibits a federal district court from conducting an evidentiary hearing only when "the applicant has failed to develop the factual basis of a claim" in state habeas corpus proceedings.[54] The word "applicant" is a statutory term, and like all other words included in the text of a statute, courts must construe its meaning in reference to the text itself, as well as established principles of statutory interpretation.[55] Typically, when a word has not been defined in the statute, courts start by looking at the term's "ordinary" or "plain"

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[51] Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq*.

[52] *See* 1 HERTZ & LIEBMAN, *supra* note 46, § 3.2 n.38 (citing various studies and other empirical data that suggest AEDPA has drastically reduced the availability of federal habeas relief for state and federal prisoners).

Although the writ is available to all prisoners after trial and direct appellate review, this Note focuses on the writ's use by individuals facing a death sentence, for whom the consequences of restricting its use are harsher.

[53] Poggio, *supra* note 28. *See also* Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 34–36 (1990) (discussing the Supreme Court's efforts to restrict the availability of habeas review through doctrinal manipulation and how these efforts have weakened the oversight function of federal habeas).

[54] § 2254(e)(2).

[55] *See* Morell E. Mullins, *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 2–3, 15 (2004) (describing statutory interpretation as "a very important area of judicial responsibility," and asserting that "courts have developed a large and stable assortment of tools and concepts in dealing with statutory interpretation"); *see also* United States v. Am. Trucking Ass'ns., 310 U.S. 534, 543–44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use . . . ." (footnotes and citations omitted)); Andreiu v. Ashcroft, 253 F.3d 477, 480 (9th Cir. 2001) ("Our analysis is governed by fundamental principles of statutory construction.").

meaning.[56] Under the plain-meaning doctrine, the statutory text of § 2254(e)(2) appears relatively clear on its face: a federal court cannot hold an evidentiary hearing when the inadequacy of the state-court record is due to the failure(s) of the petitioner—i.e., the prisoner who is requesting federal habeas relief.[57] However, this is not how the statute has been construed.[58] Rather, the word "applicant" has been read to include "the prisoner *or the prisoner's counsel*,"[59] such that counsel's failure to develop the factual basis of the applicant's claim in state habeas proceedings is attributed to the petitioner for purposes of precluding further evidentiary development in federal court.

This deviation from the word's plain meaning requires examining preexisting common law and prior interpretations of the same word in a similar context to understand the meaning of the word "applicant" as used in the statute.[60] The application of the agency-based attribution rule and

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[56] *See* Williams v. Taylor, 529 U.S. 420, 431 (2000) ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." (quoting Walters v. Metropolitan Ed. Enterprises, Inc., 519 U.S. 202, 207 (1997))); *see also* Sebelius v. Cloer, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (internal quotation marks and alterations omitted)); F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of such a [statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning."); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 114 (2d ed. 2002) (expressing "that the plain meaning rule is the constitutionally compelled starting place for any statutory construction and that tools of interpretation are only applicable when, for whatever reason, the plain meaning rule fails to provide the answer").

[57] *See Applicant*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who requests something; a petitioner, such as a person who applies for letters of administration."); *see also* Larry Y. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 135 (1996) ("Statutory construction demands attention . . . to the literal dictionary definitions of isolated terms . . . .").

[58] For a more detailed discussion of the Supreme Court's prior interpretations of the word "applicant" and application of the attribution rule in its habeas corpus jurisprudence, see *infra* Part II.

[59] Shinn v. Ramirez, 596 U.S. 366, 383 (2022) (quoting *Michael Williams*, 529 U.S. at 432 (emphasis added)).

[60] Although the plain-meaning doctrine is often the starting point in any court's statutory analysis, courts are generally still bound to give effect to the common-law meaning of the statutory term at the time the law was enacted. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012) ("Words must be given the meaning they had when the text was adopted."); LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS

its incompetence exception was a well-established part of the common law governing federal habeas at the time AEDPA was enacted.[61] This background informed the Court's understanding of "applicant," as that word was used in the previous version of the federal habeas statute before the 1996 Amendments.[62] Thus, understanding the Court's prior interpretations of the statutory word requires an understanding of the agency-law principles underlying those interpretations.

2. Common-Law Agency Principles as Applied to the Attorney-Client Relationship

The common law of agency governs legally recognized relationships in which one person (the "agent") has "derivative" authority to act for or represent another person (the "principal"), and the binding legal consequences that follow from such relationships.[63] The attorney-client relationship is widely recognized as an agent-principal relationship.[64] One of the most well-settled principles of agency law is

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20 (2014) ("Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise."); *see also* Yackle, *supra* note 57, at 144 (for courts interpreting the meaning of § 2254(e)(2) and the effect of procedural default in state court, "it is crucial to keep in mind that Congress legislates against the backdrop of existing law").

[61] *See infra* Sections II.A and II.B. For an example of a case outside of the federal habeas context in which the Supreme Court turned to agency law to interpret the meaning of statutory language, see Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) (relying on traditional common law agency principles for meaning of term "employee").

[62] 28 U.S.C. § 2254(d), *amended by* 28 U.S.C. § 2254(e) (1996). *See* Morissette v. United States, 342 U.S. 246, 263 (1952) (relying on the assumption that "where Congress borrows terms of art . . . , it presumably knows and adopts the cluster of ideas that were attached to each borrowed word"); Stokeling v. United States, 139 S. Ct. 544, 551 (2019) (when a word or phrase is "obviously transplanted from another legal source, whether common law or other legislation, it brings the old soil with it" (quoting Hall v. Hall, 138 S. Ct. 1118, 1128 (2018))); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("Words of art bring their art with them. . . . And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

[63] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

[64] *See id.* cmt. c (listing the lawyer-client relationship as one in which "[t]he elements of common-law agency are present"); 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2150 (2d ed. 1914) ("The relation of attorney and client is a relation of agency,

that clients, as principals, are bound by the conduct of *competent* lawyer-agents during the course of the representation.[65]

The "competence" qualifier is critical. A fundamental component of lawyers' role as agents of the client-principals is the client's expectation to receive and the lawyer's obligation to provide competent representation[66] that advances the client's interests through the duration

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and, in its general features, is governed by the same rules which apply to other agencies."); WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 21, 57–58 (3d ed. 2001) ("The law of Agency, however, pretty generally governs the relationship between the lawyer and his client." (footnote omitted)); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 54 (12th ed. 2020) ("Lawyers are their clients' agents. The law of agency therefore applies to the client-lawyer relationship."); Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301 (1998) ("[T]he lawyer-client relationship is a commonsensical illustration of agency. A lawyer acts on behalf of the client, representing the client, with consequences that bind the client."); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 347–48 (2007) ("There is no disagreement on this basic premise . . . [that the attorney-client relationship] invokes the established body of agency law . . . .").

[65] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, topic 4, intro. note (AM. L. INST. 2000) (explaining that matters concerning a lawyer's authority to act for a client "are classical issues of the law of agency"); ABA Comm'n on Evaluation of Pro. Standards, Chair's Intro. (2019) ("Viewed as a whole, however, the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as . . . agency law."); MODEL RULES OF PRO. CONDUCT r. 1.6 annot. (AM. BAR ASS'N 2023) [hereinafter MODEL RULES] (a lawyer's obligation to protect the confidentiality of client information is "derived from agency law and professional regulations"); SUSAN R. MARTYN ET AL., THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES 1 (2011–2012 ed. 2011) ("[T]he lawyer code loyalty obligation that requires lawyers to avoid and resolve conflicts of interest originated in agency law."); *see also* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 349 (2000) ("The law of agency has governed American lawyers since before the Revolution . . . .").

[66] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES, *supra* note 65, r. 1.1. As a whole, the Model Rules are animated by a presumption of competent representation. *See id.* r. 1.0(h) (defining "reasonable" attorney conduct as that of a "competent lawyer"); *id.* r. 1.1 cmts. 1–8 (explaining the factors that contribute to and are necessary for competent representation); *id.* r. 1.3 cmts. 2 & 5 (suggesting steps that practitioners can take to ensure that each matter of a case is handled competently); *id.* r. 1.7(b)(1) (stating that a lawyer can represent a client, notwithstanding a conflict of interest, so long as "the lawyer will be able to provide competent and diligent representation to each affected client"); *id.* r. 1.16 cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently."); *id.* r. 6.2 cmt. 2 (noting that an appointed lawyer would have

of the representation.[67] In lawyer-client agency relationships, the agent's competence and expertise provides the preeminent justification for the most important consequence of that relationship: that the acts or omissions of the agent (here, the lawyer) bind the principal (the client).[68]

"good cause" to decline such an appointment "if the lawyer could not handle the matter competently").

Other authorities on the rules of professional conduct and ethical obligations similarly consider the competence duty to be of central importance to the lawyer's role. *See, e.g.*, MODEL CODE OF PRO. RESP. Canon 6 (AM. BAR ASS'N, 1980) [hereinafter MODEL CODE] ("A lawyer should represent a client competently." (capitalization altered)); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (AM. L. INST. 2000) ("In pursuing a client's objectives, a lawyer must . . . be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications."); GILLERS, *supra* note 64, at 27–28, 743 (describing lawyers' ethical duty of competence).

[67] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. c (AM. L. INST. 2000) ("The lawyer's efforts in a representation must be for the benefit of the client."); MODEL CODE, *supra* note 66, EC 7-9 ("[A] lawyer should always act in a manner consistent with the best interests of his client."); *see also* MODEL RULES, *supra* note 65, r. 1.2 (stating that a lawyer must pursue the objectives of representation as defined by the client); THE ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, COMM. ON PRO. RESP., THE AMERICAN LAWYER'S CODE OF CONDUCT 2.1 (rev. draft 1982) ("[T]he lawyer shall give undivided fidelity to the client's interest as perceived by the client. . . ."); ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-3.7 (4th ed. 2017) (explaining that defense counsel's efforts in furtherance of the litigation should be shaped by what is in the client's best interests).

[68] *Cf.* Wainwright v. Sykes, 433 U.S. 72, 118 (1977) (Brennan, J., dissenting) (expressing concern about the consequences that will result from a rule that attorney errors are binding on clients if courts "continue to indulge the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients").

Several scholars have pointed out that traditional agency principles, including the general rule of attribution, may have a more limited application in the lawyering context. For example, Professor DeMott notes that courts have recognized that agency law fails to capture the full range of legal consequences that follow from the attorney-client relationship:

> [L]awyers perform functions that distinguish them from most other agents. That a lawyer is an agent is sometimes irrelevant to the legal consequences of what the lawyer has done or has failed to do, making an unswerving focus on agency misleading. It is not surprising, then, that courts on occasion differentiate among agency's consequences, rather than according agency a monolithic or inexorable set of consequences.

DeMott, *supra* note 64, at 301. Other authorities raise similar arguments about the unique treatment that attorney-client relationships receive in terms of how certain exceptions to traditional agency doctrine are applied. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, intro. note (AM. L. INST. 2000) (explaining that although the lawyer-client relationship is, "from one point of view, derived from the law of agency," the nature of the relationship warrants "safeguards for clients beyond those generally

The well-established converse of this principle is that a lawyer who is not competent cannot bind a client.[69]

The Supreme Court and a majority of other courts apply agency principles to hold that, unlike other attorney acts and omissions, those falling below the level of effective assistance of counsel are not attributable to the defendant. Courts apply this long-recognized "attribution rule" in a variety of contexts, including in capital and other federal habeas corpus proceedings.[70] Across cases where the rule applies,

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provided to principals"); Kenneth A. Goldman, Comment, *Criminal Waiver: Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1278 (1966) ("[T]he mere existence of the attorney-client relationship is no inherent justification for binding the accused to a waiver which results in his incarceration."); Giesel, *supra* note 64, at 348 (outlining several contexts "in which agency principles are given cramped application when the agent and principal are an attorney and a client").

[69] *See* Carol A. McCoy, Comment, *An Attorney's Implied Authority to Bind His Client's Interests and Waive His Client's Rights*, 3 J. LEGAL. PROF. 137, 150 (1979) (there are "exceptional circumstances" to warrant withdrawing the general rule that a client is bound by counsel's waiver of rights "where there is evidence of gross neglect, fraud, or incompetence on the part of counsel"); *see also* DeMott, *supra* note 64, at 319 ("[I]n at least some circumstances courts consider whether the lawyer's competence and obedience to the client's instructions should mitigate consequences for the client, despite the client's agency relationship with the lawyer."); Goldman, *supra* note 68, at 1281 (discussing the "practical and theoretical difficulties which a court will encounter in relying on the theories of agency in a discussion of incompetent counsel"); *see also* cases cited *infra* note 134.

[70] John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 683 (1990) ("[C]riminal defendants are often bound by the mistakes of their lawyers."). In several pre-AEDPA cases, the Supreme Court relied on agency principles to attribute error by a criminal attorney to the defendant for conduct that fell below the level of ineffective assistance of counsel. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 485, 492 (1986); Coleman v. Thompson, 501 U.S. 722, 753–54 (1991). For a more detailed discussion of the Supreme Court's application of the attribution rule in the federal habeas context, see *infra* Part II.

However, many scholars have noted the incompatibility between traditional agency principles and the relationship between capital defendants and their appointed attorneys in the habeas context. *See, e.g.*, Marni von Wilpert, Holland v. Florida*: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1473 (2011) ("Because none of the remedies and procedures available to clients in a typical agency relationship apply to convicted prisoners, strict agency principles are not fairly applied in [the habeas] context."); Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 397–405 (2005) (discussing inequity of holding habeas petitioners liable for significant attorney error and describing the use of traditional agency principles in the habeas context as "artificial and inappropriate");

the defendant bears the risk of attorney error only so long as the attorney's performance falls within the "wide range of professionally competent assistance."[71]

II. INTERPRETATIVE HISTORY OF THE WORD "APPLICANT" IN FEDERAL HABEAS JURISPRUDENCE

The modern Court emphasizes the primacy of plain meaning in statutory interpretation, and this proposition is central to the Court's decision in *Shinn*.[72] However, the *Shinn* Court justifies its reading of § 2254(e)(2)'s word "applicant" to mean "applicant or applicant's lawyer," with no more than a conclusory statement: "state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner."[73] The Court then proceeds to conclusory interpret, and insist on fealty to, the plain words of other portions of the statute, providing that if the applicant "failed to develop" a claim in state court, the federal habeas court "shall not hold an evidentiary hearing on the claim."[74] It concludes that Jones and Ramirez must bear the consequences of their state habeas attorneys' failure to develop their claims.[75] This Section explains how the *Shinn* majority's reading of § 2254(e)(2) is inconsistent with the Court's prior interpretations of the statutory text in the same habeas context.[76]

Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 691 (1990) (when attorney error results in procedural default, capital habeas petitioners whose trial or sentence may have violated the Constitution must nonetheless "pay with their lives for the ignorance or neglect of their attorneys," which is far too harsh of a rule). *See generally* William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L. J. 733, 734 (1988) (arguing that agency law reflects an inaccurate view of the attorney-client relationship and should not be used to hold clients responsible for their attorneys' procedural errors). *See also* authority cited *infra* note 134.

[71] Strickland v. Washington, 466 U.S. 668, 690 (1984); *see Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 752–53; Holland v. Florida, 560 U.S. 631, 650, 652–53 (2010); Maples v. Thomas, 565 U.S. 266, 282–83 (2012); Martinez v. Ryan, 566 U.S. 1, 10 (2012).

[72] Shinn v. Ramirez, 596 U.S. 366, 387 (reasoning based on "§ 2254(e)(2)'s clear text").

[73] *Id.* at 382.

[74] *Id.* at 371 (quoting 28 U.S.C. § 2254(e)(2)).

[75] *Id.* at 381–84.

[76] In addition to plain meaning and the backdrop of common law, the Supreme Court frequently relies on judicial precedent, particularly prior interpretations of the same word or phrase in the same legal context, as a major interpretive resource. *See* Anita S.

The Court's federal habeas jurisprudence demonstrates that the common-law understanding of the term "applicant" in the previous version of the statute was based on "the fundamental idea in all the familiar default cases"[77] at the time—namely, that the "applicant" fairly bears the consequences of inadequate fact development in state court if responsibility can be attributed either to the applicant or, "assuming the lawyer's competence," to their lawyer.[78] Therefore, the word "applicant" used in § 2254(e)(2), as amended, should be interpreted as retaining the agency-based, common-law meaning that the Supreme Court ascribed to it in prior cases, both before and after the 1996 Amendments,[79] such that the term may be read to encompass the applicant and the applicant's lawyer, so long as the lawyer is competent.[80] Otherwise, traditional

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Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 243 (2010) (noting significant reliance on "[p]recedents in the relevant area of law, particularly interpretations given by the Supreme Court to the same words or phrases in similar statutes," by the Supreme Court generally over time and by the Roberts Court specifically). Also, the Court often adheres more strictly to *stare decisis* in the context of statutory construction. *See* WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 253 (6th ed. 2020) (explaining that judges sometimes adopt a "super-strong presumption of correctness for statutory precedents").

[77] Yackle, *supra* note 57, at 144–45 (interpreting the "express language" of § 2254(e)(2) as incorporating much of the Court's prior default doctrine "into the baseline condition for its application to any case—namely, the understanding that 'the applicant' must have been responsible for the lack of adequate fact development in the first instance").

[78] Wainwright v. Sykes, 433 U.S. 72, 95 n.2 (1977) (Stevens, J., concurring) (quoting United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 745 (7th Cir. 1973)).

[79] *See* ESKRIDGE ET AL., *supra* note 76, at 715 ("[W]hen the legislature employs words with established common law meanings, courts will presume that those meanings are adopted by Congress."); SCALIA & GARNER, *supra* note 60, at 320 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning.").

For examples of cases in which the Court has invoked a statutory term's common-law meaning, see Evans v. United States, 504 U.S. 255, 259 (1992) ("[A] statutory term is generally presumed to have its common-law meaning.") (quoting Taylor v. United States, 495 U.S. 575, 592 (1990)); Perrin v. United States, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the term . . . at the time Congress enacted the statute . . . ."); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.").

[80] This is the approach that the Court has taken with respect to interpreting the meaning of other statutory language contained in the 1996 Act. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930, 943–44 (2007) (retaining the pre-Act definition of "second or successive"

agency principles do not apply, and the term "applicant" as used in the statute extends no further than to the petitioners themselves. As explained below, had the Court in *Shinn* done more than take for granted that the word "applicant" always means "applicant or lawyer," the seemingly irrational outcome of the case—leaving habeas petitioners with a right to raise a trial-counsel-ineffectiveness claim but no way to prove it—would have been different.[81]

A. The Development of the Attribution Rule in Habeas Corpus

The federal habeas corpus statute has attributed consequences to things the "applicant" did and did not do since 1948,[82] and the Court has repeatedly addressed the question of how far the word extends beyond the applicants themselves (i.e., individuals in custody). The modern story picks up with the Court's 1963 decision in *Fay v. Noia*, which adopted the agency rule in part. The Court clarified that counsel's actions are sometimes attributed to the client in habeas corpus but imposed a two-part qualification on the rule that went beyond common-law agency

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petitions, as used in 28 U.S.C. § 2244(b)(2), to avoid a result that would produce "distortions and inefficiencies"). The Court has also held, at least in some instances, that its own equitable judgments in the habeas context survived the passage of AEDPA, even if the Act failed to explicitly include them. *See, e.g.*, McQuiggin v. Perkins, 569 U.S. 383, 392–94 (2013) (asserting that the judicially-crafted "miscarriage of justice" exception to the procedural default continues to apply in the post-AEDPA context); *see also* 1 HERTZ & LIEBMAN, *supra* note 46, § 3.2 ("[T]he Court has . . . demonstrated a willingness to use its interpretive powers to moderate restrictions apparently effected by AEDPA and, in situations in which AEDPA undeniably cuts off review, to establish or reaffirm the continuing vitality of alternative means of judicial review to rectify serious systemic malfunctions."). *See generally* Larry Yackle, *The New Habeas Corpus in Death Penalty Cases*, 63 AM. U. L. REV. 1791, 1798 (2014) (arguing that in the habeas corpus context, courts should adopt sensible interpretations of AEDPA that are permissible under, even if not necessarily demanded by, the statutory text).

[81] Under our legal and judicial system and "well-settled principles of agency law," defendants are generally bound by the acts of their lawyers. Coleman v. Thompson, 501 U.S. 722, 754 (1991); *see also* Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 92 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent . . . .'" (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962))). However, when a lawyer's performance falls outside "the wide range of reasonable professional assistance," Strickland v. Washington, 466 U.S. 668, 689 (1984), the lawyer ceases to be an agent of the defendant and instead becomes an external obstacle to the defense. *See* Murray v. Carrier, 477 U.S. 478, 488, 492 (1986).

[82] The word "applicant" in the federal habeas statute can be traced back to Congress's revision of the Judicial Code in 1948. *See* Act of June 25, 1948, ch. 646, 62 Stat. 967 (1948).

doctrine.[83] The applicant, Noia, was seeking federal habeas corpus relief from a state-court conviction he claimed was based on an unconstitutionally coerced confession.[84] State postconviction courts previously refused to hear the claim because Noia failed to file a direct appeal of his conviction. The federal district court denied relief on the ground that Noia did not exhaust his state court remedies, but the Second Circuit reversed, noting that "exceptional circumstances were present" to excuse Noia from failing to file a direct appeal in state court.[85] The Supreme Court affirmed, ruling that counsel's failure to pursue an available state-court remedy would be attributed to the applicant only where "a habeas applicant, after consultation with *competent counsel* . . . understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts."[86] Under *Fay*, a federal habeas court generally would not attribute counsel's act or omission to the applicant unless two requirements were met: (1) counsel was "competent" and (2) the applicant himself made a deliberate and knowing choice to bypass a procedure.[87] In other words, the word "applicant" at times meant "applicant or counsel" but only in situations that were narrower than under standard agency law given the addition of the "applicant's deliberate bypass" requirement to the usual "attorney competence" requirement.[88]

In the 1970s, the Court began chipping away at *Fay*'s "deliberate bypass" narrowing of the usual agency rule of attribution.[89] The Court

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[83] Fay v. Noia, 372 U.S. 391, 438–39 (1963).

[84] *Id.* at 394.

[85] *Id.* at 397.

[86] *Id.* at 439 (emphasis added).

[87] *See id*. (explaining that "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief"); *see also id.* at 471 (Harlan, J., dissenting) (arguing further that the majority's decision "suggests that the State may no more have a rule of forfeiture for one who is competently represented than for one who is not"). Under the more lenient deliberate-bypass standard, it is the knowing exercise of volition by the petitioner rather than the competence of the petitioner's counsel that governs when attorney error resulting in default will be imputed to the applicant.

[88] The language used in the 1948 version of the statute is nearly identical to that used in the current version of the statute, as amended in 1996. Compare *id.* at 419 n.29 (majority opinion), *with* 28 U.S.C. § 2254(b)(1), *and* 28 U.S.C. § 2254(c). For purposes of this Note, is it worth mentioning that the word "applicant" was put front-and-center in the Court's analysis in *Fay*.

[89] *See, e.g.*, Francis v. Henderson, 425 U.S. 536, 537–39 (1976) (holding that in the context of a habeas petitioner's challenge to the composition of the grand jury, the appropriate standard was not the deliberate bypass rule but the cause-and-prejudice test, which, until then, had only been applied to procedurally defaulted claims brought by

expressly rejected that narrowing in 1977 in *Wainwright v. Sykes*.[90] Explicitly conforming federal habeas corpus review to traditional agency law,[91] the *Sykes* Court overruled *Fay*'s second, novel exception to the rule of attribution and held that the absence of a deliberate bypass would no longer prevent federal habeas corpus courts from attributing counsel's failure to preserve a constitutional claim on direct appeal to the applicant. However, the Court was careful to note that it was only overruling part of the *Fay* holding,[92] and nowhere did it challenge *Fay*'s first, more traditional caveat to the attribution rule, requiring counsel's representation to be competent. To the contrary, although the petitioner did not allege lawyer incompetence in the case,[93] the Court acknowledged

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federal defendants). In dissent, Justice Brennan expressed doubt that the *Francis* Court's decision was intended to overrule *Fay* across the board, particularly with respect to certain fundamental rights such as the right to counsel. *Id.* at 553 n.4 (Brennan, J., dissenting). However, he stated that if the Court was rejecting *Fay*'s holding—that a waiver of constitutional rights must be made personally by the petitioner—it would have to specify which rights the lawyer is permitted to waive on the petitioner's behalf. *Id.* Justice Brennan continued to explain that:

> [I]f the Court is embarking on a program of diluting *Fay* standards to bind the accused by waivers by counsel, some concrete content should be given the Sixth Amendment guarantee of effective assistance of counsel and some explanation made of what actually constitutes action "within the range of competence demanded of attorneys in criminal cases." Indeed, *if defendants' constitutional rights are to be controlled by counsel's conduct, a more exacting scrutiny of counsel's conduct over the full course of the criminal process should be made*.

Id. (emphasis added) (citations omitted) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[90] 433 U.S. 72, 87–88 (1977). Many federal habeas scholars who view the Warren Court as having greatly expanded the reach of federal habeas relief consider *Sykes* to be the turning point, marking the Burger Court's retrenchment in habeas review. *See, e.g.*, Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 85 YALE L. J. 1035, 1100 (1976) (citing *Sykes* as the first case that "openly confronts and limits" the Supreme Court's expansive habeas decisions).

[91] *Sykes*, 433 U.S. at 91 n.14 (due to "the burden on a defendant to be bound by the trial judgments of his lawyer," claims that have been procedurally defaulted due to unintentional attorney error are not necessarily barred from federal habeas corpus review under the standard articulated by the Court).

[92] *Id.* at 88 n.12, 87–88 (criticizing *Fay* for "choos[ing] to paint with a . . . broad brush" and explaining that "[i]t is the sweeping language of *Fay v. Noia* . . . which we today reject").

[93] *Id.* at 75 n.4 ("Respondent expressly waived 'any contention or allegation as regards ineffective assistance of counsel' at his trial."). The prisoner in *Sykes* did not claim his lawyer was incompetent; instead, he relied on the second prong of the *Fay* test. Thus, it is perfectly sensible that *Sykes* said little about attorney competence because it was not at issue in the case, and the Court did not want to articulate a rule that would go beyond the

in passing that attribution would not be appropriate if the petitioner could show cause for the procedural default and actual prejudice resulting therefrom.[94]

The Court did not define cause and prejudice, as we will see, but determined that it included "exceptional circumstances" in which counsel provided inadequate representation. Thus, the *Sykes* Court's agency-based rule of procedural default recognized, even if not in such express language, and embedded the "competence" requirement for attribution in its generally stated "cause-and-prejudice" standard. The three concurring Justices articulated their understanding of the qualified attribution rule in *Sykes* to be that, while competent counsel's tactical decisions are appropriately attributed to the defendant, the defendant is not bound by the errors of incompetent counsel. Moreover, Justices Stevens and White directly referenced the notion of attorney "competence" in describing the scope of the Court's "cause-and-prejudice" standard for procedural default. Justice Stevens emphasized the impropriety of a standard that required every trial decision be made with the client's express consent. He concluded that, "*assuming the lawyer's competence*, the client must accept the consequences of his trial strategy."[95] Similarly, to explain when the client can be presumed to have concurred in counsel's judgment, Justice White distinguished decisions made by counsel for "reason[s] that flow[] from his exercise of professional judgment" from those that "were 'not within the range of competence demanded of attorneys in criminal cases.'"[96] By leaving intact the "competence" prong of *Fay*'s two-part test

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facts presented. But the *Sykes* Court did indicate that agency doctrine governed, which brings with it the competence requirement, as discussed by the concurring Justices.

[94] *Id.* at 87. It is worth noting that the usual agency rule of attribution was already an established fixture of federal habeas corpus case law by the time *Sykes* was decided. *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 512 (1976) (counsel is generally entrusted with "the vast array of trial decisions, strategic and tactical"); Henry v. Mississippi, 379 U.S. 443, 451 (1965) (absent exceptional circumstances, "trial strategy adopted by counsel without prior consultation with an accused" is binding on the accused).

[95] *Sykes*, 433 U.S. at 95 n.3 (Stevens, J., concurring) (quoting United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 745 (7th Cir. 1973)) (emphasis added). Chief Justice Burger made a similar point in his concurrence, albeit more implicitly. He noted that *Fay*'s "knowing and intelligent waiver" standard was ill-suited for cases alleging constitutional errors committed during trial given the myriad strategic and tactical decisions that trial counsel "must, as a practical matter, [make] without consulting the client." *Id.* at 92–93 (Burger, C.J., concurring). The logic of this argument necessarily assumes that trial counsel is competent, for a defendant cannot reasonably rely on "his lawyer for vindication of constitutionally based interests" if his lawyer is incompetent. *Id.* at 94.

[96] *Id.* at 98–99 (White, J., concurring in the judgment) (quoting McMann v. Richardson,

and establishing that the legal consequences of a state procedural default would be governed by agency doctrine, *Sykes* reaffirmed the competence-qualified rule of attribution in the federal habeas context.

B. The Attribution Rule's Application and Evolution

Sykes held that courts must apply the agency rule of attribution when reading the word "applicant" in the federal habeas corpus statute as referring to either the applicant or the applicant's lawyer. The rule necessarily includes a built-in exception for attorney incompetence, which raises the question: what is the standard of "competence"?[97] While the Supreme Court was contemplating when a state procedural default caused by attorney error was attributable to a client in the federal habeas context, it was also examining what degree of attorney defalcation violated a defendant's Sixth Amendment right to counsel.

Throughout the 1970s and early 1980s, lower courts debated the meaning of "effective" representation and adopted varying standards of attorney performance to assess defendants' constitutional claims of ineffective assistance of counsel.[98] In 1984 in *Strickland v. Washington*, the Supreme Court ultimately intervened to address these conflicts regarding the proper standard of care in the Sixth Amendment context and to resolve the question of when counsel's ineffectiveness would amount to a constitutional violation.[99] Recognizing that "the right to counsel is the right to the effective assistance of counsel," the Court articulated a two-part test for determining when attorney performance was so ineffective as to violate the Constitution and require reversal of the defendant's conviction or death sentence. Under the standard of ineffectiveness established in *Strickland*, a defendant claiming ineffective assistance of counsel must show that attorney performance "fell below an objective standard of reasonableness" and that, but for the attorney's errors, there is

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397 U.S. 759, 771 (1970)).

[97] *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PENN. L. REV. 41, 94 (1979) (explaining that in the context of professional lawyering standards, "[c]ompetence has largely been left undefined").

[98] Prior to the Supreme Court's controlling decision in *Strickland* as to how claims of ineffective of assistance of counsel should be reviewed, courts generally applied one of three standards to determine whether attorney performance met constitutional requirements: the "farce and mockery" test, the "reasonably competent attorney" test, and the "community standards" test. *See* Steven Joseph Rurka, *Habeas Corpus—The Supreme Court Defines the* Wainwright v. Sykes *"Cause" and "Prejudice" Standard*, 19 WAKE FOREST L. REV. 441, 453 nn.101–03 (1983).

[99] 466 U.S. 668, 686 (1984).

a "reasonable probability" the proceeding's result would have been different.[100]

The *Strickland* Court struggled to come up with a standard for attorney competence that distinguished decisions in which counsel may act without consulting the client from those in which counsel must obtain the client's consent before acting. Thus, the Court adopted a standard that would balance the right to effective assistance against the independence of defense counsel.[101] *Strickland* applied this definition of attorney incompetence in the constitutional context—i.e., where the Sixth Amendment right to counsel applied—but the majority expressly made clear that it was articulating "general standards," as opposed to constitutional ones.[102] This suggests the Court's resolution of the standard-of-care question in the Sixth Amendment context could translate over to the federal habeas context, thereby resolving the concurrent question that the Court left open in *Sykes* as to the level of "competence" required for the attribution rule to apply.[103] Indeed, the question of what

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[100] *Id.* at 688, 694. Elsewhere in the opinion, the Court explained that the proper inquiry under the first prong of the two-part test is "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

[101] By the time *Strickland* was decided, it was well-established that counsel is generally entrusted to make most of the strategic and tactical decisions that arise during trial without consulting the client. *See* authorities cited *supra* note 94. This was not a very useful dividing line, however, given that almost every decision made by counsel could, with the benefit of hindsight, be characterized as a strategic or tactical choice. *See* Estelle v. Williams, 425 U.S. 501, 512 n.9 (1976) (conceding that "defense tactic" may have actually been "simpl[e] indifference"); David Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 828 (1976) ("All too often courts have excused acts and omissions by counsel with the magic words 'tactical decision,' without inquiring as to whether the lawyer even thought about the problem, or whether his thinking was informed by a knowledge of the relevant law and facts."); Wesley Romine, *Inadequate Preparation by an Attorney as a Basis for Malpractice Liability or Disciplinary Action*, 2 J. LEGAL PROF. 223, 227–28 (1977) ("Because the employment of tactics is not subject to precise evaluation, courts and commentators have recognized that attorneys are vested with broad discretionary powers in conducting litigation."). To the extent *Strickland* took these concerns into account when developing a standard for Sixth Amendment purposes, that standard easily serves the purposes of the competence caveat to the attribution rule in the federal habeas context, as established by the *Sykes* Court.

[102] *Strickland*, 466 U.S. at 698; *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("The *Strickland* standard is a general one, so the range of reasonable applications is substantial.").

[103] In the abuse-of-the-writ context, for example, when *Strickland* was pending before the Supreme Court, the Fifth Circuit recognized that:

> The standard for measuring competence of counsel, while developed in the

degree of attorney incompetence was sufficient to demonstrate "cause" to excuse a procedural default under *Sykes* was still very much up for debate among lower courts throughout the 1970s and early 1980s.[104] It was not

> context of constitutional right, is a familiar one. We are persuaded that this standard vindicates the competing values of facilitating judicial review of meritorious claims and finality of criminal convictions in habeas cases. . . . In sum, we see no principled reason for not applying to habeas counsel the same measure of their competence that we apply when the Constitution requires the lawyer's work.

Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983), *overruled on other grounds by* Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992). There, the court applied the same standard of attorney competence that was used to determine whether counsel's incompetence violated the Sixth Amendment—which was, at the time, "counsel reasonably likely to render and rendering reasonably effective assistance"—to determine whether such incompetence excused what would otherwise be an abuse of the writ in the federal habeas corpus context, where the Constitutional right to effective assistance of counsel did not apply. *Estelle*, 722 F.2d at 167.

[104] *Sykes* clearly did not envision a level of attorney incompetence sufficient to show "cause" that would be identical to the showing necessary to establish constitutionally ineffective assistance of counsel. *See* Wainwright v. Sykes, 433 U.S. 72, 79, 87 (1977) (distinguishing between "cognizable federal issues on federal habeas review" and a showing of "cause" to permit federal review of such claims). Rather, it seemed to contemplate a level attorney error that did not necessarily have constitutional implications. *See* R.A.M., *Attorney Error as "Cause" Under* Wainwright v. Sykes*: The Case for a Reasonableness Standard After* Washington v. Downes, 67 VA. L. REV. 415, 421–28 (1981) (arguing that the standard for assessing "cause" under *Sykes* is whether counsel's error was reasonable, not whether counsel rendered ineffective assistance to the degree necessary to show an independent constitutional violation).

After *Sykes* was decided, several federal circuit courts adopted this interpretation. *See, e.g.*, Tyler v. Phelps, 622 F.2d 172, 177 n.8 (5th Cir. 1980) ("An attorney need not be so incompetent as to give rise to a separate ground of relief to be incompetent enough to satisfy the 'cause' element of *Sykes*."); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981) ("[F]or purposes of evaluating attorney ignorance or inadvertence, a defendant may satisfy the cause requirement with proof short of that necessary to make out a Sixth Amendment claim."); Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983) ("[A]ttorney error short of wholesale ineffectiveness of counsel can constitute [*Sykes*] cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy."); Collins v. Augur, 577 F.2d 1107, 1110 n.2, 1111 (8th Cir. 1978) (holding that, where defense counsel's failure to assert an objection stemmed from counsel's ignorance of the law, this showing of incompetency was sufficient to prove "cause" under *Sykes*, regardless of whether it implicated the 6th Amendment), *cert denied*, 439 U.S. 1133 (1979). Recognizing that the question of whether attorney incompetence amounted to a constitutional violation was separate and distinct from whether such incompetence constituted "cause" to withdraw the usual attribution rule and excuse a procedural default, these courts applied different standards to each and held that the competence standard in the procedural default context was higher than in the constitutional context. This interpretation, however, was not universal,

until 1986 in *Murray v. Carrier*[105] that the Court officially adopted the same standard of care used in constitutional ineffective-assistance-of-counsel cases for the separate question of "competence" for purposes of attribution.

The Court's analysis in *Murray* made clear that there were two contexts in which attorney incompetence was being considered: to determine if there was a Sixth Amendment violation and to determine "whether there was cause for a procedural default" that would rebut the attribution presumption.[106] *Murray* ultimately held that the single "general" standard of care that the Court developed in *Strickland* would apply to both inquiries: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[107] By carelessly including the word "constitutionally" in the above statement, the *Murray* Court mistakenly elided what it otherwise considered to be two separate questions.[108] This mistake was understandable because, in *Murray*, the instance of attorney incompetence that allegedly rendered attribution inappropriate occurred at a stage of the proceedings to which the Constitution applied;[109] so a deviation from the level of lawyer competence required to trigger the attribution rule in the procedural-default context would *also* be a Sixth Amendment violation. Thus, the "constitutionally" qualification in *Murray* can best be understood as dicta or surplusage to the extent it was not necessary to the

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as some courts applied the same standard to both inquiries. *See, e.g.*, Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981) (holding that the standards for assessing "[c]ause for non-compliance [with a state procedural rule] and ineffective assistance of counsel are patently intertwined"); Long v. McKeen, 722 F.2d 286, 289 (6th Cir. 1983); Indiviglio v. United States, 612 F.2d 624, 631 (2d Cir. 1979), *cert denied*, 445 U.S. 933 (1980).

[105] 477 U.S. 478 (1986).

[106] *Id.* at 487.

[107] *Id.* at 489 (citation omitted).

[108] Elsewhere in its opinion, the Court stated that "the standard for cause should not vary depending on the timing of a procedural default." *Id.* at 491. Thus, limiting "cause" based on attorney error to when there has also been an independent constitutional violation rather than to when such incompetence meets the functional standard set forth in *Strickland* would conflict with *Murray*'s general understanding that procedural defaults should be treated consistently regardless of the stage of the proceedings at which they occurred.

[109] The error complained of in *Murray* occurred during the petitioner's first appeal of right, where the 6th Amendment operates to guarantee effective counsel. *See* 477 U.S. at 497 (noting that the right to effective assistance of counsel attaches on a direct appeal).

holding.

In the early 1990s, cases in which habeas petitioners claimed that their attorneys' errors should not be attributed to them for procedural default purposes were also cases in which the non-attributable attorney error constituted an independent constitutional violation because it occurred during proceedings where the constitutional right to effective counsel attached.[110] Thus, cases adopting *Murray*'s approach reaped the benefit of applying the same standard of care developed in *Strickland*—"reasonableness under prevailing professional norms"[111]—to the two separate issues of constitutional competence and attributional competence, thereby allowing the two questions to essentially merge into one. The possibility of applying the attribution rule to attorney errors in proceedings where the Constitution did *not* apply first arose only hypothetically five years later in *Coleman v. Thompson*.[112]

Through an analysis that completely ignored the statutory text of § 2254, *Coleman* relied on *Murray*'s dicta in holding that attorney error can only establish "cause" to excuse procedural default if it independently constitutes ineffective assistance in violation of the Constitution.[113] *Coleman* failed to consider the implications of the Court's prior interpretations of the word "applicant" as including the competence caveat to the attribution rule. This not only led to the disappearance of the word "applicant" from the Court's analysis in *Coleman*—and its later analysis in *Shinn*—but also caused the Court to overlook the fact that there were two distinct issues of attorney incompetence subject to the same general standard.[114] Despite the Court's mistaken disregard of the word

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[110] *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 379 (1986); Cook v. Lynaugh, 821 F.2d 1072, 1077–78 (5th Cir. 1987); Orazio v. Dugger, 876 F.2d 1508, 1511 (11th Cir. 1989); Mercer v. Armontrout, 864 F.2d 1429, 1433–35 (8th Cir. 1988); Rodriguez v. Young, 906 F.2d 1153, 1159–61 (7th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991); *cf.* Keeney v. Tamayo-Reyes, 504 U.S. 1, 3–4, 11 (1992). Because the alleged attorney errors occurred at stages to which the constitutional right to effective counsel applied, these cases did not have the occasion to address the question of whether there was a different standard of competence with respect to attorney errors in proceedings to which the 6th Amendment does not apply.

[111] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[112] 501 U.S. 722 (1991).

[113] *Id.* at 754–55 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation.").

[114] It is unclear why the *Coleman* Court made the mistake of ignoring the word "applicant" and its interpretative history. One explanation is that the Court forgot the link to the statutory word "applicant." The opinion makes several references to agency and attribution, so the Court seemed to understand that there was an attribution question at

"applicant" and prior interpretations thereof in habeas corpus case law, *Coleman* recognized the possibility that a state postconviction proceeding, where the Sixth Amendment does not apply,[115] could be the

issue. *See id.* at 753 (noting that "the attorney is the petitioner's agent" within the scope of the litigation and that "'cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him"). However, the Court decided the attribution issue as if it was purely a matter of judge-made law that had not yet been addressed. This was wrong in two ways: (1) although procedural default is largely judge-made, if the Court had traced the doctrine back to *Fay* and *Sykes*, it would have seen that the Court was focused on the statutory word "applicant" and had interpreted it to include a competence requirement to the attribution rule, and (2) there was substantial case law on the attribution rule and how it applied in federal habeas that the *Coleman* Court failed to confront. Even if the Court based its holding on its unexpressed belief that the procedural default doctrine had become entirely uncoupled from the statute, AEDPA's passage in 1996 made clear that the doctrine also had a *statutory* basis while putting the word "applicant" front and center. *See* Yackle, *supra* note 57, at 145, 147 n.44 (interpreting the text of § 2254(e)(2) as integrating the Court's prior default doctrine).

A second possible explanation is that *Coleman* realized that there were two separate questions of attorney incompetence—for constitutional and attributional purposes—but nonetheless decided that the attribution rule would apply without the competence requirement at state postconviction. However, this is a weak possibility because the Court did not say this. Rather, it only addressed the constitutional question with respect to state postconviction, but the conclusion that the 6th Amendment does not apply at state postconviction does not explain why the usual competence-qualified rule of attribution would not apply.

The final, and most likely, explanation for why the *Coleman* Court got off track is that it was led astray by the *Murray* dictum that carelessly elided the two separate issues of constitutional incompetence and attributional incompetence into one. As previously explained, in all cases up until this point, every allegation of attorney incompetence for purposes of "cause" to excuse a procedural default occurred at a stage of the proceeding to which the 6th Amendment applied (i.e., at trial or on direct appeal). *See* cases cited *supra* note 110. Thus, while *Murray*'s "constitutionally" qualification was accurate in cases where attorney error serving as a basis for non-attribution was also an independent constitutional violation, it led future courts, beginning with the Supreme Court in *Coleman*, to mistakenly believe that a constitutional violation was a prerequisite for applying the "incompetence" exception of the attribution rule.

[115] Under the general rule of *Coleman*, claims that have been procedurally defaulted as a result of attorney error typically cannot be raised during collateral review because habeas petitioners do not have a constitutional right to counsel during postconviction proceedings. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (refusing to hold that a non-capital habeas petitioner has a constitutional right to counsel in postconviction proceedings); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (extending the reasoning of *Finley* to apply in capital habeas cases). Together, the holdings of *Finley* and *Giarratano* suggest that the 6th Amendment does not require the assistance of counsel in either non-capital or capital state postconviction proceedings, at least insofar as the petitioner seeks to raise claims that were litigated on direct appeal. Although the Supreme Court did not

first realistic opportunity for a petitioner to raise certain claims after trial. The Court expressly reserved the question of whether there should be an exception to the general rule that errors of state postconviction counsel are attributed to the petitioner "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."[116]

C. Post-AEDPA Cases

It was not until 2012 that the Court ultimately addressed the question that *Coleman* left unanswered.[117] Before that, however, came AEDPA's enactment in 1996 and its amendment to Section 2254(e)(2) to preclude a federal court from holding an evidentiary hearing when "the applicant has failed to develop the factual basis of a claim" in state habeas proceedings.[118] Since then, the Supreme Court has proceeded according to the interpretive principle that, unless designed to change prior law, the statute should be interpreted consistently with prior case law.[119] In *Michael Williams*, the Court affirmed this proposition in the post-AEDPA federal habeas context.[120] *Michael Williams* read the newly amended § 2254(e)(2) as being consistent with the prior agency-law rule of attribution,[121] without indicating any intention to alter the "competence" requirement for the rule's application in the procedural default context.

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address whether there was a constitutional right to counsel in federal habeas proceedings, the lack of such a right appeared to be a foregone conclusion after *Finley* and *Giarratano* were decided.

[116] *Coleman*, 501 U.S. at 755; *see also* Martinez v. Ryan, 566 U.S. 1, 8 (2012) ("*Coleman v. Thompson* left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." (citation omitted)).

[117] *Martinez*, 566 U.S. at 1.

[118] 28 U.S.C. § 2254(e)(2).

[119] *See* authorities cited *supra* note 76; *see also* EIG, *supra* note 60, at 51 ("The Court closely adheres to judicial precedents in interpreting statutes, on the grounds that Congress is free to supersede the Court's interpretation of a particular statute through subsequent legislation."); Neal v. United States, 516 U.S. 284, 295 (1996) ("Absent [changes in the law that render a prior decision inapplicable] or compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes." (citing NLRB v. Longshoremen, 473 U.S. 61, 84 (1985))).

[120] Williams v. Taylor, 529 U.S. 420, 433–34 (2000) ("[T]here is no basis in the text of § 2254(e)(2) to believe Congress . . . intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a broader class of cases than were covered by [the Court's pre-AEDPA] cause and prejudice standard.").

[121] *Id.* at 432 (concluding that "the opening clause of § 2254(e)(2) codifies" the Court's pre-AEDPA understanding of the requisite showing to establish "cause" for a procedural default).

The Court interpreted what it meant for the petitioner or the petitioner's counsel, as to whom no claim of incompetence or ineffective assistance was made, to "fail[] to develop" a claim under § 2254(e)(2).[122] Ultimately, the Court unanimously concluded that the statute imposes a fault-based standard, such that the evidentiary bar only applies when the petitioner or competent counsel bears some causal responsibility for the lack of factual development in state court.[123]

This understanding of when attorney error is attributable to the petitioner has also been reflected in the Supreme Court's more recent decisions, including *Martinez v. Ryan*, where the Court finally answered the question that *Coleman* set aside for later resolution.[124] For the first time, the Court was presented with an instance of attorney incompetence that had implications for the applicability of the attribution rule but not for a constitutional claim of ineffectiveness because the Sixth Amendment did not apply.[125] In *Martinez*, the applicant's claim was not that his counsel's incompetent failure to raise a constitutional claim during state postconviction amounted to an independent constitutional violation for which the applicant was entitled to federal habeas relief.[126]

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[122] *Id.* at 431. The Court did not analyze what the statute meant by the word "applicant," presumably because that question had already been asked and answered in the Court's pre-AEDPA case law.

[123] *Id.* at 431–32.

[124] 566 U.S. 1, 4 (2012) ("Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings."). Thus, the state habeas proceeding, which the Court referred to as the "initial-review collateral proceedings" under these circumstances, would essentially be the petitioner's "one and only appeal" with respect to a trial-counsel-ineffectiveness claim. *Id.* at 8 (quoting Coleman v. Thompson, 501 U.S. 722, 756 (1991)).

[125] *Id.* at 9 (explaining that the question before the Court was not whether ineffective assistance of counsel in an initial-review collateral proceeding violated the Constitution, but rather "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding")

[126] Such a claim would be unlikely to prevail, not only because the Supreme Court has held that the Constitution does not apply in state postconviction to govern the (in)effectiveness of counsel, but also because AEDPA expressly states that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief." 28 U.S.C. § 2254(i); *see also* 28 U.S.C. § 2261(e) (same language). However, while these statutes prevent the incompetence of postconviction counsel from serving as a constitutional ground for federal habeas corpus relief, they do not preclude counsel's incompetence from serving as the basis for applying the exception to the general attorney-attribution rule. *See Martinez*, 566 U.S. at 17 (holding that AEDPA's bar on using state postconviction

Rather, the applicant argued that his attorney's incompetence, as measured under *Strickland*, should not be attributed to him so as to preclude federal review of his underlying claim.[127] In other words, the Court was asked to embrace the idea that whether there had been a violation of the applicant's constitutional right to effective assistance of counsel was irrelevant, so long as postconviction counsel's performance fell short of the competence standard set forth in *Strickland*.[128]

The majority in *Martinez* ultimately held that a federal court may consider a habeas petitioner's ineffectiveness-of-trial-counsel claim, even if not asserted in state court, if 1) the state bars the petitioner from raising that claim until state postconviction, and 2) the petitioner's counsel in those proceedings was also ineffective under the standard set forth in *Strickland*.[129] The *Martinez* Court thus established an "equitable" pathway for habeas petitioners who had twice received ineffective assistance of counsel to raise a trial-ineffectiveness claim for the first time in federal court.[130] In announcing this limited yet essential qualification to *Coleman*'s holding that attorney error in state habeas proceedings

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counsel's ineffectiveness as a ground for relief does not preclude a habeas petitioner from using it to show "cause" to excuse a procedurally defaulted trial-counsel-ineffectiveness claim); 1 HERTZ & LIEBMAN, *supra* note 46, § 3.3(b) n.58 (suggesting that, notwithstanding 28 U.S.C. § 2261(d), "it would appear that ineffective assistance of counsel could nonetheless serve as a basis for excusing a procedural default at the state postconviction stage" caused by incompetent appointed counsel). In that case, counsel's incompetence would provide, not a constitutional ground for relief, but rather a justification for not attributing the attorney's conduct to the applicant.

[127] *Martinez*, 566 U.S. at 7. In describing its decision as an equitable ruling rather than a constitutional one, the Court recognized that the standard of (in)effectiveness against which it would measure postconviction counsel's performance was not a constitutional rule. *Id.* at 13–14, 16. Rather, it was an equitable principle that would determine whether the applicant could be held responsible for the procedural default. *Id.*

[128] *See id.* at 23–24 (Scalia, J., dissenting).

[129] *Id.* at 14 (majority opinion) ("[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . [if] appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*."). Thus, despite the careless qualifying language in the *Murray* dicta, *Martinez* recognized (1) that there is a difference between incompetence for procedural-default purposes and for 6th Amendment purposes by finding that such incompetence need not be an independent constitutional violation to establish "cause" and justify non-attribution, and (2) the *Strickland* standard of competence is the appropriate standard for assessing the performance of habeas counsel to determine whether their errors are attributable to the petitioner.

[130] *Id.* at 14, 16.

generally does not excuse procedural default,[131] the *Martinez* Court recognized that an individual in custody almost always requires the help of an adequate lawyer to present a trial-counsel-ineffectiveness claim at an initial-review proceeding. The Court reasoned that attorney error in such a proceeding, if it does not qualify as "cause" to excuse the resulting procedural default in federal habeas court, would deprive the petitioner of any opportunity for review of their ineffectiveness claim.[132]

One year later, in *Trevino v. Thaler*, the Court reaffirmed *Martinez*'s rationale and extended its holding to cases in which a state's procedural framework effectively denies petitioners a "meaningful opportunity" to raise an ineffectiveness-of-trial-counsel claim on direct appeal.[133] The Court's reasoning in *Martinez* and *Trevino* emphasized the inequity of holding habeas petitioners responsible for the incompetence of their lawyers or absence of counsel during their state postconviction proceedings.[134] Under such circumstances, a habeas applicant cannot

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[131] *Id.* at 9 ("To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.").

[132] *Id.* at 10–12.

[133] 569 U.S. 413, 429 (2013). *Martinez* involved a state procedural law that required defendants to raise an ineffective-assistance-of-trial-counsel claim during their first state collateral review proceeding, whereas *Trevino* analyzed a state procedural law that appeared to permit defendants to raise such a claim on direct review but made it "virtually impossible" for defendants to do so. *Id.* at 414.

[134] *See Martinez*, 566 U.S. at 14 (recognizing that allowing federal courts to hear claims that were procedurally defaulted due to attorney error or absence "acknowledges, *as an equitable matter*, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim" (emphasis added)); *Trevino*, 569 U.S. at 425, 427 (finding that a state procedural system that effectively foreclosed direct review of defendants' ineffective-assistance-of-trial-counsel claims "create[d] significant unfairness" and presented an "*equitable problem* to be solved" (emphasis added)).

For further discussion of the incompatibility between agency principles and the attorney-client relationship in the habeas context, see authority cited *supra* note 70. *See also* Choice Hotels Int'l v. Grover, 792 F.3d 753, 755 (7th Cir. 2015) ("Being put to death is a disproportionate penalty for having a bad lawyer—especially when as a practical matter persons on death row (and for that matter other prisoners) have only limited opportunity to choose their own counsel.").

There are substantial obstacles in the relationship between a habeas petitioner and appointed counsel that render traditional agency principles virtually unworkable in the habeas context. One of the most fundamental elements of an agency relationship is the fact that the principal has the ability to control the agent. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("The agent shall act on the principal's behalf and

reasonably be held at fault for their lawyer's failure to present the claim in state court because the lawyer did not function as a competent agent.[135] Moreover, these decisions directed federal habeas courts to apply the *Strickland* standard of "reasonableness under prevailing professional norms"[136] to determine whether postconviction counsel was sufficiently competent to warrant attributing their errors to the applicant, regardless of the absence of a constitutional right to competent representation.[137] After *Martinez* and *Trevino*, there seemed to be no question among lower federal courts that *Strickland* provided the governing standard against which to measure postconviction counsel's conduct,[138] leading many courts to begin defining the bounds of "professionally competent assistance" for postconviction counsel.[139]

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subject to the principal's control . . . ."). The principal's supervisory role thus provides justification for attributing the agent's acts or omissions to the principal. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (AM. L. INST. 2000) (explaining that attributing attorney conduct to the client is warranted by the fact that clients are the only actors who can control the lawyer's actions during litigation). However, in habeas cases, petitioners are incarcerated and, therefore, have limited ability to communicate with, let alone exercise supervisory control over, their attorneys. *See* Wilpert, *supra* note 70, at 1469–70 (making this argument). In addition, the principles of consent and free choice that characterize traditional agency relationships are notably absent from the attorney-client relationship in habeas cases, where most attorneys are appointed by the court due to the petitioner's indigency. *See* McCollough, *supra* note 70, at 398–400 (making this argument); Wainwright v. Sykes, 433 U.S. 72, 113–14 (1977) (Brennan, J., dissenting) ("[N]o fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney. This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial." (footnotes omitted)).

[135] *See also* Maples v. Thomas, 565 U.S. 266, 283 (2012) ("[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."); Holland v. Florida, 560 U.S. 631, 659 (2010) (Alito, J., concurring) ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.").

[136] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[137] *See supra* note 129.

[138] *See cf.* Landrum v. Anderson, No. 1:96 CV 641, 2012 WL 3637365, at *6 (S.D. Ohio Aug. 22, 2012) ("The Supreme Court in *Martinez* did little to adumbrate a standard for ineffective assistance of post-conviction counsel beyond saying *Strickland v. Washington* . . . would provide the governing standard."); Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (plurality opinion) (stating that "the [*Martinez*] Court did not specify the manner in which *Strickland* should be applied" to evaluate ineffective-assistance-of-postconviction-counsel claims).

[139] *Strickland*, 466 U.S. at 690. Many federal courts applying *Martinez* and *Trevino* have applied the standards that are generally applicable to trial counsel. *See, e.g.*, Canales v. Stephens, 765 F.3d 551, 569–70 (5th Cir. 2014) (finding state habeas counsel's

III. THE "ILLOGICAL" RESULT OF *SHINN V. RAMIREZ*

The above-described history demonstrates the Supreme Court's adherence to the agency-based, competence-qualified rule of attribution in its federal habeas corpus jurisprudence. In light of this historical

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performance deficient when counsel failed to seek funding for investigation, and comparing habeas counsel's performance to that of trial counsel in Hinton v. Alabama, 571 U.S. 263, 272–75 (2014) (per curiam)); Miles v. Ryan, 713 F.3d 477, 494 (9th Cir. 2013) (finding postconviction counsel's performance was not incompetent under *Strickland* when counsel "conducted an extensive investigation during post-conviction review," akin to trial counsel's investigative duties); Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila., 790 F.3d 457, 479–80 (3d Cir. 2015) (McKee, C.J., concurring) (emphasizing that in modern habeas corpus, the fate of a federal habeas petitioner depends on the performance of state postconviction counsel, and discussing the various duties postconviction must meet to provide effective representation, many of which mirror the duties of trial counsel). *But see* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 304 (1983) ("The penalty phase of a capital trial differs so greatly from an ordinary criminal trial that the usual standards for assessing competency of counsel in criminal cases are inadequate in death penalty cases.").

Other courts have declined to establish any particular standard at all. *See, e.g.*, *Landrum*, 2012 WL 3637365, at *6 ("Rather than attempting to create a detailed general standard in this first case the Court has confronted in applying this branch of *Martinez*, it is more appropriate to proceed in common law fashion to consider just the conduct exhibited here."); Leberry v. Howerton, 583 F. App'x 497, 501 (6th Cir. 2014) (suggesting an ipso facto approach to claims of postconviction counsel's ineffectiveness, such that postconviction counsel's failure to raise a substantial trial-counsel-ineffectiveness claim is deficient performance); Sheridan v. Curley, No. 10-3987, 2015 WL 1208065, at *5 (E.D. Pa. Mar. 16, 2015) (suggesting that if postconviction counsel's failure to raise a claim resulted in the claim being procedurally defaulted in federal habeas, the failure constitutes deficient performance if the defaulted claim is substantial).

An ancillary question that courts began to grapple with after *Martinez* and *Trevino* concerned the sources from which these professional norms could be drawn. The Supreme Court has repeatedly cited the ABA Standards and Guidelines as reflecting the prevailing professional norms for defense counsel at the trial level. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable . . . ."); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (referring to ABA Guidelines as "well-defined norms" and relying on them to hold that counsel's mitigation investigation failed to meet reasonable professional standards). However, the Court has yet to consider whether ABA Guidelines similarly serve as guides in determining the bounds of reasonable attorney conduct at the postconviction stage. Allen L. Bohnert argues that in addition to the ABA Guidelines, courts should consider case law, state statutes, professional standards set by state agencies, publications of private defender organizations, training manuals, and legal scholarship. *See* Allen L. Bohnert, *Wrestling with Equity: Identifiable Trends as the Federal Courts Grapple with the Practical Significance of* Martinez v. Ryan *&* Trevino v. Thaler, 43 HOFSTRA L. REV. 945, 982 (2015).

background, there were two logical steps that the Supreme Court could have taken in *Shinn v. Ramirez* to resolve whether state habeas counsel's failure to develop the factual basis of the applicant's trial-counsel-ineffectiveness claim is attributed to the applicant for purposes of triggering § 2254(e)(2)'s bar on further evidentiary development in federal court. First, it would be reasonable for the Court to read § 2254(e)(2), which brought the word "applicant" to the fore, to include the Court's prior interpretation of that word in *Fay* and *Sykes* as applying the agency rule of attribution if, *and only if*, counsel was competent.[140] Second, *Shinn* could have followed *Coleman*'s recognition that, when a defendant is prohibited from raising a particular claim on direct appeal, the first state postconviction proceeding is special in a way that distinguishes it from other collateral proceedings, such that the "incompetence" exception to the general attribution rule may be warranted—a recognition that *Martinez* later confirmed.

The majority in *Shinn*, however, considered neither of these possibilities and instead dropped the interpretive ball by ignoring the word "applicant." By failing to consider its prior interpretations of "applicant," the Court drastically limited the availability of federal habeas relief for petitioners who have received ineffective assistance of counsel both during their trial and in their state postconviction proceedings.[141] Writing for the majority, Justice Thomas asserted that respondents Jones and Ramirez were not entitled to further evidentiary development of their underlying trial-counsel-ineffectiveness claims because, under the plain meaning of § 2254(e)(2), a federal court cannot conduct an evidentiary hearing on a defaulted claim "[i]f the applicant has failed to develop the factual basis of [that] claim in State court proceedings."[142] The Court held that Jones and Ramirez were "at fault" for their attorneys' failures to develop their claims in the state postconviction phase. The majority reasoned that "under AEDPA and [Supreme Court] precedents, state postconviction counsel's ineffective assistance in developing the state-

[140] Had *Shinn* followed this reasoning, Section 2254(e)(2) would be understood as having superseded the careless dicta that the *Murray* Court unnecessarily included in its opinion and that the Court in *Coleman* mistakenly relied upon five years later. *See supra* note 114. This approach would have declined to follow the logic of *Coleman* in situations governed by § 2254(e)(2)—i.e., regarding what evidence can be adduced—but would not fully overrule *Coleman* to the extent that its holding would continue to apply in determining which claims can be raised in federal habeas corpus.

[141] Shinn v. Ramirez, 596 U.S. 366, 381–89 (2022).

[142] 28 U.S.C. § 2254(e)(2).

court record is attributed to the [applicant]."[143] However, as the preceding interpretive history of the statutory text in prior Supreme Court cases demonstrates, and as the dissenting Justices in *Shinn* aptly recognized, "[n]either AEDPA nor [the] Court's precedents require this result."[144]

A. *Shinn*'s Unjustified Deviation

Shinn has created an absurd and illogical situation. Habeas petitioners who received ineffective assistance of counsel both at trial and in state postconviction proceedings have the right to raise a defaulted trial-counsel-ineffectiveness claim in federal court,[145] but they are bound by the evidence that was presented in state court by incompetent postconviction counsel.[146] This fundamentally flawed result stems from the Court's deviation from the logical, well-established agency principles underlying the attribution rule and its incompetence exception that have governed federal habeas corpus doctrine for almost sixty years.[147]

In dissent, Justice Sotomayor, joined by Justice Breyer and Justice Kagan, argued that the Court has "render[ed] *Martinez* and *Trevino* dead letters" and "empt[ied] them of all meaning" by misconstruing its own precedent.[148] Taking issue with the majority's suggestion that its holding was compelled by the statutory text, Justice Sotomayor confirmed that "[n]either AEDPA nor the[] Court's precedents require this result."[149] In fact, this decision "makes no sense"[150] in light of past cases. By prioritizing the need to accord finality and respect to state convictions over concerns that such convictions may have been obtained through deeply flawed and blatantly unconstitutional proceedings, the majority's ruling "reduces to rubble many habeas petitioners' Sixth Amendment rights to the effective assistance of counsel."[151]

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[143] *Shinn*, 596 U.S. at 382.
[144] *Id.* at 393 (Sotomayor, J., dissenting).
[145] *See* Martinez v. Ryan, 566 U.S. 1 (2012); Trevino v. Thaler, 569 U.S. 413 (2013).
[146] *Shinn*, 596 U.S. at 381–82.
[147] See *supra* Part II for a more detailed discussion of federal habeas corpus case law.
[148] *Shinn*, 596 U.S. at 405 (Sotomayor, J., dissenting).
[149] *Id.* at 393.
[150] *Id.* at 392.
[151] *Id.* at 410 ("For the subset of [habeas] petitioners who receive ineffective assistance both at trial and in state postconviction proceedings, the Sixth Amendment's guarantee is now an empty one. Many, if not most, individuals in this position will have no recourse and no opportunity for relief."); *see also* Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel*, N.Y. STATE BAR ASS'N J., Sept.–Oct. 2022, at 17, 18 (stating that, by disregarding past precedent, *Shinn* effectively "took a wrecking ball" to "*Gideon* and *Strickland*").

This Section considers *why* the Court in *Shinn* deviated from the text of Section 2254(e)(2), both by its plain meaning and as interpreted in the Court's precedents, and ultimately concludes that the Court simply dropped the interpretive ball.

1. AEDPA's Retention of Prior Meaning

The *Shinn* Court's departure from its prior interpretations of the same statutory language seems to be based, at least in part, on the majority's belief that "AEDPA largely displaced" the Court's pre-AEDPA cause-and-prejudice standard for evidentiary development through the amended language of § 2254(e)(2).[152] However, nothing in the plain text of the 1996 amendment nor in the subsequent case law suggests that the enactment of AEDPA did anything to change the preexisting meaning of "applicant" as encompassing the applicant and *competent* counsel.[153] To be sure, in the immediate aftermath of AEDPA's passage, many were hopeful that the new provisions would not be read in a manner that would depart significantly from the prevailing doctrines governing federal habeas.[154] Moreover, President Bill Clinton, at the crucial moment of signing the Act into law, adopted this exact interpretation of Section 2254(e)—that only the "fairly attributable" actions of counsel should be imputed to the "applicant" for purposes of evidentiary development in federal court.[155] The statute's legislative

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[152] *Shinn*, 596 U.S. at 382.

[153] *See supra* notes 79–80 and accompanying text.

[154] For example, with respect to § 2254(e)(2), as amended, Professor Larry Yackle cautioned against a strictly literal reading to the extent that the new provision "establishes a presumption in favor of a state finding of fact, without regard for the process from which it was generated," whereas "[u]nder preexisting law . . . the presumption in favor of a state factual finding was contingent on sound process in state court." Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 388 (1996). Any alternative regime would seem to raise serious due process concerns. *See id.* at 390 (anticipating that § 2254(e)'s "limits on federal fact-finding will be unconstitutional . . . at least in some instances"). For a discussion of the due process implications created by the *Shinn* decision, see *infra* note 188.

[155] President Bill Clinton, in a statement he made the day that he agreed to enact AEDPA, stated that any other interpretation of Section 2254(e) could be contrary to the Constitution:

> If [§ 2254(e) (as amended)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which "the *applicant* has failed to develop the factual basis" of his or her claim. Therefore, [§ 2254(e) (as amended)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from

history provides further support for this interpretation. Although federal courts' exercise of independent judgment was surely limited by AEDPA's deferential standard of review, the standard prescribed by the statute was not meant to be "a blank, total deference" to state court decisions.[156] Rather, the statute was intended to curb the federal courts' tendency to consider the merits of claims adjudicated in state court without showing proper respect for those judgments.[157] Therefore, it is evident that AEDPA was neither intended nor subsequently read to change the agency-based, competence-qualified rule of attribution underlying the meaning of the word "applicant" that the Court established in earlier cases.

2. Absence of the Word "Applicant" From Shinn*'s Incomplete Analysis*

The *Shinn* majority focused its analysis entirely on the statute's "failed to develop" language and the fact that there is no Sixth Amendment guarantee to effective counsel in habeas proceedings, thereby assuming away the question of whose failure it was. Justice Thomas reasoned that because there is no constitutional right to counsel in state postconviction proceedings, attorney error cannot establish cause, and the petitioner bears responsibility for such errors.[158] While the Court's

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being developed in State court.

Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 631 (Apr. 24, 1996) (emphasis in original) [hereinafter Signing Statement].

[156] 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde).

[157] *See* 141 CONG. REC. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter) (providing a flexible definition of the "deference" prescribed: "There will be deference to the determinations of the state court, but the Federal judge will still have latitude to alter the State court decision."). When the conference report was later on the floor for final passage, Senator Specter, after explaining that he was "not entirely comfortable" with the deference that the bill afforded state court judgments, insisted that the new standard would "allow Federal courts sufficient discretion to ensure that convictions in state court have been obtained in conformity with the Constitution." 142 CONG. REC. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter). This is the same interpretation that President Clinton seemed to have when he signed the bill into law:

> Our constitutional ideal of a limited government that must respect individual freedom has been a practical reality because independent Federal courts have the power "to say what the law is" and to apply the law to the cases before them. I have signed this bill on the understanding that the courts can and will interpret these provisions [§§ 2254(d), 2254(e)] in accordance with this ideal.

Signing Statement, *supra* note 155, at 632 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[158] Shinn v. Ramirez, 596 U.S. 366, 381 (2022).

statutory analysis of Section 2254(e)(2) regarding "failed to develop" was consistent with prior cases in the context of the "cause-and-prejudice" test,[159] the majority neglected to analyze the preceding words "the applicant," which identify the party that must have failed to develop the claim for the provision to apply.

Ironically, Justice Thomas asserted, "We have no power to redefine when a prisoner 'has failed to develop the factual basis of a claim in State court proceedings.'"[160] Yet, the majority ultimately fell victim to its own cautionary tale. It redefined the meaning of the word "applicant," as it appears in § 2254(e)(2), to mean the applicant or the applicant's lawyer, regardless of the lawyer's level of (in)competence. This blanket attribution of all of the lawyer's failings to the client neither aligns with the Court's precedents, which clearly establish an exception to this rule for incompetent counsel, nor comports with the wording of § 2254(e)(2), which holds a habeas petitioner responsible when "the applicant has failed to develop the factual basis of a claim" but notably does *not* say "the applicant or lawyer."[161] Congress clearly fixed the failure of "the applicant" as the triggering condition for § 2254(e)(2), but it did not fix the rules that determine when the failure of counsel would be attributed to, and thus become the failures of, the applicant.[162] In interpreting this

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[159] *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 4, 8, 11–12 (1992) (consistently referring to the petitioner's "failure to develop" his claim in state-court proceedings—the same language that Congress incorporated into the amended text of § 2254(e)(2)—as the trigger for the heightened showing to obtain a federal evidentiary hearing); Coleman v. Thompson, 501 U.S. 722, 753–54 (1991) (specifying that attorney error resulting in procedural default is imputed to the petitioner, "who must bear the burden of a failure to follow state procedural rules" pertaining to state-court fact development, unless the attorney's error "cannot fairly be attributed" to the petitioner under agency principles); Williams v. Taylor, 529 U.S. 420, 433 (2000) (arguing that, based on the language used in § 2254(e)(2), "Congress intended to preserve . . . *Keeney*'s holding" that only "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing"); *see also* Brief for Habeas Scholars as Amici Curiae in Support of Respondents at 9–16, *Shinn*, 596 U.S. 366 (No. 20-1009) (reviewing the Supreme Court's habeas jurisprudence and demonstrating how the doctrines for excusing a procedural default or an underdeveloped evidentiary record have always emphasized the *petitioner*'s fault).

[160] *Shinn*, 596 U.S. at 385.

[161] 28 U.S.C. § 2254(e)(2).

[162] The Court has expressly acknowledged that AEDPA must be interpreted in light of evolving habeas doctrine. *See* Panetti v. Quarterman, 551 U.S. 930, 943–44 (2007); *see also* Felker v. Turpin, 518 U.S. 651, 664 (1996) (explaining that AEDPA's restrictions in the abuse-of-the-writ context incorporate the "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and

provision, courts have not read it as necessarily requiring the failure to develop the state-court record to be exclusively that of "the applicant" for the statutory bar on evidentiary hearings to apply. Rather, most courts have found that "the applicant" may bear responsibility for counsel's errors under the operative rule of attribution, *so long as counsel is competent*; otherwise, the text of the statute governs, and "the applicant" cannot be read so as to encompass the failure of incompetent counsel.[163]

3. The Standard of Attributional Incompetence Established in Prior Cases

The majority in *Shinn* considered its holding to be consistent with both the plain text of the statute and the Court's prior federal habeas decisions.[164] The Court stated that "a prisoner 'bears the risk in federal habeas for all attorney errors made in the course of the representation,' unless counsel provides 'constitutionally ineffective' assistance."[165] Therefore, "because there is no constitutional right to counsel in state postconviction proceedings, a prisoner ordinarily must 'bea[r] responsibility' for all attorney errors during those proceedings."[166] This is a perversion of the Supreme Court's federal habeas case law.

When the Supreme Court first articulated and applied the general attorney-attribution rule in *Sykes*, it clearly indicated it would only bind a client on the condition that the acts or omissions were those of a *competent* attorney.[167] Subsequent pre-AEDPA cases referenced *Sykes* in holding that counsel's error cannot constitute "cause" to excuse an applicant from bearing responsibility for the error unless it amounts to a violation of the applicant's Sixth Amendment right to counsel.[168] As previously

judicial decisions" (quoting McClesky v. Zant, 499 U.S. 467, 489 (1991))).

[163] *See supra* Section I(B).

[164] *Shinn*, 596 U.S. at 381–86.

[165] *Id.* at 382–83 (first quoting Coleman v. Thompson, 501 U.S. 722, 754 (1991); then quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

[166] *Id*. at 383 (first citing Davila v. Davis, 582 U.S. 521, 528–29 (2017); then quoting Williams v. Taylor (*Michael Williams*), 529 U.S. 420, 432 (2000)).

[167] *See supra* notes 90–96 and accompanying text.

[168] *See Murray*, 477 U.S. at 485–88; *Coleman*, 501 U.S. at 749–53. The central importance that the majority in *Shinn* placed on *Murray* and *Coleman* is misplaced insofar as both cases involved a defendant who was guaranteed constitutionally effective counsel. The error complained of in *Murray* occurred during the defendant's appeal as of right, where the Sixth Amendment operates to ensure counsel is effective. *Murray*, 477 U.S. at 497. The attorney error that resulted in a procedural default in *Coleman* occurred on an appeal from an initial-review collateral proceeding. Thus, the petitioner's claims had already been addressed, and denied, by the state habeas trial court. *See* 501 U.S. at 755–

explained, however, this careless elision of the two separate issues of constitutional incompetence and attributional incompetence occurred in cases in which all assertions of attorney incompetence that were sufficient to establish "cause" to excuse a procedural default were also violations of the constitutional right to the effective assistance of counsel because they occurred at proceedings to which the Sixth Amendment applied.[169] The Court never actually faced a scenario in which that was not true until the question came up hypothetically in *Coleman*'s dicta, where the Court expressly refrained from holding that only an independent constitutional violation qualifies as attributional incompetence and reserved the question for a later day.[170] *Martinez* ultimately confirmed that attorney incompetence sufficient to establish "cause" is not synonymous with the degree of incompetence necessary to withdraw the application of the attribution rule.[171] The Court then upheld this ruling one year later in *Trevino v. Thaler*.[172]

In *Shinn*, Justice Thomas argued that *Martinez* and *Trevino* did not contemplate elaborate hearings in federal court to consider new evidence.[173] However, providing habeas petitioners the opportunity to present evidence in support of a substantial claim that trial counsel rendered ineffective assistance clearly falls within the intendment of *Martinez* and *Trevino*. Both cases discuss how such claims frequently require introducing evidence outside the existing trial-court record, something that most petitioners are unable to do on their own—i.e., without the assistance of effective counsel.[174] Moreover, by suggesting

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56. This marks a critical difference between initial-review collateral proceedings and other collateral proceedings, one that the *Martinez* Court believed was significant enough to warrant recognizing a "narrow exception" to *Coleman*'s holding. Martinez v. Ryan, 566 U.S. 1, 9 (2012).

[169] *See supra* Part II.B.

[170] *See Coleman*, 501 U.S. at 755.

[171] *See* 566 U.S. at 17.

[172] 569 U.S. 413, 428–29 (2013) (holding that the *Martinez* exception applies if an initial-review collateral proceeding is not only the petitioner's first actual opportunity to raise a trial-ineffectiveness claim but also the first "meaningful opportunity" for the petitioner to do so).

[173] Shinn v. Ramirez, 596 U.S. 366, 388 (2022) (arguing that the "sprawling evidentiary hearing" in Jones' case amounted to a "wholesale relitigation of Jones' guilt," which "is plainly not what *Martinez* envisioned").

[174] *See Martinez*, 566 U.S. at 11–12 ("Without the help of an adequate attorney, a prisoner will have . . . difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . . To present a claim of ineffective assistance at trial in

that *Martinez* established a rule that allowed a petitioner to raise a substantial trial-counsel-ineffectiveness claim for the first time in federal habeas, only to then be barred from developing necessary evidentiary support, the majority affords the *Martinez* Court far too little credit.[175] Both *Martinez* and *Trevino* upheld the fundamental nature of the constitutional right to counsel by ensuring that individuals who had twice received ineffective assistance would have at least one opportunity to be heard.[176] However, the Court's decision in *Shinn* effectively closed off this equitable pathway to relief and produced an illogical result wherein a petitioner has the right to raise a claim of ineffective-assistance-of-trial-counsel but is prohibited from developing evidence to support that claim.[177] As Justice Sotomayor explained in her dissent, the *Shinn* majority "guts" the core reasoning of *Martinez*, and in effect, "extinguishes the central promise" of the Sixth Amendment.[178]

By failing to interpret the word "applicant" and ignoring prior interpretations in federal-habeas case law, the *Shinn* majority treated the attribution question as a constitutional-violation question. As a result, the Court never actually addressed the separate issue of attributional

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accordance with the State's procedures, then, a prisoner likely needs an effective attorney."); *Trevino*, 569 U.S. at 424–25 (explaining that the very nature of trial-ineffectiveness claims means the trial record will likely be inadequate to substantiate the claim, and citing multiple cases that discuss the need to expand the trial-court record in order to provide a full and fair adjudication on the merits). Even prior to *Martinez* and *Trevino*, the Court recognized that the trial-court record is "often incomplete or inadequate" for the purpose of deciding "either prong of the *Strickland* analysis." Massaro v. United States, 538 U.S. 500, 504–05 (2003).

[175] Justice Kavanaugh suggested as much in his questions to the State during oral argument. *See* Transcript of Oral Argument at 11–12, *Shinn*, 596 U.S. 366 (No. 10-1009) (suggesting that, to accept the State's argument that *Martinez* should be read as answering the very narrow question of when there is cause to excuse a procedural default, "you have to assume that the [*Martinez*] Court majority was somehow unaware of how this would play out," because "it's hard to envision the Court thinking" that a defaulted trial-counsel-ineffectiveness claim could be raised in federal habeas but not actually pursued).

[176] *See Martinez*, 566 U.S. at 10–12 (explaining that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims" that their right to effective assistance of trial, "a bedrock principle of our justice system" had been violated); *Trevino*, 569 U.S. at 422 (describing the right to effective counsel as "the foundation for our adversary system" (quoting *Martinez*, 566 U.S. at 12)).

[177] *See Shinn*, 596 U.S. at 398 (Sotomayor, J., dissenting) ("A petitioner cannot logically be faultless for not bringing a claim because of postconviction counsel's ineffectiveness, yet at fault for not developing its evidentiary basis for exactly the same reason.").

[178] *Id.* at 392, 410.

incompetence that defeats the agency presumption, a well-established feature of habeas corpus doctrine. It also did not discuss the related question of what the appropriate standard of competence should be to assess attorney conduct for attribution purposes. Instead, the Court seemed to suggest that *no* standard of care should apply for that purpose.

B. *Shinn*'s Implications for Effective Representation and Due Process

During oral argument, many of the Justices in the majority seemed to recognize the inherent conflict between *Martinez* and the State's proposed reading of the statute. In fact, four out of the six Justices in the majority expressly acknowledged that the State's argument was difficult to square with settled precedent.[179] Nonetheless, each one ultimately joined the majority opinion in *Shinn*,[180] thereby endorsing the State's interpretation of § 2254(e)(2). Without any concurring opinions, it is difficult to determine why each Justice in the majority ruled the way they did. However, Chief Justice Roberts and Justices Alito and Kavanaugh seemed persuaded by Arizona's argument that the plain language of the statute must govern, despite its conflict with the logical implications of *Martinez*.[181] The State based its argument on the text of § 2254(e)(2),

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[179] In the first question he asked, Justice Thomas pointed out that it "seems rather odd" and "pretty worthless" to allow a petitioner to bring an otherwise defaulted claim under *Martinez* but not allow the petitioner to present evidence in support of that claim. Transcript of Oral Argument, *supra* note 175, at 5. Chief Justice Roberts echoed Justice Thomas's doubts in his follow-up, claiming that the issue was "a basic syllogism," insofar as "if you do get the right to raise the claim for the first time, because your counsel was incompetent before, surely, you have the right to get the evidence that's necessary to support your claim." *Id.* at 6. Justice Kavanaugh also asked what the point of *Martinez* would be if the Court were to accept the State's position, seeing as that its interpretation of § 2254(e)(2) would "really gut *Martinez* in a huge number of cases." *Id.* at 10. Finally, Justice Alito, although ultimately concluding that the Court was bound to follow the text of the statute, told the attorney for the respondents that they "have a strong argument that accepting the State's interpretation of 2254(e)(2) . . . would drastically reduce what a lot of the lower courts have thought *Martinez* means." *Id.* at 36.

[180] *See Shinn*, 596 U.S. at 369.

[181] *See* Transcript of Oral Argument, *supra* note 175, at 36 (Justice Alito said he "certainly understand[s] why the courts of appeals have interpreted *Martinez* the way they did. But the fact remains that we have to follow the federal habeas statute."); *id.* at 42 (Chief Justice Roberts asked whether there's a case that talks about what the Court should do when "the plain language of the statute seems to require one result, the result [the State] argues for, and the plainly logical meaning of subsequent precedent would seem to require the result that [the respondents] argue for"); *id.* at 46 (Justice Kavanaugh asked respondents' counsel what his response was to the fact that the Court "can't ignore the

claiming that the plain language was an independent bar on federal evidentiary hearings.[182] In response, counsel for the respondents seemed to believe that he could present a policy-based argument that would override the State's statutory argument. Respondents' counsel argued that the "failed to develop" language must be read in light of the particular context to which it is being applied.[183] Here, where someone is deemed faultless for failing to raise a claim, they cannot logically be deemed at fault for failing to develop it.[184] Although counsel claimed to not be ignoring the statute, this argument clearly did not convince enough members of the Court's textualist majority.

However, there is a sensible counter-argument to the State's interpretation that is similarly based on the plain language of the statute. Section 2254(e)(2) says the "applicant" must have failed, and "applicant" can only be read to encompass the applicant and the applicant's lawyer where the lawyer is competent, which the lawyers in these cases clearly were not.[185] There is no need to inquire into the meaning of the words "failed to develop" because the threshold requirement for § 2254(e)(2) to apply—that the applicant failed—did not occur. By providing a counter-argument based on textualism that is consistent with both the statute's plain meaning and settled precedent, it is possible that the respondents' counsel could have persuaded enough members of the conservative majority—all of whom are known to be textualists[186]—to rule on the respondents' behalf. Such a ruling would avoid the issue of the Court

statute" and the "ordinary meaning [of] failure to develop").

[182] *See id.* at 26; Brief for Petitioners at 29, *Shinn*, 596 U.S. 366 (No. 10-1009).

[183] *See* Transcript of Oral Argument, *supra* note 175, at 42–43, 46–47; *see also* Brief for Respondents, *supra* note 15, at 35–41, 47–50.

[184] *See* Transcript of Oral Argument, *supra* note 175, at 43, 47–48; *see also* Brief for Respondents, *supra* note 15, at 40, 48–49.

[185] *See supra* Part I.A.

[186] *See* Nancie G. Marzulla, *The Textualism Of Clarence Thomas: Anchoring The Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER, SOCIAL POL'Y & THE LAW 351, 351 (2002); Diane S. Sykes, *"Of a Judiciary Nature": Observations on Chief Justice Roberts's First Opinions*, 34 PEPP. L. REV. 1027, 1042 (2007); Emily Bazelon & Eric Posner, Opinion, *Who Is Brett Kavanaugh?*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html; Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (Alito, J., dissenting); *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 131 (2017) (statement of Judge Neil M. Gorsuch); Ed Whelan, *Judge Barrett on Textualism and Originalism*, NATIONAL REVIEW (Sept. 25, 2020), https://www.nationalreview.com/bench-memos/judge-barrett-on-textualism-and-originalism/.

handing down a nonsensical decision,[187] as well as uphold constitutional due process requirements, which have virtually been stripped from the federal habeas process by the majority's decision.[188] But counsel chose not to raise this argument, nor point out the due process implications of the State's argued interpretations. As a result, the Court entirely skips over the word "applicant" in its analysis of § 2254(e)(2)[189] and instead seems to assume that it can read the words "or the applicant's lawyer" into the

[187] It is worth mentioning that even if the proposed reading of the word "applicant" explained in this Note is thought to be inconsistent with the statute's plain meaning, this interpretation is still preferred over that adopted by the *Shinn* majority because of the absurdity doctrine. For a general discussion of the concept of "absurd results," see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994). "The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense." *Id.* at 133.

[188] *See* Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context."). As a general matter, the constitutional mandate of due process requires government actors to provide certain procedural protections before depriving an individual of any protected life, liberty, or property interest. *See* U.S. CONST. amends. V, XIV. Because substantial interests relating to life and liberty are at stake in the case of a federal habeas petition brought by a state prisoner facing the death penalty, a federal habeas court must itself operate in accordance with due process. Thus, if a federal habeas court chooses to have a hearing, it cannot be disputed that a hearing in which the state is permitted to present evidence but the habeas petitioner is precluded from doing the same would violate due process. *See* Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (stating that having an opportunity to be heard, which is a fundamental requisite of due process, includes being able to present evidence); Matthews v. Eldridge, 424 U.S. 319, 347–49 (1976) (finding no violation of due process so as to require an evidentiary hearing where the claimant already had an effective opportunity to assert his claim). However, this is essentially how the Court reads the statute in *Shinn*. According to the Court's interpretation, AEDPA permits a petitioner to raise a claim but prohibits the petitioner from presenting evidence to support it. It is important to note that this reading only prevents the habeas applicant from developing and introducing evidence, not the State. In effect, the Court has adopted an interpretation that not only leads to an irrational and confusing result but also creates serious due process implications. It seems plausible that, at least in some cases, this holding could force federal habeas courts to commit, by edict of the statute as interpreted by the Court, a due process violation. Thus, *Shinn*'s interpretation of AEDPA clearly conflicts with the constitutional-avoidance canon of statutory interpretation. *See* Crowell v. Benson, 285 U.S. 22, 62 (1932) (explaining that if a suggested interpretation of a statute casts "serious doubt" on its constitutionality, courts should adopt another, "fairly possible" interpretation); *see also* ESKRIDGE ET AL., *supra* note 76, at 677–78 (discussing the use of the constitutional-avoidance canon to reaffirm and vindicate underenforced constitutional norms, including due process norms).

[189] *See* Shinn v. Ramirez, 596 U.S. 366, 381–89 (2022).

statute, regardless of whether the lawyer is competent or not.

The silver lining of the Court's failure to consider the word "applicant" in its statutory analysis is that lower courts are not precluded from relying on this interpretation of the word "applicant." This permits federal habeas courts to hold evidentiary hearings when a petitioner seeking to raise a defaulted trial-counsel-ineffectiveness claim also had incompetent counsel at state postconviction. Under these circumstances, the word "applicant" in the statute simply refers to the petitioner. Because the petitioner is not the one who failed to develop the factual basis for the claim, the statute does not apply, and there is no bar to evidentiary development in federal court. Moreover, because "the applicant" cannot reasonably be held responsible for the default, there is no need to get into the Court's restrictive "failed to develop" analysis.[190] Thus, not even the ruling in *Shinn* would preclude this interpretation.

CONCLUSION

Under the Court's ruling in *Shinn*, a petitioner who is faultless for not raising a trial-counsel-ineffectiveness claim due to the ineffectiveness of state postconviction counsel may nonetheless be deemed at fault for their ineffective postconviction counsel's failure to develop evidence in support of that claim.[191] By precluding federal habeas courts from considering evidence beyond state-court records constructed by incompetent trial and postconviction counsel, *Shinn* effectively prevents federal habeas from functioning as an enforcement mechanism for petitioners' Sixth Amendment right to counsel. This result is particularly concerning in capital cases like Jones' and Ramirez's, given the well-documented state of deficient representation at every stage of a capital case,[192] the procedural complexity and demanding obligations associated with capital litigation,[193] and the inexorable finality of the death

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[190] *See* Transcript of Oral Argument, *supra* note 175, at 25–26.

[191] *See Shinn*, 596 U.S. at 382–83.

[192] See authorities cited *supra* notes 1–2 and accompanying text; *see also* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 397–410 (1995) (providing an overview of the lack of meaningful assistance of counsel in capital cases).

[193] *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence). The complex and specialized nature of death penalty litigation imposes demanding obligations on defense counsel that are definably different from the duties of counsel in ordinary criminal cases. *See* 18 U.S.C. § 3005 (requiring more stringent experience criteria for counsel appointed in capital postconviction proceedings than in non-capital proceedings); ABA GUIDELINES, *supra*

penalty.[194]

Much of the reaction to the *Shinn* decision has been in response to the irrational Catch-22 that the majority places upon habeas petitioners—deeming them faultless for incompetent counsel's failure to raise a claim yet at fault for counsel's failure to develop that claim. As a result of this holding, petitioners can bring a defaulted trial-counsel-ineffectiveness claim in federal court but cannot develop evidence to support it. Many commentators expressed concern over what this means for capital defendants and for the future of federal habeas relief in general.[195] By further restricting federal courts' authority to review state-

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note 1, at 923 ("Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master."); Goodpaster, *supra* note 139, at 303–04 ("Trials about life differ radically in form and in issues addressed from those about the commission of a crime . . . . Capital cases require perceptions, attitudes, preparation, training, and skills that ordinary criminal defense attorneys may lack."); Note, *supra* note 2, at 1923 ("[C]apital trials are so complex, and the death penalty so different in kind from other punishments, that, for capital defendants, the Eighth Amendment requires a higher standard of effective assistance of counsel."). *See generally* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

[194] *See* Grant Proposal of the ABA Task Force on Death Penalty Habeas Corpus Reform submitted to State Just. Inst. 8 (July 11, 1988) (on file with Washington & Lee University, School of Law); ABA GUIDELINES, *supra* note 1, at 923 (describing the implications of the "extraordinary and irrevocable nature of the [death] penalty"); Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

[195] *See, e.g.*, Michael Douglas, *Supreme Court Ruling a Blow to Legal Rights of Death Row Inmates*, AKRON BEACON J., July 17, 2022, at A14 (describing majority's ruling as "negligent" and "off course" by "putting [Jones and Ramirez] in a Catch-22"); Joseph Darius Jaafari, *U.S. Supreme Court Says Federal Judges Can't Rule on Innocence*, ARIZ. REPUBLIC (May 23, 2022), https://www.azcentral.com/story/news/politics/arizona/2022/05/23/us-supreme-court-agrees-with-arizona-federal-judges-cant-determine-guilt-state-crimes/9900209002/ (decision is "a direct blow to prisoners" and a "shock" to many defense and civil rights lawyers); Elie Mystal, *Supreme Homicide*, THE NATION, June 27, 2022, at 8 (denouncing majority for "holding [Jones and Ramirez] in this procedural death loop"); Marco Poggio, *Justices Shut Door On Inmates Claiming Ineffective Counsel*, LAW360 (May 23, 2022), https://www.law360.com/articles/1495806/justices-shut-door-on-inmates-claiming-ineffective-counsel (various lawyers and scholars describing the opinion as "wrong at every turn," "fraught with irony," and "horrible . . . for the Sixth Amendment"); Radley Balko, Opinion, *In Death Row Case, The Supreme Court Says Guilt Is Now Beside the Point*, WASH. POST (June 1, 2022), https://www.washingtonpost.com/opinions/2022/06/01/arizona-death-row-supreme-

court convictions, the Supreme Court undermines both the deterrent effect the federal habeas process is intended to provide against constitutional violations and capital defendants' ability to challenge their death sentences.[196] Moreover, it does so at the expense of well-established common-law doctrine, longstanding principles of statutory interpretation, and its own precedent.

As previously explained, under traditional attorney-client agency

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court-shinn-innocence/ (*Shinn* is "an illogical and profoundly cynical ruling"); Matt Ford, *The Supreme Court Decides Death Row Prisoners Don't Deserve Competent Lawyers*, NEW REPUBLIC (May 24, 2022), https://newrepublic.com/article/166588/death-penalty-sixth-amendment-ramirez ("The decision is a chilling reminder that the court's conservative majority need not overturn a constitutional right . . . to destroy it."); Statement from Executive Director Christina Swarns on *Shinn v. Ramirez* and *Jones*, INNOCENCE PROJECT (May 24, 2022), https://innocenceproject.org/innocence-project-statement-from-executive-director-christina-swarns-on-shinn-v-ramirez-and-jones/ (*Shinn* has left "thousands of people in the nightmarish position of having no court" of recourse); Sandman, *supra* note 151, at 19 (stating that the *Shinn* decision "is remarkable for its utter indifference to injustice").

By contrast, former Arizona Attorney General Mark Brnovich applauded the Supreme Court's decision, claiming that "it will help refocus society on achieving justice for victims, instead of on endless delays that allow convicted killers to dodge accountability for their heinous crimes." Press Release, Arizona Attorney General Mark Brnovich Gains Victory at SCOTUS in *Shinn v. Ramirez* (May 22, 2022), https://www.azag.gov/press-release/arizona-attorney-general-mark-brnovich-gains-victory-scotus-shinn-v-ramirez. However, it is hard to see how either of the two outcomes mentioned in this statement are implicated in *Shinn*, where the State was seeking to execute two men, one of whom was later released due to his compelling innocence, *supra* note 5, and the other of whom is likely ineligible for the death penalty due to intellectual disability, whose convictions were obtained as a result of fundamental breakdowns in our adversary system.

[196] Evidentiary hearings play a critical role in federal habeas cases. *See* ANDREA D. LYON, EMILY HUGHES, MARY PROSSER & JUSTIN MARCEAU, FEDERAL HABEAS CORPUS: CASES AND MATERIALS 369 (2d ed. 2011) ("The federal evidentiary hearing is the most important vehicle through which prisoners demonstrate that their constitutional rights were violated during the state court process."). This is particularly true with respect to habeas petitioners raising trial-counsel-ineffectiveness claims, which often require additional investigative work and evidentiary development that most petitioners cannot do themselves. *See* Brief for Federal Defender Capital Habeas Units as Amici Curiae in Support of Respondents at 4, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 10-1009) ("[L]itigating unpreserved trial-ineffectiveness claims in federal court nearly always requires the presentation of extra-record evidence newly developed by federal habeas counsel."); Martinez v. Ryan, 566 U.S. 1, 12 (2012) ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record."). For those facing a death sentence, restricting the availability of federal hearings increases the likelihood that constitutional errors will go unchecked and executions will go forward without a full and fair review of the underlying conviction.

rules, counsel does not have to violate the Sixth Amendment to no longer be considered an agent of the client.[197] Thus, attorney incompetence that is insufficient to show "cause" to excuse a default under § 2254(e) may nonetheless be sufficient to withdraw the presumption that counsel's failure to develop the record is attributable to the applicant. In such a case, § 2254(e)(2)'s procedural bar on federal evidentiary development would not apply because the failure does not belong to "the applicant." Had the majority in *Shinn* found that "the applicant" as used in the statute simply referred to the applicant, it would have been clear that § 2254(e)(2) does not preclude further evidentiary development in federal court in either Jones' or Ramirez's case.

The inadequacy of the state-court record in either case was due to incompetent counsel's failure to develop the underlying claim—a failure which is not fairly attributable to the applicant.[198] Thus, under the plain language of § 2254(e)(2), "the applicant[s]" in these cases *did not* fail to develop their claims and are, therefore, entitled to evidentiary hearings. Such a holding would be consistent with common-law principles and case law regarding when attorney error is properly attributable to the habeas applicant, with well-established precedent regarding the right to counsel as fundamental to our justice system, and with the statutory text of AEDPA.

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[197] *See supra* Part I.B.2.

[198] Based on how lower federal courts have substantively applied *Martinez*, the conduct of state postconviction counsel in Jones' and Ramirez' cases clearly was objectively unreasonable so as to amount to incompetence. *See* cases cited *supra* note 139. Counsel's performance similarly falls short of the duties and obligations of postconviction counsel in capital cases, as articulated by the ABA. *See* ABA GUIDELINES, *supra* note 1, Guideline 10.15.1 at 1079–87. Although ABA Guidelines are not to be construed as inexorable commands (*see* Bobby v. Van Hook, 558 U.S. 4, 8 (2009)), they are still guides as to what constitutes objectively reasonable performance. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003). Among the many responsibilities of postconviction counsel is the duty to pursue and preserve "arguably meritorious" claims. ABA GUIDELINES, *supra* note 1, Guideline 10.15.1(C) at 1079. Thus, state postconviction counsel's failure to investigate, present, litigate, and preserve Jones' and Ramirez's substantial claims of trial-counsel-ineffectiveness clearly amounts to professional incompetence.