No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,
Petitioner,
vs.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should this Court's precedent in *Pennsylvania* v. *Finley*—that there is no constitutional right to counsel in collateral review—be overruled to the extent it applies to claims that could not have been litigated on direct appeal?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the petitioner seeks to overturn precedents going back a quarter century to create a new constitutional right that this Court has unequivocally held does not exist—a right to counsel on collateral review of a criminal judgment. He further seeks to litigate on federal habeas corpus whether his state collateral review attorney was effective. This is an attempt to make an end-run around the reforms that Congress adopted to curtail abuse of the writ of habeas corpus. It would impair the finality of criminal convictions, contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of the case and its history in the state courts were described in the report of the Federal Magistrate Judge, App. to Pet. for Cert. 38a-42a, and accepted without objection by the District Court. See App. to Pet. for Cert. 27a. The victim in this case, petitioner's 11-year-old stepdaughter, described two acts of sexual abuse in a video-recorded forensic interview with a social worker. App. to Pet. for Cert. 38a. She later recanted her allegations, and at trial answered largely with "I don't know" or "I don't remember." The earlier recorded statement was played for the jury. As noted in petitioner's subsequent petition for review, the prosecution also introduced evidence of semen matching petitioner's DNA on the victim's nightgown. See App. to Brief in Opposition A-24. An expert on Child Sexual Abuse Accommodation Syndrome explained that false recantation by victims who are unsupported by their families is common. See *id.*, at A-14.

Petitioner took an appeal, which was stayed pending a petition for postconviction relief. See App. to Pet. for

Cert. 39a-40a. He was represented by the same attorney in both reviews. See *id*., at 40a. The attorney could find no meritorious arguments for postconviction relief, and petitioner did not file a *pro se* pleading arguing any, as state procedure permits him to do. See *id*., at 40a-41a.

After conclusion of direct appeal, petitioner filed a second state postconviction proceeding, claiming that trial counsel was ineffective and that first postconviction counsel was ineffective for not raising that claim. See *id*., at 41a; see also App. to Brief in Opposition A-16 to A-27 (describing claims). This petition was considered by the original trial judge. The state trial court found, "Counsel's arguments do not raise a colorable claim of ineffective assistance of trial counsel, and, in any event, that claim is precluded . . . ." See *id*., at B-27. Further review of this decision was denied by the state courts. App. to Pet. for Cert. 42a.

On federal habeas, the Magistrate Judge found that the ineffective assistance claim was procedurally barred, see *id*., at 59a, and that there had been no miscarriage of justice. "Petitioner has not presented supplementary post-trial reliable evidence establishing he is factually innocent." *Id*., at 62a. The Magistrate Judge also found in the alternative that the claim failed on the merits. See *id*., at 63a.[2] The District Court concluded that the claim was defaulted and declined to reach the merits. See *id*., at 33a-36a.

The Court of Appeals affirmed. It rejected the premise that there is a right to counsel in collateral proceedings under the circumstances of this case, *id*., at 22a, and affirmed the procedural default holding of the

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2. This case appears to be an inappropriate vehicle for considering the question presented, given that the underlying claim has been considered and rejected on the merits twice.

District Court. See *id*., at 23a-25a. Petitioner petitioned for rehearing en banc, and no judge called for a vote. See *id*., at 85a. This Court granted certiorari on June 6, 2011.

SUMMARY OF ARGUMENT

The threshold question of whether to provide counsel on state collateral review is one of allocation of resources. Petitioner asks this Court to transform into a constitutional question a decision that has, up to now, been clearly within the legislative authority. This is an example of "constitution creep," expanding the scope of constitutional law to remove more and more decisions from the democratic process. Constitution creep has many ill effects, including stifling of innovation, expansion of the already-bloated scope of federal habeas review, and diminution of the people's right of democratic self-government.

Pennsylvania v. *Finley* and *Murray* v. *Giarratano* are on-point precedents contrary to the central thesis of petitioner's argument. For petitioner to prevail, they would have to be overruled as to claims that cannot be made on direct appeal. No case has been made under the doctrine of *stare decisis* for overruling these precedents. They have not been undermined by later decisions. They are not unworkable. Evading the limitations on habeas created by Congress is not a valid basis for overruling precedents Congress relied on when it enacted those limitations. State legislatures have also relied on the established law that the provision of counsel on collateral review is within their control. The implicit call to overrule *Finley* and *Giarratano* should be rejected.

ARGUMENT

I. Constitution creep is a poor way to allocate limited resources.

Oddly, the question of whether a State is constitutionally required to appoint counsel for indigent prisoners making their first collateral challenge comes to this Court from a State that does make such appointments as a matter of state law. This oddity results from the holding of *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985), that the right to effective assistance extends to an appeal where indigents have a constitutional right to appointed counsel. The State challenges the application of *Evitts* in Part II of its brief.

Assuming *Evitts* applies, the threshold question is whether States must appoint counsel for indigent prisoners on their first collateral review, at least in cases where the prisoner raises a claim that could not have been made on appeal. Because claims that could have been raised on appeal are barred from collateral review in most jurisdictions, that means most cases.

A. A World of Limited Resources.

In a world of unlimited resources, there would be little objection to providing every criminal defendant with a lawyer for his first postconviction review. But of course the world is not ideal. Indeed, an ideal world would have no crime and would not need a criminal justice system. "If men were angels, no government would be necessary." The Federalist No. 51 (J. Madison), reprinted in 1 The Founders' Constitution 330 (P. Kurland & R. Lerner eds. 1987). Constitutions must be written for the real world, with practical realities in mind. See *ibid*.

The problem is one of resource allocation. Providing counsel for collateral review, at least in some cases, is a

worthy goal. Congress has provided for collateral representation in all capital cases, whether the case originated in state or federal court. See 18 U. S. C. § 3599(a)(2). For capital cases in state court, most states have established a mechanism for appointment of counsel, see, *e.g.*, Cal. Govt. Code § 68662, and Congress has provided an incentive for the remaining states to do so. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maples* v. *Thomas*, No. 10-63, pp. 17-23, available at http://www.cjlf.org/briefs/MaplesC.pdf

For noncapital cases, legislative authorities have determined, in many jurisdictions, that counsel should be provided in some but not all collateral review cases. For example, "*Whenever* the United States magistrate judge or the court determines that *the interest of justice so require*, representation *may* be provided for any financially eligible person who . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28." 18 U. S. C. § 3006A(a)(2) (emphasis added). This discretionary appointment provision contrasts sharply with the mandatory appointment requirement for most criminal prosecutions in paragraph (a)(1). Clearly Congress does not think that appointment in every case is an appropriate allocation of resources.

In a world of limited resources, every request for the government to spend money for a worthy goal is in competition with every other such request, all considered worthy by their proponents. A decision to spend a dollar on one worthy goal is a decision not to spend that dollar on some other worthy goal.

If this Court finds that a particular expenditure is constitutionally required, that expenditure butts in line, bypassing the legislative priority-assigning process. If the expenditure is required by the unambiguous words of the Constitution as understood at the time of adop-

tion, then this line-butting remains the people's choice, exercised in the constitution-making process rather than the standard legislative process. For example, jury trial must be provided in those federal cases where the Sixth and Seventh Amendments require it, regardless of cost, because the people so decided when they ratified those amendments, and that was understood at the time.

Petitioner in the present case seeks to allocate resources through a very different mechanism. He and supporting *amici* advance reasons why collateral counsel in every case is a worthy goal. Then they ask this Court to move this expenditure to the front of the line, not by any decision of the people of the United States to give it that preferred status, but rather through a process we call constitution creep.

B. Constitution Creep.

In recent years, the term "mission creep" has entered the lexicon, first in military and foreign affairs, and then spreading to other fields. See, *e.g.*, Etzioni, Mission Creep and Its Discontents, Middle East Quarterly 3-15 (Spring 2011) (U. S. operations in Afghanistan). Definitions of this term vary, but one definition is "doing a much larger job for a longer time than was originally expected, especially in a military operation." Cambridge Dictionaries Online, http://dictionary.cambridge.org/dictionary/british/mission-creep (viewed Sept. 7, 2011).

A similar broadening far beyond the original mission has occurred in constitutional law. The broadening might be called "constitution creep." The term is new, but warning against it is not. Some of the nation's foremost legal minds have raised warnings over the course of many years. Justice Jackson warned long ago, "This Court is forever adding new stories to the temples

of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (concurring in the result). Judge Friendly warned that the Bill of Rights was being expanded into a "detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156 (1970) (footnoted omitted).

Constitution creep has many ill effects, particularly when it occurs at the federal level. First, constitutionalizing a rule of law makes the rule particularly difficult to change, even when new knowledge and experience call for a change. A federal constitutional decision by this Court can be changed only by an overruling of this Court or by the drastic and difficult process of amending the Constitution. In the case of *Perry* v. *New Hampshire*, No. 10-8974, petitioner asks the Court to constitutionalize evidence rules on the reliability of eyewitness identifications. As CJLF will explain in our brief in that case (to be filed shortly after this brief), the science on reliability continues to evolve, a situation for which constitutional rule-making is ill-suited. As another example, the sweeping dictum of *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), was ill-considered from the beginning and has subsequently had massive unintended consequences in terms of delay and expense in capital cases. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Styers*, No. 08-1350, available at http://www.cjlf.org/briefs/Styers.pdf. Yet the states have all been forced to conform their statutes to *Lockett*'s mandate, making it difficult to get the issue back before this Court.

A second, related problem is that federalizing a rule stifles innovation in the states, innovations that could lead to better practices. Constitutionalizing a legal issue "short-circuit[s] . . . legislative response." *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U. S. __, 129 S. Ct. 2308, 2322, 174 L. Ed. 2d 38, 54 (2009). For example, even though *Miranda* v. *Arizona*, 384 U. S. 436, 490 (1966), said that the measures laid out in the opinion were not rigid and states could try other methods of protecting the privilege against self-incrimination, a state would be foolish to try. In *Florida* v. *Powell*, 559 U. S. __, 130 S. Ct. 1195, 1200-1201, 175 L. Ed. 2d 1009, 1015 (2010), a state supreme court had thrown out a confession for a minor variation in the wording of the warning. While this Court reversed, two Justices would have affirmed, and the upholding of this particular variation gives no assurance other variations will be upheld. For a state's standard warning, and all confessions obtained with it, to be thrown out after years of use would be a disaster that a state ought not risk. Britain, where the advisement is prescribed by statute rather than constitution creep, has a better form. See Altdoerffer, *Miranda* with an English Accent, 10 Engage 35 (Oct. 2009), http://www.fed-soc.org/doclib/20091116_AltdoerfferEngage10.3.pdf.

Similarly, over four decades ago, Chief Justice Burger threw down the gauntlet and challenged legislatures to devise a better way to enforce the Fourth Amendment. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 422 (1971) (dissenting opinion). No legislature picked it up, and none is likely to. So long as the exclusionary rule remains a constitutional mandate, no legislature can enact an alternative remedy with any assurance that it really will be accepted as a substitute. So we are stuck with a remedy that "exacts a heavy toll on both the judicial system and

society at large." *Davis* v. *United States*, 564 U. S. __, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285, 294 (2011).

Third, constitutionalizing a rule that previously had been one of state law opens the judgments of state courts on that issue to scrutiny on federal habeas corpus, with all the difficult problems of federalism, finality, and resource expenditure that such scrutiny entails. Congress took dramatic action in1996 to curtail this review in the Antiterrorism and Effective Death Penalty Act of 1996, and cases involving that statute have been a large slice of this Court's workload ever since. Yet federal habeas for state prisoners remains a long and costly endeavor. Indeed, two well-known habeas scholars have concluded that federal habeas review of state criminal judgments has become such a "costly charade" that it should be abolished almost entirely, at least in noncapital cases. See N. King & J. Hoffman, Habeas for the Twenty-First Century: Uses, Abuses, and Future of the Great Writ 87 (2011). Expansion of the scope of constitutional criminal procedure expands the scope of a costly and largely fruitless procedure that we should be contracting.

The fourth ill effect of constitution creep is the least tangible, yet ultimately it may be the most detrimental. Every new constitutional rule benefitting criminal defendants is promptly hailed in the law reviews as an advance for constitutional rights. Yet every new chapter in the "detailed code" is also a loss to constitutional right number one—the right of the people to govern themselves through the democratic process. Does the Constitution provide that all important decisions are constitutional questions to be decided by judges, with the democratic process reduced to deciding trivia? See *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 858 (CA9 1996) (en banc) (Kleinfeld, J., dissenting), rev'd *sub nom*. *Washington* v. *Glucksberg*,

521 U. S. 702 (1997). That seems to be the unstated premise of the American Bar Association's *amicus* brief—it is important; therefore it is constitutional. But this conclusion does not follow.

A few fundamental rights were placed in the Constitution where the legislative authority cannot change them by ordinary statute. The ones placed there are those that were both fundamental enough to warrant such protection and agreed upon by an overwhelming consensus of the people. Other rights may be equally important. They may even be within the "penumbra" of a right in the Constitution. Cf. *NASA* v. *Nelson*, 562 U. S. __, 131 S. Ct. 746, 766, 178 L. Ed. 2d 667, 689 (2011) (Scalia, J., concurring in the judgment). But a right is not legitimately in the Constitution unless the people decided to put it there. If they did not, then its existence and scope are within the control of the people through the normal democratic process.

For a court to usurp to itself a decision that the Constitution actually leaves to the legislative authority is a violation of the constitutional separation of powers and a violation of the people's right to democratic self-government. Usurpation in the name of enforcing the Constitution is actually a gross violation of the Constitution.

The notion that all important questions must be constitutional questions has a corrosive effect on the process for selecting judges for the federal courts generally and this Court in particular. If an Act of Congress is little more than a staff recommendation to the real decision-maker, the judiciary, then the political battles over the selection of the judiciary become more important than the battles over the legislation itself. In such an environment, the vitriolic confirmation battles we have seen are not at all surprising and cannot be expected to abate in the future. See O'Scannlain,

Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework, 91 Marquette L. Rev. 895, 915 (2008).

Constitution creep needs to be recognized for the insidious temptation that it is. Each step might seem, examined *in vitro*, to be a positive one. Yet collectively and *in vivo* the expansion of the Constitution into a "detailed code" has detrimental effects on federalism, on innovation, on democracy, and ultimately on the judiciary itself.

C. Rights and Resources.

"All rights tend to declare themselves absolute to their logical extreme," Justice Holmes wrote for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908). "Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." The other policy, on the question of providing counsel for collateral review,[3] is the always-important policy of limiting expenditure of public funds. Government cannot spend without limit, and expenditure must be directed where it will do the most good, generally known as "getting the most bang for the buck."

Is a mandate to provide state-paid counsel for every indigent collateral review petitioner a more effective way to achieve justice than the other measures those dollars might be spent on? Who should decide that question?

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3. On the question of litigating effectiveness of collateral counsel in subsequent reviews, there are policy considerations of finality and federalism in addition to resources.

An *amicus* describes a few cases where ineffective assistance led to conviction of innocent people. See Brief of Innocence Network as *Amicus Curiae* 7-11. Certainly conviction of the innocent is the ultimate injustice, and measures to reduce the possibility of that happening and correcting it when it does happen deserve a very high priority within judicial budgets. But is spending money on collateral review a better way to address that problem than spending money on better defense representation at trial? See King & Hoffman, *supra*, 100-101. Meritorious habeas petitions have long been compared to needles in the haystack. See *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result). The Innocence Network has shown the Court a few needles in a pitch to sell the haystack. Better measures to keep needles out of haystacks in the first place might be wiser than a massive, permanent, carved-in-concrete mandate to search haystacks.

These are questions without simple answers. *Amicus* CJLF does not pretend to have definitive answers. We do maintain that further spread of constitutional mandates is a poor way to answer them.

II. *Stare decisis* warrants adherence to *Carrier*, *Finley*, and *Giarratano*.

This Court recognized in *Coleman* v. *Thompson*, 501 U. S. 722, 752-753, 755 (1991), that the argument petitioner made in that case was precluded by the precedents in *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987), and *Murray* v. *Giarratano*, 492 U. S. 1 (1989). "For Coleman to prevail, therefore, there must be an *exception* to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."

Coleman, *supra*, at 755 (emphasis added). To create an exception to a precedent that contains no such exception is to overrule the precedent in part. The *Coleman* Court decided that it need not address whether to overrule *Finley* and *Giarratano* in part, because the alleged ineffectiveness of Coleman's counsel in state habeas was on appeal and not in the first court to consider the claim. See *ibid*. As a result, *Coleman* is distinguishable from the present case, but *Finley* and *Giarratano* are not. The precedential force of those decisions is not diminished by the fact that a later case pondered whether to make an exception to them but then decided that a more limited question was actually presented by the case before it.

Petitioner in the present case effectively asks for the same partial overruling that Coleman asked for, but the question cannot be avoided on the same basis that it was avoided in *Coleman*. Petitioner does not expressly say that he is asking the Court to overrule *Finley* and *Giarratano*, but he cannot prevail otherwise.

Carrier established that a default by an attorney is not "cause" for default under the procedural default rule unless that default amounted to constitutionally ineffective assistance of counsel. See 477 U. S., at 488. Hence, attorney error cannot be "cause" where there is no constitutional right to counsel. If there were any doubt that the *Carrier* rule really is that broad, it was eliminated in *Coleman*. See 501 U. S., at 752-753. Petitioner does not challenge this holding. See Brief for Petitioner 22.

Finley clearly and unequivocally held that there is no constitutional right to counsel on state collateral review. "States have no obligation to provide this avenue of relief [citation], and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer

as well." 481 U. S., at 557. This holding was not based on the nature of the claims presented in collateral review, but rather on the nature of the proceeding as being even further removed from trial than a discretionary appeal. See *id.*, at 556-557.

Finley was part of a series of cases creating a greater distinction between direct and collateral review. Just four months earlier, *Griffith* v. *Kentucky*, 479 U. S. 314, 321-322 (1987), had drawn a line between direct and collateral review for the purpose of retroactivity of new rules of procedure. That distinction was intensified not long after in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). Other cases distinguished direct from collateral review with regard to the exclusionary rule, see *Stone* v. *Powell*, 428 U. S. 465, 494-495 (1976), and harmless error analysis. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 637-638 (1993).

The application of *Finley* to capital cases arose in a case from Virginia, *Murray* v. *Giarratano*, *supra*. There could be no doubt that *Giarratano* was primarily, if not exclusively, about representation for claims that could not have been made on appeal. The Court was familiar with the long-established Virginia rule that a claim that could have been made on appeal cannot be raised in state habeas. See *Smith* v. *Murray*, 477 U. S. 527, 533 (1986). The *Giarratano* plurality held squarely that *Finley* applies unmodified to capital cases. See 492 U. S., at 10. The concurrence is less clear but rejected the proposition that appointment of counsel in every case is required, see *id*., at 14-15 (opinion of Kennedy, J.), and that is more than sufficient to negate petitioner's argument in the present case.[4]

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4. Because both opinions concurring in the judgment are contrary to petitioner's thesis, there is no need to struggle with the Gordian knot of the rule of *Marks* v. *United States*, 430 U. S.

No case since *Finley* and *Giarratano* has overruled them in whole or in part. Petitioner claims that *Coleman* "recognized that there might be an exception . . . when 'state collateral review is the first place a prisoner can present a challenge to his conviction.' " Brief for Petitioner 16. That is a considerable overstatement. As is clear from the full sentence, quoted *supra*, at 13, the *Coleman* Court only noted that the petitioner would need for this exception to be created in order to prevail, and the Court went on to decide that only a narrower issue was actually presented.

Petitioner relies heavily on *Halbert* v. *Michigan*, 545 U. S. 605 (2005), but he does not contend that *Halbert* overruled *Finley* and *Giarratano*. Any such argument would be meritless, as the opinion of the Court in *Halbert* does not even mention either of those cases.[5] "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silento*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 18 (2000). While *Halbert* provides some language that is useful for makeweight arguments for petitioner, the question before the Court in that case did not require reconsideration of *Finley*, and hence it cannot be one of the rare instances where the Court does overrule a precedent by implication.

"The question at hand . . . [in *Halbert* was] whether this case should be bracketed with *Douglas* v. *California*, 372 U. S. 353 (1963), because appointed counsel is sought for initial review before an intermediate appellate court, or with *Ross* v. *Moffitt*, 417 U. S. 600 (1974),

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188 (1977), a rule "more easily stated than applied." *Nichols* v. *United States*, 511 U. S. 738, 745 (1994).

5. The dissent mentions them in passing. See *id.*, at 628, and n. 1 (opinion of Thomas, J.).

because a plea-convicted defendant must file an application for leave to appeal." 545 U. S., at 616, n. 2. Under those precedents, appointment was required for a first-tier appeal as of right but not for a discretionary second-tier appeal. *Halbert* decided that the first-tier v. second-tier characteristic was more important than the discretionary v. of-right characteristic for the purpose of drawing the line between the set of cases grouped with *Douglas* and the set grouped with *Ross*.[6] See *id*., at 619. This decision is based unambiguously on the importance of the "first, and likely the only, direct review the defendant's *conviction and sentence* will receive." *Ibid*. (emphasis added). The precedents in *Finley* and *Giarratano*, where the convictions and sentences had received a previous review, were therefore not at issue.

Finley and *Giarratano* are therefore Supreme Court precedents squarely contrary to an essential element of petitioner's argument, unimpaired by any subsequent precedents. The Court of Appeals correctly recognized them as such. See App. to Pet. for Cert. 9a. Indeed, the Court of Appeals cited and quoted *Finley* repeatedly. See *id*., at 17a, 21a, 22a. What argument does petitioner make, under the doctrine of *stare decisis*, for overruling a controlling Supreme Court precedent correctly relied on by the decision he seeks to have reversed? Remarkably, he does not mention *Finley* once in his brief, much less make any argument for overruling it. Equally remarkable is the complete absence of any discussion of *Finley* or argument for overruling it in any of three *amicus* briefs filed in

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6. For an explanation of sets of cases defined by material facts in the application of precedent, with emphasis on the *Marks* rule, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, pp. 5-13.

support of the petitioner. See Brief of American Bar Association as *Amicus Curiae*; Brief of Former State Supreme Court Justices as *Amici Curiae*; Brief of Innocence Network as *Amicus Curiae*.

"While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (citations and internal quotation marks omitted). Subsequent cases have not undermined the doctrinal underpinnings of *Finley*. Cf. *ibid*. *Halbert*'s approach of looking at the tier of review of the judgment, not of individual claims, is consistent with the rationale of *Finley* that collateral review is "even further removed from the criminal trial" than the second tier of direct review. *Finley*, 481 U. S., at 556-557.

One reason for abandoning a precedent is that it "has proved unworkable." See *Hudson* v. *United States*, 522 U. S. 93, 102 (1997). No such argument can be made for overruling *Finley*. The simple bright line drawn by that case, in conjunction with *Ross* and *Halbert*, is eminently workable. The constitutional right to counsel exists at trial and on the first-tier appeal, period. Abandoning the well-established tier approach for a claim-by-claim approach is the path that leads to unworkability. What if the record on appeal (the trial transcript and perhaps the record of a new trial motion) provides some basis for raising an ineffective assistance claim, but a better, more compelling argument for that claim can be made with additional evidence on state collateral review? Would we then say that even though the state collateral review was not the first opportunity to review the claim, it was the first as

a practical matter? Would we say that the additional evidence had transformed the claim so as to make it a new claim? Cf. Transcript of Oral Argument in *Bell* v. *Kelly*, No. 07-1223, p. 13 (2008). Petitioner in this case may seek only a rule applicable to states where ineffective assistance claims are categorically excluded from direct appeal. If such a rule is created, though, the argument will immediately be made that this is a distinction without a difference in the typical case, where the claim cannot be made on appeal as a practical matter.

Although not directed specifically to *Finley*, the argument of *amici* Former State Supreme Court Justices, at pages 15-22, could be read as a claim that the changed circumstance of reduced availability of federal habeas warrants reexamination of the *Finley* precedent. But the availability of a federal backstop never was the basis of *Finley*. Not a word in the opinion even hints at such a rationale. *Finley* has always been understood to negate a constitutional right to counsel for federal prisoners seeking relief under 28 U. S. C. § 2255, where there is no backstop. See, *e.g.*, *United States* v. *Angelone*, 894 F. 2d 1129, 1130 (CA9 1990).

On a related theme, the claim is made that Congress's retraction of federal habeas for state prisoners is a ground to expand federal habeas for state prisoners by allowing litigation of the competence of state habeas counsel. See Brief for Petitioner 20-21. This argument has ominous implications for the separation of powers. The scope of federal habeas for state prisoners is entirely within the power of Congress to prescribe. Congress could, and once did, forbid such use of the writ altogether. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 932 (1998). When Congress directs

that the scope of federal habeas has become excessive and needs to be contracted, courts should not evade that direction by expanding the scope somewhere else, contrary to the body of precedent on which Congress relied when it enacted the limitation. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maples* v. *Thomas*, No. 10-63, pp. 5-17.

An argument might be made that the number of innocent people wrongly convicted is greater than previously realized, and that this is a changed circumstance warranting reconsideration of *Finley*. As discussed in Part I, *supra*, it is far from clear that devoting increased resources to collateral review instead of trial is the optimum solution to this problem. Speculation is a poor basis for overruling a considered constitutional precedent.

An important reason not to overrule a precedent is reliance, and in this case the reliance by legislatures throughout the Nation looms large. As previously discussed in our *Maples* Brief, *supra*, at 13, Congress relied on *Finley* and *Giarratano* in deciding which aspects of the law of habeas corpus it needed to change in AEDPA and which it could leave as they were. At the state level, states have adopted collateral review mechanisms and decided whether to appoint counsel for all indigent prisoners on their first review or to follow the lead of Congress and be more selective. In California, for example, collateral counsel is appointed in all capital cases, see Cal. Govt. Code § 68662, but in noncapital cases counsel must be appointed only if the application survives the initial screening and the court

issues an order to show cause. See *In re Clark*, 5 Cal. 4th 750, 780, 855 P. 2d 729, 748 (1993).[7]

State governments have made these decisions with the understanding that (1) they can create collateral review mechanisms while still retaining control over which cases warrant appointment of counsel, and (2) if they do appoint counsel, the effectiveness of that counsel will not be subject to litigation in federal habeas corpus. Cf. *Finley*, 481 U. S., at 559 ("a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections . . ."); 28 U. S. C. § 2254(i). The cost factor in a mandate to appoint counsel in every case is obvious. Litigating the effectiveness of that attorney in federal habeas also involves a large cost in dollars and finality. Given the standard for an ineffective assistance claim, litigating that claim in federal habeas often amounts to *de facto* litigation of the underlying claim. See, *e.g.*, *Lockhart* v. *Fretwell*, 506 U. S. 364, 369-370 (1993) (no habeas relief for counsel's failure to make meritless claim); *Harrington* v. *Richter*, 562 U. S. __, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624, 642 (2011) (ineffective assistance claim as escape from default rules). The reliance factor therefore weighs heavily against overruling.

Finley is on-point precedent, and the case has not been made that it can be overruled consistently with the doctrine of *stare decisis*. "That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in

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7. The contrary statement in 1 D. Wilkes, State Postconviction Remedies and Relief § 7:38, p. 214 (2009-2010 ed.) is an error.

fact." *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). The implicit call to overrule *Finley* should be rejected.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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