No. 10-1001

In the Supreme Court of the United States

LUIS MARIANO MARTINEZ, PETITIONER

v.

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a prisoner who has received the assistance of counsel at trial and on direct appeal has a constitutional right to the assistance of counsel on collateral review, when such review is the first opportunity for the prisoner to raise a particular claim of error.

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INTEREST OF THE UNITED STATES

This case presents the question whether a state prisoner who is prohibited by state law from raising a claim of ineffective assistance of trial counsel before collateral review has a federal constitutional right to the effective assistance of counsel in presenting that claim in collateral proceedings. Federal courts generally postpone adjudication of ineffective-assistance-of-counsel claims until collateral review, at which time federal prisoners may raise those claims in a motion for relief under 28 U.S.C. 2255 (2006 & Supp. III 2009). See *Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). Federal courts may appoint counsel for indigent Section 2255 movants if "the interests of justice so require," 18 U.S.C.

3006A(a)(2)(B), but federal prisoners are not guaranteed the assistance of counsel in postconviction proceedings. Because federal law treats the appointment of counsel in postconviction proceedings as discretionary rather than mandatory, the United States has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. Petitioner was charged by the State of Arizona with two counts of sexual conduct with a minor under the age of 15. According to the State, on July 10, 1999, petitioner twice had sexual intercourse with his stepdaughter, who was 11 years old at the time. Pet. App. 38a. That morning, the victim called her mother and reported that petitioner "had laid on top of her like adults do" and done "nasty things with her," including putting his "privates in her." 2:08-cv-00785 Docket entry No. (Dkt. No.) 10-2, at 30 (D. Ariz. July 28, 2008). The victim also told an investigating police officer later that day that, after the initial assault in her bedroom, petitioner had pushed her to the kitchen floor and again placed his penis inside of her. *Ibid.* Five days after the assaults, the victim repeated those allegations to a social worker during a videotaped forensic interview. *Id.* at 30-31.

Before trial, however, the victim recanted her accusations, first to family members and then to the same social worker during a second videotaped interview. Pet. App. 38a. Petitioner presented all of that evidence in his defense at trial. *Ibid.* The State nevertheless argued that petitioner was guilty based on the victim's initial accusations; expert testimony on the tendency of child molestation victims to recant; and physical evidence—specifically, skin and semen cells on the victim's

nightgown that matched petitioner's DNA. Dkt. No. 10-2, at 31. After deliberating for eight hours, the jury found petitioner guilty on both counts. Pet. App. 73a. In February 2002, petitioner was sentenced in Arizona Superior Court to consecutive terms of life imprisonment with no possibility of parole for 35 years. *Id.* at 39a.

2. a. On direct appeal, petitioner was represented by court-appointed counsel, Harriette Levitt. Counsel argued that the state prosecutor had committed reversible misconduct; that the verdicts were against the weight of the evidence; and that a new trial was warranted in light of newly discovered evidence, namely, exculpatory statements in the victim's diary. Pet. App. 39a-40a.

b. In April 2002, while his direct appeal was pending, petitioner's counsel (Levitt) filed a notice of postconviction relief in the Arizona Superior Court. Dkt. No. 10-1, at 5-7. Such a notice commences a postconviction proceeding. See Ariz. R. Crim. P. 32.4(a). The Arizona Court of Appeals stayed petitioner's direct appeal pending the conclusion of that postconviction proceeding. Pet. App. 40a.

Although Arizona entitles indigent defendants to appointed counsel for their first postconviction proceeding, see Ariz. R. Crim. P. 32.4(c)(2), petitioner already was represented by the same counsel handling his direct appeal. Under state law, the notice of postconviction relief "must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." Ariz. P. Crim. P. 32.4(a). Petitioner's counsel elected to file the notice within 90 days of the imposition of petitioner's sentence. According to

petitioner (Pet. 4), counsel filed the notice without advising him.

In February 2003, counsel filed a notice informing the court that she had reviewed the record and found no colorable claims for postconviction relief. Pet. App. 4a; see Ariz. R. Crim. P. 32.4(c)(2) ("If counsel determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination."). Counsel requested the full 45 days available under state law for petitioner to file a *pro se* petition. *Ibid.* According to petitioner (Pet. 4), counsel filed that notice without his consent and without informing him of his ability to raise his own claims. In April 2003, after the 45-day period for raising such claims had expired, the Arizona Superior Court dismissed the postconviction proceeding. Pet. App. 4a.

c. In March 2004, following the dismissal of petitioner's first postconviction action, the Arizona Court of Appeals resolved petitioner's direct appeal by affirming his convictions. Pet. App. 40a. The Arizona Supreme Court denied review. *Ibid.*

3. In October 2004, petitioner filed a second notice of postconviction relief in the Arizona Superior Court. After the court denied his request for appointed counsel, petitioner's current counsel filed for relief alleging that trial counsel had been ineffective by failing to present the victim's allegedly exculpatory pretrial statements, to impeach the victim's credibility, and to properly cross-examine the investigating police officer and the State's expert witness on child sexual abuse. In order to excuse his failure to present that ineffective-assistance claim during his initial postconviction proceeding—which was his first opportunity to raise the claim under state law, see *State* v. *Spreitz*, 39 P.3d 525, 527 (Ariz. 2002)—peti-

tioner asserted that his former counsel during that proceeding (Levitt) had herself been ineffective. Pet. App. 41a.

a. The trial court denied relief on two grounds. Pet. App. 68a-75a. First, the court held that petitioner's ineffective-assistance-of-trial-counsel claim was procedurally barred by Arizona Rule of Criminal Procedure 32.2(a), which "preclude[s] * * * relief" on any ground that could have been raised on direct appeal or in any previous postconviction proceeding under Rule 32. See Pet. App. 75a. The court found "that all issues identified by counsel could have been raised in the original" postconviction relief proceeding and "are therefore precluded." *Ibid.*

Second, the court denied the claim on the merits. Having "presided over the trial" and "reviewed the record," the court explained why additional evidence of the victim's recantations would have been cumulative; how trial counsel had effectively cross-examined the State's expert witness on child sexual abuse; and how trial counsel had offered "credible" explanations for the presence of petitioner's semen on the victim's nightgown. Pet. App. 72a-74a. The court concluded that even "if trial counsel had done everything suggested by counsel in this Post Conviction Relief, the result would [not] have changed." *Id.* at 74a.

b. The Arizona Court of Appeals granted review and denied relief. Pet. App. 79a-83a. It agreed with the trial court that petitioner's claim was precluded, because he "could have raised a claim" in his first postconviction proceeding "that trial counsel had been ineffective." *Id.* at 82a. The Arizona Supreme Court denied review. *Id.* at 5a.

4. In April 2008, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241(a) and 2254(a), contending that his trial counsel had provided ineffective assistance.

a. The magistrate judge recommended that the petition be denied and dismissed with prejudice. Pet. App. 37a-67a. In his view, petitioner "ha[d] not shown cause for, nor prejudice arising from, his procedural default of his ineffective assistance of trial counsel claim," *id.* at 58a, nor had petitioner shown "that review of the merits of his claim is necessary to prevent a fundamental miscarriage of justice or that he is factually innocent of the crimes of conviction," *id.* at 65a. The magistrate judge also determined that, even if petitioner's claim were not procedurally defaulted, it should be denied on the merits because the performance of petitioner's trial counsel had been neither deficient nor prejudicial. *Id.* at 64a-65a.

b. The district court adopted in part the magistrate judge's recommendation. Pet. App. 26a-36a. The court held that "[p]etitioner's ineffective-assistance-of-trial-counsel claim is procedurally defaulted." *Id.* at 33a. The court further held that "[p]etitioner's ineffective-assistance-of-post-conviction-relief counsel claim does not show cause to excuse this procedural default," because "there is no right to post-conviction-relief counsel." *Ibid.* The district court did not reach the merits of petitioner's claim that his trial counsel had provided ineffective assistance. *Id.* at 34a.

c. The court of appeals affirmed. Pet. App. 1a-25a. Petitioner argued that the State's procedural bar was not an adequate and independent state-law ground for denying relief and that in any event he had shown cause to excuse his procedural default. *Id.* at 5a. Resolution of those arguments, the court of appeals reasoned, de-

pended on whether petitioner had a constitutional right to assistance of counsel in his first postconviction proceeding. *Id.* at 8a. Surveying this Court's cases concerning the right to counsel, see *id.* at 10a-23a, the court found "no federal constitutional right to counsel in collateral proceedings, even where those post-conviction proceedings constitute the first opportunity for a criminal defendant to present an ineffective assistance of counsel claim," *id.* at 9a.

SUMMARY OF ARGUMENT

A. For the last half-century, this Court has consistently held that the Sixth and Fourteenth Amendments entitle a criminal defendant to the effective assistance of counsel at trial and during an initial appeal. This Court has repeatedly declined, however, to extend the right to counsel to further proceedings—whether those proceedings were direct or collateral. This Court has thus always determined the existence of a right to counsel with respect to the particular stage of the case at issue. Petitioner's proposed approach—*i.e.*, extending the right to counsel to postconviction proceedings whenever a prisoner raises claims that could not have been raised on direct appeal—would be inconsistent with this Court's categorical approach and more generally with principles of due process and equal protection.

B. Petitioner's proposed exception also would create significant practical difficulties for States and the federal government. First, petitioner's rationale reaches well beyond ineffectiveness claims to many other claims that, for factual or procedural reasons, must be or typically are raised on collateral review. Second, because on petitioner's approach an ineffectiveness claim would secure the assistance of counsel on collateral review,

prisoners would have an overwhelming incentive to argue, among their grounds for collateral relief, that their trial, appellate, and even earlier postconviction counsel had been ineffective. Third, recognizing a right to counsel on collateral review would lead to additional litigation concerning what other constitutional protections apply to those collateral proceedings. Finally, petitioner's proposed exception is unnecessary in light of current state and federal law, which provide in various ways that prisoners with colorable claims of ineffective assistance may obtain appointed counsel.

ARGUMENT

PRISONERS WHO HAVE RECEIVED THE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL HAVE NO FEDERAL CONSTITUTIONAL RIGHT TO SUCH COUNSEL ON COLLATERAL REVIEW, EVEN IF COLLATERAL REVIEW IS THE FIRST OPPORTUNITY TO RAISE A PARTICULAR CLAIM OF ERROR

The well-established general rule is that "[t]here is no constitutional right to an attorney in state postconviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). This Court should adhere to that rule, without creating an exception for claims of ineffective assistance of counsel that can be raised for the first time only on collateral review. States can sensibly allocate such claims, which typically require development of a new record, to collateral proceedings without infringing the constitutional right to counsel on a defendant's first appeal as of right.

A. The Sixth And Fourteenth Amendments Require The Effective Assistance Of Counsel During A Criminal Trial And Direct Appeal But Not On Collateral Review

1. This Court has repeatedly held that the right to counsel attaches only to a criminal trial and direct appeal

a. The Sixth Amendment, as applied to the States through the Fourteenth Amendment, provides that the accused "[i]n all criminal prosecutions * * * shall * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. At trial, that constitutional guarantee entitles indigent felony defendants to appointed counsel in either federal or state court. See *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Once the right to counsel attaches, it applies at all phases of the trial proceedings "where substantial rights of a criminal accused may be affected." *Mempha* v. *Rhay*, 389 U.S. 128, 134 (1967); see *United States* v. *Wade*, 388 U.S. 218, 224 (1967) (right to counsel attaches at "critical" pre-trial stages "where the results might well settle the accused's fate and reduce the trial itself to a mere formality").

The Court has further held, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that indigent defendants pursuing their "*first appeal* * * * of right * * * from a criminal conviction" have a right to appointed counsel. *Douglas* v. *California*, 372 U.S. 353, 356 (1963); see *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005) ("[I]n first appeals as of right, States must appoint counsel to represent indigent defendants," which reflects "both equal protection and due process concerns.") (internal quotation marks omitted). This Court, however, has never extended the right to counsel beyond the initial appeal of a defendant's convic-

tion and sentence. See *Ross* v. *Moffitt*, 417 U.S. 600, 602-603 (1974) (holding that the Fourteenth Amendment does not require the appointment of counsel "for discretionary state appeals" to state supreme courts or "for applications for review in this Court"); *id.* at 609-618.

b. Because a defendant is not entitled to counsel at the latter stages of his criminal case (*i.e.*, a discretionary appeal of his conviction or sentence to a State's highest court or this Court), it follows that he is not entitled to counsel beyond his criminal case, once his conviction and sentence have become final. This Court therefore has repeatedly declined to hold "that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987). As the Court explained in *Finley*, its decisions in this context from *Douglas* through *Ross* "establish that the right to appointed counsel extends to the first appeal of right, and no further." *Ibid.* Because, the Court continued, "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Ibid.*

The Court also explained in *Finley* why principles of due process and equal protection do not require the appointment of counsel in postconviction proceedings. Collateral review, the Court noted, "is not part of the criminal proceeding itself, and is in fact considered to be civil in nature." *Finley*, 481 U.S. at 557. Because States are not obliged to provide collateral review at all, "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer" if it elects to make available postconviction remedies. *Ibid.*

Similarly, the Court reasoned that "the equal protection guarantee of 'meaningful access'" does not require appointment of counsel. *Ibid.* Just as the defendant in *Ross* who sought appointed counsel for discretionary review in the state supreme court and this Court already had obtained the benefit of counsel at trial and on direct appeal, so too has a prisoner who requests postconviction relief. *Ibid.* The Court thus concluded that a prisoner's "access to the trial record and the appellate briefs and opinions provide[s] sufficient tools for the *pro se* litigant to gain meaningful access to courts * * * with respect to postconviction review." *Ibid.*

In addition, this Court rejected the premise "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must take." *Finley*, 481 U.S. at 559. As the Court explained, "States have substantial discretion to develop and implement programs to aid prisoners" in obtaining postconviction relief, and thus States may make such remedies available "without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right." *Ibid.*; see *Ross*, 417 U.S. at 610-611.

c. This Court has never recognized any exception to the rule that appointed counsel is not constitutionally required in postconviction proceedings. To the contrary, the Court has applied that rule to postconviction proceedings in state capital cases, see *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *id.* at 14-15 (Kennedy, J., concurring in the judgment), and has repeatedly reaffirmed since *Finley* that prisoners have no constitutional right to counsel on collateral review.

See *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *Mayle* v. *Felix*, 545 U.S. 644, 664 n.8 (2005); *Smith* v. *Robbins*, 528 U.S. 259, 275 (2000); *Coleman*, 501 U.S. at 752; *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991).[1] The lower courts have likewise uniformly declined to recognize a constitutional right to counsel on collateral review, even when such review is the first opportunity for a prisoner to present a particular claim of error. See, *e.g.*, *Mackall* v. *Angelone*, 131 F.3d 442, 449 & n.13 (4th Cir. 1997) (en banc), cert. denied, 522 U.S. 1100 (1998); *People* v. *Ligon*, 940 N.E.2d 1067, 1078-1079 (Ill. 2010), cert. denied, 131 S. Ct. 1698 (2011); *Gibson* v. *Turpin*, 513 S.E.2d 186, 191 (Ga.), cert. denied, 528 U.S. 946 (1999). Petitioner does not point to a single decision of this Court or of any other court finding a federal constitutional right to counsel in postconviction proceedings.

2. Extending the right to counsel to postconviction proceedings on a case-by-case basis would be inconsistent with this Court's categorical approach

Petitioner asks this Court to recognize for the first time a federal constitutional right to the effective assistance of counsel in certain postconviction proceedings. Specifically, petitioner seeks a constitutional right to the "effective assistance of first-tier post-conviction counsel with respect to any ineffective-trial-counsel claim."

[1] In *Coleman*, the Court acknowledged the prisoner's argument for "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." 501 U.S. at 755. The Court did not need to address that argument, however, because the prisoner there did not challenge the effectiveness of counsel in his state habeas proceeding. *Ibid.* Rather, the Court "need[ed] to decide only whether [the prisoner] had a constitutional right to counsel on appeal from the state habeas trial court judgment," and it "conclude[d] that he did not." *Ibid.*

Br. 16; see *id.* 16-19, 23 & n.4. Petitioner's proposed exception, however, is contrary to this Court's consistent practice of determining the right to counsel in criminal cases categorically based on the stage of the proceeding at issue, not case-by-case based on the nature of the claims asserted in that proceeding.

a. For the last half-century, this Court's decisions concerning the right to counsel under the Sixth and Fourteenth Amendments "have been categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general." *Giarratano*, 492 U.S. at 12 (plurality opinion). It was not always so. Under *Betts* v. *Brady*, 316 U.S. 455 (1942), this Court formerly considered on a case-by-case basis whether the absence of counsel had violated the Fourteenth Amendment's guarantee of fundamental fairness. *Id.* at 472-473. The Court, however, rejected that approach in *Gideon*, 372 at 340-345, and indeed "it was the Court's dissatisfaction with the case-by-case approach of *Betts* * * * that led to the adoption of the categorical rule requiring appointed counsel for indigent felony defendants in *Gideon*." *Giarratano*, 492 U.S. at 12 (plurality opinion); see *id.* at 17 (Stevens, J., dissenting).

The Court likewise has applied a categorical approach in determining whether certain pretrial proceedings constitute "critical stages" that require the assistance of counsel. *Wade*, 388 U.S. at 227. In *Wade*, for instance, the Court concluded that a witness's pretrial lineup identification of a defendant categorically constitutes a critical stage requiring the assistance of counsel. *Id.* at 228-233. The Court reached the opposite conclusion in *United States* v. *Ash*, 413 U.S. 300 (1973), holding that a witness's pretrial photographic identification of a

defendant is not such a critical stage, *id.* at 321; again, however, the Court did so categorically, without regard to the facts of any particular identification. And the Court reached the same conclusion for sentencings, regardless of the issues at stake. See *Mempha*, 389 U.S. at 134 (holding that the right to counsel attaches at sentencing in light of "the critical nature of sentencing in a criminal case"). Thus, in determining whether a right to counsel exists in criminal cases, the Court has focused on the stage of the case at issue, not on the circumstances of that stage in any given case.[2]

b. Petitioner rests his position (Br. 16-19, 23-27) on this Court's decisions in *Douglas*, *supra*, and *Halbert*, *supra*. Those decisions, however, adhere to exactly the categorical, stage-based approach that petitioner eschews. In *Douglas*, this Court held that indigent defendants pursuing their "first appeal * * * of right" from a criminal conviction are constitutionally entitled to the representation of counsel. 372 U.S. at 356 (emphasis omitted). The California rule in *Douglas* provided for the appointment of counsel if a state appellate court determined from reviewing the record that counsel would be helpful in presenting a defendant's claims. *Id.* at 355.

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[2] The Court has held that a defendant charged with a misdemeanor has a right to appointed counsel only when the defendant is sentenced to actual imprisonment. See *Alabama* v. *Shelton*, 535 U.S. 654, 657 (2002). That rule depends on the sentence imposed, but it draws a categorical line for prison sentences. In contrast, the Court has adopted a case-by-case inquiry for determining whether the Fourteenth Amendment's Due Process Clause requires the appointment of counsel in parole or probation revocation proceedings. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788-790 (1973); see also *Turner* v. *Rogers*, 131 S. Ct. 2507, 2516-2517 (2011). Petitioner correctly does not contend that postconviction relief proceedings are analogous for appointment-of-counsel purposes to parole or probation revocation proceedings.

That practice was inadequate, the Court reasoned, because a nonindigent defendant could retain counsel and ensure that "the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel." *Id.* at 356. By contrast, for an indigent defendant "the appellate court [was] forced to prejudge the merits" of the case on a "barren record" before the court "[could] even determine whether counsel should be provided." *Ibid.*

The Court specifically noted, however, that its holding "did not extend beyond *the stage in the appellate process* at which the claims have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added); see *Finley*, 481 U.S. at 555 ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."). Prisoners like petitioner who seek postconviction relief stand in a far different circumstance than indigent defendants pursuing an initial appeal of right. Such prisoners have had the benefit of counsel at trial and on appeal, and thus they have "access to the trial record and the appellate briefs and opinions" in order to pursue collateral relief. *Id.* at 557. They are not pursuing their "*one and only appeal* * * * as of right." *Douglas*, 372 U.S. at 357 (emphasis added).

Petitioner's reliance on *Halbert* is equally misplaced. In that case, the Court considered whether "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access" to first-tier discretionary review in a state appellate court. 545 U.S. at 610. The Court recognized that the question was one of "classification," *i.e.*, whether Michigan's system of discretionary first-tier appellate review required the appointment of coun-

sel under *Douglas* (because it was the initial opportunity for an appellate court to review a defendant's conviction and sentence) or did not require the appointment of counsel under *Ross* (because appellate review was discretionary rather than of right). *Id.* at 609-610; see *id.* at 628 (Thomas, J., dissenting) ("Michigan's system bears some similarity to the state systems at issue in both *Douglas* and *Ross*."). The Court concluded that *Douglas* controlled, reasoning that the "intermediate appellate court looks to the merits" of defendants' claims and "indigent defendants pursuing first-tier review * * * are generally ill equipped to represent themselves." *Id.* at 617.

Again, however, the Court's reasoning and result were categorical. It held that counsel must be appointed for all plea-convicted defendants who request first-tier, discretionary appellate review, without regard to the nature of the claims that those defendants seek to raise on appeal. And the Court rested its holding on the fact that "[a] first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review." *Halbert*, 545 U.S. at 619. Indeed, the Court specifically contrasted that situation with *Ross*, because "a defendant seeking State Supreme Court review following a first-tier appeal as of right earlier had the assistance of appellate counsel." *Ibid.* Thus, as the Court explained, "[t]he attorney appointed to serve at the intermediate appellate court level will have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research," and in addition "[t]he defendant seeking second-tier review may also be

armed with an opinion of the intermediate appellate court addressing the issues counsel raised." *Ibid.*

The contrast that the Court drew in *Halbert* between "first-tier" and "second-tier" review is significant for two reasons. As an initial matter, the Court defined those "tier[s]" by looking to the stage of the appellate proceeding at issue, *i.e.*, whether the defendant was seeking review in an intermediate appellate court (first-tier review) or a state supreme court (second-tier review). The Court did not describe first-tier and second-tier review as claim-specific, depending on whether a particular claim had been previously reviewed by an appellate court. A defendant who is represented by counsel during a first-tier appeal as of right, and who then requests discretionary review by a state supreme court, is seeking second-tier review—even if he raises new claims in his state supreme court petition. This Court has never suggested that the right to counsel can attach to some claims (but not others) at a given stage of a criminal proceeding. Rather, the Court has always found that the right to counsel attaches to some stages (but not others) of the criminal proceeding itself.

Moreover, prisoners seeking postconviction relief are more similarly situated to defendants seeking second-tier than first-tier appellate review. Such prisoners are not seeking "the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert*, 545 U.S. at 619; see *Douglas*, 372 U.S. at 357. To the contrary, such prisoners already have received the benefit of appointed counsel following a first-tier appeal and they may have received second-tier appellate review as well. As a result, such prisoners face collateral review armed at a minimum with the trial record, counsel's appellate briefing, and the disposition of the

case by the state intermediate court. Although Arizona prisoners must present one category of claims—that their trial counsel were ineffective—on collateral review, they still stand in a far different position than indigent defendants seeking first-tier review of their convictions and sentences. See *Halbert*, 545 U.S. at 619-620.

3. Due process and equal protection principles do not support extending the right to counsel to postconviction proceedings that are the first opportunity for a prisoner to raise a particular claim of error

Petitioner does not contend that a prisoner seeking postconviction relief is similarly situated as a general matter to an indigent defendant seeking first-tier review of his conviction and sentence. Rather, petitioner contends (Br. 19) that he is similarly situated with respect to the one claim of error (*i.e.*, ineffectiveness of trial counsel) that he was required to raise on collateral review under state law. In other words, petitioner asserts "a due process/equal protection right to counsel" that attaches—claim-by-claim—to any claim raised on collateral review that could not have been previously presented with the assistance of counsel to an appellate court. *Id.* at 19-20, 23. As explained above, that rule is not grounded in any of this Court's precedents concerning the right to counsel. Nor is it grounded more generally in either due process or equal protection principles.

a. Beyond a criminal defendant's initial appeal, the Due Process Clause requires only that a State's procedures "comport[] with fundamental fairness." *Finley*, 481 U.S. at 556. As the Court explained in *Finley*, because States are not required to provide postconviction procedures, fundamental fairness does not oblige States to appoint counsel as part of any such procedures that it

does provide. *Id.* at 557 ("States have no obligation to provide [collateral] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.") (internal citation omitted); cf. *Ross*, 417 U.S. at 611 ("The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way."). "Unfairness results," the Court explained in *Ross*, "only if indigents are singled out by the State and denied meaningful access to the appellate system," a question that "is more profitably considered under an equal protection analysis." *Ibid.*

b. Under that analysis, a State must ensure that indigent defendants "have an adequate opportunity to present their claims fairly" within a system of review that is "free of unreasoned distinctions." *Ross*, 417 U.S. at 612 (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966)); see *Douglas*, 372 U.S. at 356 ("[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination.") (internal quotation marks omitted). As the Court recognized in both *Finley* and *Halbert*, a State does not act arbitrarily in distinguishing, for purposes of the right to counsel, between a defendant's initial appeal and subsequent proceedings. *Finley*, 481 U.S. at 557; *Halbert*, 545 U.S. at 619. A prisoner initially requesting collateral relief, like a defendant initially appealing his conviction or sentence, may present a claim that has not yet been subject to appellate review, but the prisoner is not "as ill equipped * * * to represent himself in investigating and presenting such a claim." Pet. Br. 18. The prisoner has already obtained what "the defendants in

Douglas and *Halbert*" had not—namely, the benefit of a counseled direct appeal. *Ibid.*

Petitioner argues (Br. 18-19, 26) that because under state law the direct appeal will not have addressed a claim that trial counsel was ineffective, counsel necessarily would be helpful in developing such a claim. The Court recognized in *Ross*, however, that counsel would "prove helpful" in preparing petitions for discretionary review and thus that indigent defendants were "somewhat handicapped" by proceeding without counsel. 417 U.S. at 616. But that "relative handicap," the Court reasoned, was "far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*." *Ibid.* Similarly here, the likelihood that counsel would aid in the presentation of ineffectiveness claims on collateral review "does not mean that the service is constitutionally required." *Ibid.*; cf. *Lewis* v. *Casey*, 518 U.S. 343, 354 (1996) (noting that the Constitution does not require "permanent provision of counsel").

Petitioner contends that prisoners cannot use the trial record to present ineffectiveness claims, because such claims "typically depend on non-record evidence (such as testimony by trial counsel, or by fact or expert witnesses who were not called at trial)." Br. 19. But that is precisely why a State may decide that ineffectiveness claims are better resolved in collateral proceedings, where prisoners have never had a constitutional right to counsel. As petitioner recognizes (*ibid.*), direct review permits a prisoner to present claims of error based on the record developed at trial. Appellate courts typically do not resolve claims based on facts outside the record—a practice as familiar now as at the time of *Douglas*, *Ross*, and *Finley*. By contrast, collateral review

generally permits the prisoner to present new claims—such as claims involving the ineffectiveness of counsel or the failure to disclose material exculpatory evidence—that typically are not based on the trial record. See Resp. Br. 19. Those types of claims by their nature represent a collateral attack on the direct proceedings, and thus they have traditionally been brought in postconviction proceedings where no constitutional right to the effective assistance of counsel has ever been recognized.[3]

This Court's decision in *Massaro* v. *United States*, 538 U.S. 500 (2003), demonstrates why requiring adjudication of ineffectiveness claims on collateral review is not arbitrary for equal protection purposes. As this Court explained in *Massaro* with respect to federal prisoners, collateral review "is preferable to direct appeal for deciding claims of ineffective assistance." *Id.* at 504. Returning the case to the trial court allows for preparation of a record containing "the facts necessary to determining the adequacy of representation during an entire trial," and ordinarily allows for the claim's resolution by the "district judge who presided at trial * * * [and who] should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial." *Id.* at 505-506; see

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[3] Petitioner is correct (Br. 25) that a defendant could elect to proceed simultaneously with a direct appeal and collateral review. But that decision does not alter the constitutional analysis: the defendant has a right to counsel in his direct appeal but not in any collateral proceeding, whatever the sequencing of those stages of the case. Here, for instance, petitioner proceeded simultaneously with a direct appeal and collateral review, although he could have initiated his first postconviction relief proceeding "within thirty days after the issuance of the order and mandate in the direct appeal." Ariz. R. Crim. P. 32.4(a).

id. at 505 ("The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.").

The Court in *Massaro* reached the conclusion that "in most cases a motion brought under [28 U.S.C.] 2255 is preferable to direct appeal for deciding claims of ineffective assistance," 538 U.S. at 504, even though federal prisoners are not guaranteed the assistance of counsel in Section 2255 proceedings, see 18 U.S.C. 3006A(a)(2)(B) (providing for the appointment of counsel if "the interests of justice so require"). States—which need not provide postconviction procedures at all and which retain "substantial discretion to develop and implement" such procedures, *Finley*, 481 U.S. at 559—are entitled to adopt the same system as Congress and this Court. Although States may not deprive defendants of an adequate opportunity to challenge their convictions or sentences by arbitrarily channeling claims into postconviction proceedings, petitioner correctly does not allege that is what Arizona did here. To the contrary, Arizona provided petitioner with adequate direct review and reasonably required petitioner to raise his claim of ineffective assistance on collateral review.

B. Extending The Right To Counsel To Certain Postconviction Proceedings Would Create Serious And Unnecessary Administrative Difficulties

In addition to being inconsistent with this Court's cases and principles of due process and equal protection, petitioner's proposed exception—*i.e.*, extending the right to counsel to collateral review for claims that could not have been raised on direct appeal—would create

significant practical difficulties for States and the federal government that petitioner largely fails to address.

1. Petitioner's proposed exception would reach well beyond claims of ineffective assistance of trial counsel.

a. Petitioner insists (Br. 16, 18-19) that his proposed exception is a narrow one: a right to effective assistance of postconviction counsel only with respect to a claim that trial counsel was ineffective, and even then only when state law requires such a claim to be raised on collateral review. But petitioner's rationale extends far beyond claims that trial counsel was ineffective. According to that rationale, the right to counsel attaches to any claim challenging a defendant's conviction or sentence that could not previously have been subject to appellate review. See *id.* at 18-19, 23; *id.* at 19 ("[I]n Arizona a first post-conviction relief proceeding effectively serves as the first appeal for any ineffective-assistance-of-trial-counsel claim."). If that rationale were correct, a right to counsel would attach to a host of other claims that, for factual or procedural reasons, must be or typically are raised on collateral rather than direct review.

For instance, a defendant's claim that *appellate* counsel was ineffective cannot be raised until that appeal has concluded. Similarly, claims of alleged violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), "may not surface until after the direct review is complete." *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting). In addition, commentators have advanced petitioner's same rationale in arguing that a right to counsel attaches to claims based on constitutional rules that this Court announces after a defendant's conviction and sentence have become final. See Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*,

60 Hastings L.J. 541, 579 (2009); 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 7.2e (6th ed. 2011). If petitioner were to prevail in this case, it would portend years of litigation over a question that is currently settled, *i.e.*, the extent to which a right to counsel extends beyond a defendant's trial and direct appeal.

b. The breadth of petitioner's proposed exception is highlighted by the real-world consequences of appointing counsel. Petitioner does not propose that counsel represent a prisoner in postconviction proceedings only with respect to the prisoner's ineffectiveness-of-trial-counsel claim. Rather, appointed counsel would represent a prisoner with respect to *all* of his claims and thus would generally aid the prisoner in his request for collateral relief. On petitioner's apparent view, postconviction counsel could expand a petition to include defaulted claims excused by the ineffective assistance of counsel, see *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000), or "winnow[] out weaker arguments" and focus on stronger claims, *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see, *e.g.*, *Dodd* v. *United States*, 614 F.3d 512, 514 (8th Cir. 2010) (appointed counsel filed amended postconviction motion that narrowed and organized *pro se* claims). An ineffectiveness claim therefore would become a gateway to counsel for collateral review more generally.

2. Petitioner's proposed exception would generate extensive additional litigation on the effectiveness of trial, appellate, and postconviction counsel

a. Because on petitioner's approach an ineffectiveness claim would secure the assistance of counsel on collateral review, prisoners would have an overwhelming

incentive to argue, among their grounds for collateral relief, that their counsel at trial and on direct appeal had been ineffective. Claims of ineffective assistance have long been among the most common claims raised by state prisoners in both state and federal habeas proceedings. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 7 (1995) (Hanson); Victor E. Flango, *Habeas Corpus in State and Federal Courts* 47 (1994) (Flango). Recent research indicates that half of federal habeas petitions by state prisoners include an ineffective-assistance claim. See Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 28 (2007) (King); Flango 47.[4] Petitioner's proposed exception would thus be anything but narrow, and it would only grow broader if raising an ineffectiveness claim carried with it the right to counsel. Simply put, petitioner's exception would swallow the rule that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman*, 501 U.S. at 752 (citations omitted).

b. Nor will the additional litigation be limited to the effectiveness of prisoners' trial and appellate counsel. Prisoners will also challenge the effectiveness of their postconviction counsel. Just as petitioner argues that he

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[4] These studies examine federal habeas petitions filed by state prisoners under 28 U.S.C. 2254. Similar evidence examining federal postconviction motions filed by federal prisoners under 28 U.S.C. 2255 (2006 & Supp. III 2009) is not readily available. If anything, however, these studies underestimate the frequency with which federal prisoners raise claims of ineffective assistance, in light of *Massaro* and the fact that law-of-the-case principles bar claims from being relitigated in most Section 2255 proceedings, see *Davis* v. *United States*, 417 U.S. 333, 342 (1974).

has a constitutional right to effective counsel in his "first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged," other prisoners will claim the same right in a *second* state postconviction proceeding—because that will be "the first forum" in which they can challenge the effectiveness of their first postconviction counsel. *Bonin* v. *Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993). That logic knows no end: prisoners can claim a right to counsel in any postconviction proceeding by challenging the effectiveness of their previous postconviction counsel. Petitioner's approach thus raises the specter "of an infinite continuum of litigation in many criminal cases." *Ibid.*; see *Breard* v. *Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996), aff'd, 134 F.3d 615 (4th Cir.), cert. denied, 523 U.S. 371 (1998).

Petitioner acknowledges that this risk of protracted litigation exists "in the abstract," although he attempts to identify "theoretical and pragmatic reasons" why the risk will not come to pass. Br. 29. None withstands scrutiny. Petitioner argues that there is no right to counsel in a second postconviction proceeding because that would require "second-tier review of the underlying ineffective-trial-counsel claim." Br. 30. But on petitioner's theory, what matters for appointment-of-counsel purposes is whether a postconviction proceeding is the initial opportunity to raise a particular "claim," *i.e.*, "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). A second postconviction proceeding would be the initial opportunity for a prisoner to assert as a "basis for relief" that his first postconviction counsel had been ineffective (by failing to argue, in turn, that the prisoner's trial or appellate counsel had been inef-

fective, which would be the basis for setting aside the state court judgment). Petitioner therefore lacks any principled basis for cutting off the continuum after the first stage of postconviction proceedings.

Petitioner argues that even if litigation *ad infinitum* is "theoretically possible," it is not practically likely because prisoners will have difficulty securing counsel or their requests for relief will be barred by state or federal restrictions on the availability of postconviction relief. Br. 32-34. The former point provides no limit if, as explained above, the logic of petitioner's position would require the appointment of counsel. Whether the latter point is of consequence depends on a number of legal questions that petitioner leaves unanswered. For instance, petitioner does not address whether a habeas application that claims ineffective assistance of first postconviction counsel qualifies as a "second or successive" application under 28 U.S.C. 2244(b) or similarly-worded state provisions—even though that claim could not have been raised in the first habeas application. And as petitioner recognizes, the one-year federal statute of limitations in 28 U.S.C. 2244(d) "is tolled while a timely-initiated state post-conviction relief proceeding is pending," Br. 35, which diminishes the force of petitioner's argument that state or federal statutes of limitations will prevent his new constitutional rule from being overly burdensome in practice.

3. Petitioner's proposed exception also would generate additional litigation on the constitutionality of postconviction procedures

Although petitioner argues that state statutes of limitations will mitigate the practical consequences of his new constitutional rule, elsewhere he states that "one

would hope *and expect* that Arizona will amend [its] time limit for the commencement of a second post-conviction proceeding to challenge the effectiveness of first post-conviction counsel." Br. 33 n.11 (emphasis added). Petitioner's expectation highlights that recognizing even a limited right to counsel on collateral review would require this Court to decide what other constitutional protections apply to those collateral proceedings. In *Finley*, for instance, the Court held that state-appointed postconviction counsel was not required to comply with the procedures set forth in *Anders* v. *California*, 386 U.S. 738 (1967), but the Court's holding in *Finley* was predicated on finding no underlying constitutional right to counsel in postconviction proceedings generally. See 481 U.S. at 555-556. To the extent that the right to counsel attaches to collateral review, prisoners will contend that postconviction counsel must adhere to the *Anders* framework.

Likewise, some States and the federal government require that courts screen postconviction petitions for frivolity before appointing counsel. See *infra*, p. 31. Petitioner does not say whether such procedures would survive constitutional scrutiny. But he does rely heavily (Br. 16-19, 23-27) on this Court's decision in *Douglas*, which invalidated a California law providing for the appointment of counsel only if a state appellate court determined from reviewing the record that counsel would be helpful in presenting a defendant's claims. 372 U.S. at 355-356. Petitioner's rule thus would invite litigation over considered legislative judgments about the nature of counsel's role on collateral review.

At the least, petitioner's proposed rule would encourage States to alter their postconviction procedures in ways adverse to prisoners. For instance, petitioner con-

tends (Br. 18, 27) that the present case is similar to *Douglas* and *Halbert*, because Arizona trial courts consider requests for postconviction relief on their merits. That suggests a different result if a State were to make postconviction review turn on factors other than simply the merits of requests for relief. More importantly, although Arizona appoints counsel as of right for the first postconviction proceeding, other States appoint counsel only in certain circumstances—as, for instance, upon a showing that the prisoner has a substantial or nonfrivolous claim. Faced with the choice between allocating further scarce resources to collateral review and diminishing or even eliminating the opportunity for prisoners to obtain such review, States might choose the latter.[5]

4. Petitioner's proposed exception is unnecessary in light of current state and federal law

a. Petitioner suggests that in the absence of a right to counsel for "first-tier review of any federal constitutional claim," States could channel all such claims into

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[5] Petitioner incorrectly argues (Br. 20) that prisoners would be better off if States eliminated postconviction review, because then prisoners could proceed to federal habeas without facing problems of exhaustion or procedural default. Arizona law, however, provides all prisoners with the right to appointed counsel for an initial postconviction proceeding; federal law does not. Prisoners like petitioner thus unquestionably would be harmed, and prisoners in other States would not be helped: they would have to do the same thing in federal habeas as in state habeas, *i.e.*, litigate ineffectiveness claims without guaranteed assistance from counsel. Petitioner points (*ibid.*) to the restrictive standards for federal habeas corpus review of claims previously adjudicated in state court. Although those standards would not apply if a State eliminated postconviction review, that State's prisoners still would have to litigate ineffectiveness claims in federal habeas without guaranteed assistance from counsel.

postconviction proceedings. Br. 24. States have not done so in the last quarter-century, even as this Court and the lower courts have uniformly found no right to counsel on collateral review. That should not be surprising, because States have no incentive to limit direct appeals to state claims and to compel prisoners to seek state and federal collateral review of federal constitutional claims. To the contrary, States have an overriding interest in securing the finality of their criminal convictions. See *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998) (noting that limits on federal habeas relief reflect "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system'") (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)).

In any event, it is uncertain whether a State with a functioning appellate court system that hears state constitutional claims could validly discriminate against all analogous federal constitutional claims. See *Howlett* v. *Rose*, 496 U.S. 356, 367-374 (1990); *Martinez* v. *California*, 444 U.S. 277, 283 n.7 (1980) ("[W]here the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim."); but cf. *Haywood* v. *Drown*, 129 S. Ct. 2108, 2118-2133 (2009) (Thomas, J. dissenting) (arguing that, consistent with the Supremacy Clause, a State may place certain federal claims outside the subject-matter jurisdiction of its courts). And although it is certain that a State may not arbitrarily channel claims into postconviction proceedings, see *supra*, pp. 19-22, Arizona has not done that here, and petitioner does not contend otherwise.

b. Petitioner also suggests (Br. 35) that absent a right to counsel, Arizona defendants will be left without

an adequate remedy for the ineffective assistance of trial counsel. In fact, Arizona appoints counsel to all indigent defendants for their first post-conviction proceeding. Ariz. R. Crim. P. 34.2(c)(2). Many other States do the same. See, *e.g.*, Alaska Stat. 18.85.100(c) (2010); Conn. Gen. Stat. Ann. § 51-296(a) (West 2005); Me. R. Crim. P. 69, 70(c); N.C. Gen. Stat. § 7A-451(a)(2) (2007); N.J. Ct. R. 3:22-6(b); R.I. Gen. Laws § 10-9.1-5 (1997); Tenn. Code Ann. § 8-14-205 (2002). Other States appoint counsel upon a showing that the prisoner has a substantial or nonfrivolous claim, see, *e.g.*, Kan. Stat. Ann. § 22-4506 (1995); N.M. Dist. Ct. R. Crim. P. 5-802; *Jensen* v. *State*, 688 N.W.2d 374, 378 (N.D. 2004); or if an evidentiary hearing or discovery is necessary, see Ky. R. Crim. P. 11.42(5); La. Code Crim. Proc. Ann. art. 930.7(C) (1990); Mich. R. Crim. P. 6.505(A); S.C. R. Civ. P. 71.1(d). Even in States that do not automatically provide counsel for postconviction proceedings in certain circumstances, counsel may be appointed at the discretion of the trial court or the Public Defender. See, *e.g.*, Ala. Code § 15-12-23 (LexisNexis Supp. 2010); Ark. R. Crim. P. 37.3(b); Idaho Code Ann. § 19-4904 (2004); Ind. R. Post Conviction Remedies 1 § 9(a); Mass. R. Crim. P. 30(c)(5); Neb. Rev. Stat. Ann. § 29-3004 (LexisNexis 2009); Wash. R. App. Proc. 16.15(h).[6] As those laws demonstrate, States provide various ways in which prisoners with colorable claims of ineffective assistance can obtain counsel on collateral review. Petitioner does not even attempt to show that his one-size-fits-all constitutional mandate is necessary in order to ensure that pris-

[6] Two States have not clearly addressed whether counsel may be discretionarily appointed in postconviction proceedings in certain circumstances. See *Willis* v. *Price*, 353 S.E. 2d 488, 489 (Ga. 1987); *Morris* v. *State*, 765 N.W.2d 78, 81 (Minn. 2009).

oners with colorable claims of ineffective assistance obtain adequate judicial review.

At the federal level, district courts may appoint counsel whenever "the interests of justice so require," 18 U.S.C. 3006A(a)(2)(B), and they must do so whenever an evidentiary hearing is ordered or it is necessary for effective discovery, see Rules 6(a) and 8(c), *Rules Governing Section 2254 Cases in the United States District Courts*; Rules 6(a) and 8(c), *Rules Governing Section 2255 Proceedings For The United States District Courts*. It is true that federal courts appoint counsel in relatively few postconviction proceedings, and thus the bulk of federal prisoners pursue collateral relief *pro se*. See Hanson 14; Flango 47; Richard Faust, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637, 688 (1991). But that is because the vast majority of federal prisoners do not present colorable claims for relief. Indeed, recent research indicates that fewer than one percent of federal habeas petitions filed by state prisoners are successful. See King 9.[7]

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[7] The rate of success in capital cases is significantly higher: approximately twelve percent of habeas petitions in capital cases are successful. See King 10. All but seven States recognize a right to counsel for the first postconviction proceeding in capital cases. See 1 Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief* § 1:5 (2010). Of those seven States, two do not permit capital punishment, and the remaining five States appoint counsel for postconviction review in capital cases in the same circumstances that they appoint counsel for such review in noncapital cases. See Ala. Code § 15-12-23 (LexisNexis Supp. 2010); Del. Super. Ct. R. Crim. P. 61(e)(1); *Willis* v. *Price*, 353 S.E.2d 488, 489 (Ga. 1987); Neb. Rev. Stat. Ann. § 29-3004 (LexisNexis 2009); *State* v. *Hall*, 908 A.2d 766, 770 (N.H. 2006). Petitioner does not contend that capital defendants lack legal representation in postconviction proceedings, including their initial requests for postconviction relief.

Petitioner's approach therefore promises a dramatic shift of resources to state and federal habeas review, without any showing of a corresponding benefit to the postconviction review system. See Nancy J. King & Joseph L. Hoffmann, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 Miss. L. J. 433, 437 (2008) (arguing based on recent statistical evidence that "[t]he cost of post-conviction review squanders [scarce] state and federal criminal justice dollars, instead of spending them where they are needed most"). Services for indigent defendants are already stretched thin, see, *e.g.*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 Harv. L. Rev. 1731, 1731, 1733-1735 (2005), and postconviction filings have steadily increased for the last three decades, see, *e.g.*, John Scalia, U.S. Dep't of Justice, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* 2 tbl. 1 (2002); Administrative Office of U.S. Courts, *Judicial Business of the United States Courts* 144-145 tbl. C-2 (2010). Petitioner's proposed exception is thus not simply unnecessary but unwise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2011