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No. 10-1001

In The Supreme Court of the United States

LUIS MARIANO MARTINEZ,

PETITIONER,

V.

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 FOR THE STATES OF WISCONSIN, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WYOMING, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first collateral proceeding, has a federal constitutional right to effective assistance of first collateral-review-counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

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INTEREST OF AMICI CURIAE

This case implicates several important interests of the States that have signed on to this amicus brief. Those interests include the finality of state court convictions, States' ability to develop and carry out procedures for collateral challenges without undue federal interference, and States' discretion to target criminal justice resources in ways that most effectively insure that the guilty are convicted and the innocent are not.

The States have carefully developed rules and procedures for convicted defendants to raise collateral challenges, in the shadow of decisions like *Pennsylvania v. Finley*, 481 U.S. 551 (1987), where this Court held that there is no right to collateral-review-counsel. Creation of the right to collateral-review-counsel Petitioner proposes would upset States' collateral procedures by effectively overruling *Finley*.

A decision in Petitioner's favor would undermine the finality of state convictions, something in which States have a keen interest. It would open the door for what the Ninth Circuit has called an "infinite continuum" of collateral attacks. *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). And it would create a way in capital States for defendants sentenced to death to delay their punishment, potentially indefinitely.

Creation of the right to collateral-review-counsel Petitioner proposes would also interfere with States' ability to target limited criminal justice resources where they will be the most effective in providing fair, constitutional procedures at the trial court and direct appeal levels. States would lose the discretion they currently have to determine whether and when to appoint collateral-review-counsel. They would have to furnish collateral-review-counsel, possibly in all collateral cases. They would also have to furnish the courts and prosecutors to handle the ineffective assistance of collateral-review-counsel claims that would inevitably follow.

Many States are in economic crisis and are not in a position to provide additional resources to furnish the right to collateral-review-counsel. They would be forced to divert resources from trials and direct appeals to collateral proceedings, despite this court's repeated recognition that trials and direct appeals play a significant role in the fact-finding process before convictions are final that collateral proceedings do not. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Finley*, 481 U.S. at 556-57; *Douglas v. California*, 372 U.S. 353 (1963). The likely result is that collateral challenges will increase and the cost of those challenges will increase while providing no additional overall increase in the correctness of validity of state court proceedings.

These interests, coupled with a belief that this court's precedent does not support Petitioner's argument, lead Amici to urge this Court to reject

Petitioner's invitation to create a right to collateral-review-counsel.

SUMMARY OF ARGUMENT

Petitioner seeks a much broader right to collateral-review-counsel than he acknowledges. He is effectively seeking to overturn *Finley*, in which this Court held that there is no such right. He advocates for a right to collateral-review-counsel that could not be limited to ineffective-assistance-of-trial-counsel claims and that could lead to a never-ending chain of collateral proceedings.

The ultimate effect of a decision in Petitioner's favor could be a lessening of the quality of representation defendants receive at trial and on direct appeal. States, which are in economic crisis, may have to draw upon resources from the trial and appellate levels to furnish the right to collateral-review-counsel. They would no longer have discretion to choose when to appoint collateral-review-counsel or how to best distribute criminal justice resources.

This court has always based the right to counsel on the importance of trial and direct appeal to the fact-finding process before convictions are final. *See Evitts*, 469 U.S. 387; *Douglas*, 372 U.S. 353. It has not extended the right to counsel to collateral proceedings precisely because such proceedings are not part of that process. *Finley*, 481 U.S. at 556-57. This court's concerns about ensuring that all

defendants have full access to the fact-finding process before convictions are final are not present here, anymore than they are when litigants bring a range of other claims in collateral proceedings that cannot be brought on direct appeal.

The scope of what Petitioner seeks is underscored by a consideration of how States would be affected by a decision in Petitioner's favor. Amici provide a survey of state collateral procedures and rules concerning the appointment of counsel and discuss how States would be affected by a decision in Petitioner's favor. Of particular note is how the States that always provide counsel to pursue ineffective-assistance-of-trial-counsel claims would be affected. These States already provide what Petitioner proposes. But they would be faced with the possibility of an "infinite continuum" of collateral litigation, as litigants challenge the effectiveness of tier-after-tier of collateral-review-counsel.

Statistics from Wisconsin hint at the amount of litigation that would be generated from the right to collateral-review-counsel Petitioner proposes. Wisconsin allows defendants to raise ineffective assistance of trial counsel claims on direct appeal. Approximately 25% of Wisconsin appellate courts' criminal case load concerns the effectiveness of counsel in collateral proceedings despite the opportunity to present ineffective-assistance-of-trial-counsel claims on direct appeal. These statistics would increase if litigants were then able to

challenge the effectiveness of collateral-review-counsel beyond the first collateral proceeding.

The effects of a decision in Petitioner's favor could be more pronounced in capital States. Litigants facing the death penalty have an incentive to delay punishment for as long as possible. Creation of the right to collateral-review-counsel Petitioner proposes—and the possibility of an "infinite continuum" accompanying it—would provide such litigants a way of doing just that.

ARGUMENT

I. PETITIONER IS SEEKING A NEW RIGHT TO COLLATERAL-REVIEW-COUNSEL, NOT AN EXCEPTION TO THE RULE THAT NO SUCH RIGHT EXISTS.

This Court held in *Douglas v. California*, 372 U.S. 353 (1963), that defendants have a right to counsel in a first appeal as of right. It refused to extend the right to collateral proceedings in *Pennsylvania v. Finley,* 481 U.S. 551, 559 (1987).

Without acknowledging *Finley*, Petitioner claims that he had a right to counsel in Arizona's collateral proceeding because it was his first opportunity to raise an ineffective-assistance-of-trial-counsel claim. He proposes a constitutional right to collateral-

review-counsel for ineffective-assistance-of-trial-counsel claims.

But, when Petitioner's argument is taken to its logical conclusion, it becomes apparent that the right to collateral-review-counsel could never be limited. The right would, as the court of appeals recognized, "swallow the general rule" that there is no right to collateral-review-counsel. *Martinez v. Schriro*, 623 F.3d 731, 742 (9th Cir. 2010).

A. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS.

Petitioner's proposed rule cannot be limited to the right to collateral-review-counsel for ineffective-assistance-of-trial-counsel claims that cannot be raised on direct appeal. There are other claims that cannot be raised on direct appeal including:

- Claims involving evidence that is not discovered until after direct appeal.

- *Brady*[1] violation claims that do not come to light until after direct appeal.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

- Claims based on DNA and other scientific advancements that occur after direct appeal.[2]

- Claims that require fact-finding, in States that prohibit such fact-finding on direct appeal.

- Claims based on rights that are recognized and made retroactive after direct appeal.

- Ineffective assistance of appellate counsel claims.

There is no principled basis for recognizing the rule Petitioner proposes but not these other claims. The other claims can be just as important for avoiding unfair or wrongful convictions as ineffective assistance of trial counsel claims.[3] Further, the other claims can be just as difficult to pursue as ineffective assistance of trial counsel claims and often require the same type of evidentiary hearings.

B. THERE IS NO PRINCIPLED WAY TO LIMIT THE RIGHT TO COLLATERAL-REVIEW-COUNSEL TO A SINGLE COLLATERAL REVIEW.

Petitioner's rationale paves the way for a never-ending series of collateral attacks in which the effectiveness of the first collateral-review-counsel is

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[2] *See e.g.*, *District Attorney's Office For The Third Judicial District v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308 (2009).

[3] *See, e.g.,* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591 (Winter 2009).

challenged in a second collateral proceeding, the effectiveness of second collateral-review-counsel is challenged in a third collateral proceeding, and so on.

The Ninth Circuit discussed the possibility of a never-ending series of ineffective-assistance-of-collateral-review-counsel claims when rejecting a claim similar to Petitioner's:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. . . . Because any Sixth Amendment violation constitutes cause, *McCleskey,* 499 U.S. at ----, 111 S. Ct. at 1470, federal courts would never be able to avoid reaching the merits on any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's

> competence is alleged to have been defective. As a result, the "exception" would swallow the rule. To obviate such an absurdity, we hold that the protections of the Sixth Amendment right to counsel do not extend to either state collateral proceedings or federal habeas corpus proceedings.

Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993)(citations omitted).

Petitioner claims that such a hall of mirrors is an illusion. But he does not provide any meaningful basis for distinguishing between ineffective-assistance-of-trial-counsel claims and ineffective-assistance-of-collateral-review-counsel claims (or suggest, as such a distinction would almost certainly require, that a litigant would not have a right to effective counsel at the collateral stage).

Petitioner claims that a defendant's "first post-conviction counsel could not be ineffective, under *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000), unless his or her deficient performance resulted in prejudice" (Petitioner's Br. at 29-30). *Robbins* is not about *Strickland*'s[4] prejudice standard nor the right to collateral-review-counsel. The right to counsel to pursue an ineffective-assistance claim does not depend on whether the claim would succeed. Indeed, tying the appointment of counsel to such vetting is

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

precisely what this Court rejected in *Douglas*, 372 U.S. at 354-55, and *Halbert v. Michigan*, 545 U.S. 605, 617-18 (2005).

Petitioner claims that "it is unlikely in the extreme that any defendant could work his way through more than two tiers of State post-conviction review without running afoul of state and federal statutes of limitations" (Petitioner's Br. at 32). He provides no empirical support for this statement. If state statutes of limitations are like the federal statute of limitation in 28 U.S.C. § 2244(d)(1), they are tolled during the pendency of "any properly filed . . . post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). A statute of limitations that runs only between the various tiers would do little to stem the "infinite continuum of litigation in many criminal cases" about which the Ninth Circuit warned. *Bonin*, 999 F.2d at 429. A petitioner who diligently files a new petition alleging ineffective assistance of the next tier counsel within two or three months of a previous final determination could go through four to six tiers before a one-year limitation period runs.

Petitioner also claims that rules against successive petitions will curb litigation. But such limitations would not be effective either. Consider federal criminal process. Congress placed stringent restrictions on second or successive motions filed pursuant to 28 U.S.C. § 2255. 28 U.S.C. § 2255(h). Adoption of Petitioner's position here will require counsel for § 2255 motions, and the performance of

those counsel will give rise to claims of ineffective assistance of § 2255 counsel. *Evitts,* 469 U.S. 395-96. If Petitioner has a constitutional right to § 2255 counsel, § 2255(h) would seem to be unconstitutional, running, as it does, into the same problem this case presents. It would eliminate a forum for presenting ineffective assistance of constitutionally mandated counsel claims except in those very narrow circumstances set out in § 2255(h)(1) and (2). The effect of a right to collateral-review-counsel would be similar on the States.

Without any principled basis for limiting the right to collateral-review-counsel to one or two tiers, the only way to curtail the "infinite continuum" of ineffective-assistance-of-collateral-review-counsel claims would be to arbitrarily say "it stops here." If that is the choice, then amici urge this court to keep the line where it has been since *Finley* was decided twenty-four years ago. That, after all, is the line around which States have developed their current collateral procedures.

C. THERE IS NO PRINCIPLED WAY TO LIMIT PETITIONER'S ARGUMENT TO CLAIMS ALREADY BEING PURSUED.

This Court has emphasized that counsel is important not just for pursuing claims, but for

everything that comes before—going through the record, knowing procedural rules, and deciding what, if any, claims to raise. *See Halbert*, 545 U.S. at 621-22; *Evitts*, 469 U.S. at 396-97. From this, litigants would not only have the right to collateral-review-counsel to pursue claims but also the right to collateral-review-counsel to determine whether to raise claims at all and for help bringing a collateral proceeding. But how would a defendant obtain counsel in a collateral proceeding? A defendant must file something pro se to trigger appointment of counsel. Most States currently follow this model statutorily. *See* Argument V.A., *infra.* By providing counsel after a judicial screening or at the point a hearing becomes necessary, States currently provide a safety net to protect the important role collateral proceedings play in the justice system. These statutory provisions are not disadvantaged by the repetitive nature a constitutional right would require. Petitioner's proposed rule provides little gain over the States' current approach.

II. CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL WOULD HINDER DEFENDANTS' ABILITY TO RECEIVE QUALITY REPRESENTATION AT TRIAL AND ON DIRECT APPEAL.

Petitioner and his amici claim that the right to collateral-review-counsel to pursue his proposed rule

is essential to preserving the right to trial counsel. They do not take into account how the right would be paid for. Funding for collateral-review-counsel would likely come from the same pot used to pay for criminal defense attorneys at the more critical stages of trial and direct appeal.

United States Attorney General Eric Holder emphasized the lack of resources for criminal defense attorneys in remarks the Innocence Network quotes:

> As we all know, public defender programs are too many times under-funded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding.

Eric H. Holder, Jr., U.S. Attorney General, Remarks at the Dept. of Justice Nat'l Symposium on Indigent Defense 8-9 (Feb. 18, 2010) (transcript available at http://www.ojp.usdoj.gov/BJA/topics/inddef_index.html.)(last visited Sept. 2, 2011).

A variety of organizations, including the Innocence Network, have identified a lack of resources for trial-level criminal defense attorneys

as a major cause of wrongful convictions.[5] The Innocence Network hammers on this in its amicus brief (Innocence Network Amicus Br. at 7-10).

In an ideal world, States would be able to provide additional resources to supply defendants with collateral-review-counsel. But State budgets are not ideal. States currently face unprecedented budget shortfalls and are already making difficult spending cuts.[6] Even if they wanted to provide resources to meet the additional needs that a right to collateral-review-counsel would create, it is unclear if they could.

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[5] *See 'McJustice'—The Crisis Of Indigent Defense In America,* Innocence Blog (July 15, 2008, 4:10 p.m.), http://www.innocenceproject.org/Content/McJustice__the_crisis_of_indigent_defense_in_America.php, (last visited Sept. 2, 2011); Jeff Billington, *Michigan Ranks 44th in the Nation for Criminal Defense Spending; So Called 'McJustice' System Puts Communities at Risk*, http://www.nlada.org/Defender/Defender_Evaluation/Michigan_Evaluation (last visited Sept. 2, 2011).

[6] *See* Elizabeth McNeil, Phil Oliff and Nicholas Johnson, *States Continue To Feel Recession's Impact*, Center on Budget and Policy Priorities (June 17, 2011) http://www.cbpp.org/cms/?fa=view&id=711 (last visited Sept. 2, 2011); Nicholas Johnson, Phil Oliff and Erica Williams, *An Update on State Budget Cuts,* Center on Budget and Policy Priorities (Feb. 9, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=1214 (last visited Sept. 2, 2011); Tracy Gordon, *State Budget Crisis*, Brookings Institution, research and commentary (July 22, 2011), http://www.brookings.edu/topics/state-budget-crisis.aspx (last visited Sept. 2, 2011).

If a right to collateral-review-counsel is created, most likely the public defender offices will be stretched even thinner, as they struggle to meet the increased need such a right would create. The impact would be particularly devastating because, as explained above, the right to collateral-review-counsel would be much broader and more extensive than Petitioner acknowledges.

The problem of limited resources is compounded by the fact that States would not only have to provide collateral-review-counsel. They would also have to provide additional court and prosecutor resources to handle the ineffective-assistance-of-collateral-review-counsel claims that a right to collateral-review-counsel would inevitably spawn. These entities are as important as defense attorneys in ensuring that defendants receive fair trials.[7]

From these realities comes a somewhat counterintuitive result. Creating a right to collateral-review-counsel would not lead to more legal representation for criminal defendants, but more diluted representation. It would direct resources away from trial and direct appeal and divert them to a possibly never-ending series of collateral proceedings. Such dilution would be particularly troubling because, as this Court has recognized, the trial and direct appeal levels are

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[7] Gershowitz, Adam M. and Killinger, Laura R., *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Northwestern University Law Review 261, n.26-30 (2011).

integral to the truth-seeking function in a way that collateral proceedings are not. *See Evitts*, 469 U.S. at 399-400; *Finley*, 481 U.S. at 556-57. And the proposed rule would add little in view of the statutory landscape already in effect.

Ultimately, the best way to protect defendants from being wrongfully convicted is not to create a new right to collateral-review-counsel, but to target the right to counsel where it is most needed—at the more critical stages of trial and direct appeal.

States would still be free to appoint collateral-review-counsel for all or some litigants. But they would not have to provide collateral-review-counsel to all litigants, even serial litigators with obviously meritless claims. States could weigh the costs and benefits of appointing collateral-review-counsel and consider the effects on trial and appellate representation. They would not be put in a position of having to limit collateral remedies, either completely or by imposing statutes of limitations, to avoid the drain on resources that a right to collateral-review-counsel would cause.

III. THIS COURT'S PRECEDENTS TARGET RESOURCES TO TRIAL AND DIRECT APPEAL AND DO NOT SUPPORT CREATING THE RIGHT TO COLLATERAL-REVIEW-COUNSEL PETITIONER SEEKS.

This Court has always tied the right to counsel to direct appeal, thus targeting resources to the most important phases of the criminal justice process.

When this court recognized the right to counsel on direct appeal in *Douglas*, it implicitly recognized that a direct appeal is still part of the fact-finding process, describing a defendant on direct appeal as being "burdened by a *preliminary* determination that his case is without merit." *Douglas,* 372 U.S. at 358 (emphasis added). It held that depriving indigent defendants of "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments" on a party's behalf would unconstitutionally discriminate against the indigent by denying them a meaningful appeal. *Id.*

This Court, in *Evitts* and *Halbert,* reiterated the importance of direct appellate review in the fact-finding process underlying a defendant's conviction. In *Evitts*, this Court held that the right to counsel on direct appeal includes the right to effective counsel. It noted that "[a] system of appeal as of right is established precisely to assure that only those who

are validly convicted have their freedom drastically curtailed." *Evitts,* 469 U.S. at 399-400.

In *Halbert*, this Court held that defendants have a right to counsel in a discretionary appeal that provides the only opportunity for defendants who plead guilty to get direct appellate review. *Halbert,* 545 U.S. at 619. It distinguished the case from *Ross v. Moffit*, 417 U.S. 600, 609-616 (1974), where it held that defendants did not have a right to counsel to seek discretionary review on direct review in this Court or in a State supreme court, on the ground that the appellate court before it was "an error-correction instance" and "provide[d] the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619.

This Court has conversely noted finality and the significance of appellate review as an error-correction mechanism in the fact-finding process as a basis for *not* recognizing the right to counsel in other collateral proceedings.

In *Finley*, this Court distinguished collateral proceedings from direct appeals on the ground that collateral proceedings are brought after convictions become final. *Finley*, 481 U.S. at 555. Building upon *Ross*, it held: "We think that since 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." *Id.* It noted:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

Id. at 556-57(citation omitted).

Underscoring its view that collateral proceedings are not error-correcting in the same way as direct appeals, this Court held in *Murray v. Giarratano,* 492 U.S 1, 10 (1989), that *Finley* applies in capital cases.

This Court's decisions do not support creating the right to collateral-review-counsel. This case is much more like *Finley* and *Ross* than *Douglas*. Petitioner had a trial and direct appeal and his conviction is now final. He had statutorily appointed counsel for a collateral proceeding. He is in no different position than litigants who want to raise claims that, by their nature, cannot be raised on direct appeal. *See* Argument I.A.

Petitioner analogizes his case to *Halbert,* noting that he could not raise his ineffective assistance of trial counsel claim on direct appeal. But *Halbert*, like *Evitts* and *Douglas*, involved a defendant's ability to get *any* appellate review, not a defendant's ability to pursue individual claims in a collateral proceeding.

This difference is critical. If *Halbert* applied any time a defendant could not raise a single claim until a collateral proceeding, it would have effectively overturned *Finley*. This Court never suggested in *Halbert* that it was overturning *Finley sub silencio*.

The Former State Supreme Court Justices, who write in support of Petitioner, emphasize that ineffective-assistance-of-counsel claims require an evidentiary showing that pro se litigants may have difficulty making (Former State Supreme Court Justices Amici Br. at 27). But the fact-finding for ineffective-assistance claims is of a different order than the fact-finding this court sought to protect in *Douglas*. The fact-finding for ineffective-assistance-of-counsel claims does not go to guilt or innocence. It goes to what counsel did or did not do at trial and implicates a different burden of proof.

Further, it by-passes State created rules established to avoid piece meal litigation. As this Court has recognized, ineffective-assistance-of-counsel claims "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington v. Richter*, 562 U.S. __, 131 S. Ct. 770, 788 (2011). *Harrington*'s court observation is not limited to the first collateral proceeding.

IV. PETITIONER'S FAIRNESS CONCERNS ARE OVERBLOWN AND DO NOT PROVIDE A BASIS FOR CREATING A RIGHT TO COLLATERAL-REVIEW-COUNSEL.

Petitioner and his amici all make a fairness argument: collateral-review-counsel can help litigants identify, present, and pursue ineffective-assistance-of-trial-counsel claims.

This Court emphasized the benefits of appellate counsel in *Douglas*, *Evitts*, and *Halbert* when recognizing the right to counsel for direct appellate review. *See Halbert*, 545 U.S. at 621; *Evitts*, 469 U.S. at 393; *Douglas*, 372 U.S. at 357-58. But it never recognized the right as required solely because counsel is helpful. It has always tied the right to counsel to the importance of direct appellate review to correct errors before convictions become final. The right to appellate counsel is a means of ensuring that all defendants, rich and poor alike, have "meaningful access" to direct appellate review, *See Douglas*, 372 U.S. at 355, 357-58 (California's law requiring courts to vet defendant's claims before appointing counsel unconstitutionally discriminated against indigents by depriving them of a meaningful appeal).

This Court made it clear in *Ross* that the right to counsel does not depend on whether litigants would benefit from counsel, explaining:

> [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is . . . only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Ross, 417 U.S. at 616.

The Court could not have ruled the way it did in *Ross*, *Finley*, or *Murray* if the test was whether the right to counsel would be helpful. There would be no limit to the right to counsel if helpfulness is the metric because a litigant will always benefit from counsel.

Petitioner and his amici greatly exaggerate the difficulties facing litigants who want to pursue ineffective-assistance claims. The fact remains, as the Innocence Network notes, that pro se litigants can and do manage to identify, present, and prevail on ineffective-assistance claims (Innocence Network Br. at 4). Some factors work in a pro se litigant's favor. Their pleadings are "liberally construed." *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The *Strickland* test for ineffective-assistance-of-trial-counsel claims is well known and the mere mention of "ineffective assistance" focuses a reviewing Court on *Strickland's* well-known two-part test. And ineffective-assistance claims are typically based on

trial-tested facts that litigants should be familiar with. Having sat through the trial, defendants are at least aware of trial counsel's defense and what witnesses counsel presented. This, together with the statutory provisions already existent, provide adequate protection for the role of collateral proceedings without a burden of repeated litigation.

Moreover, even without a right to collateral-review-counsel, States remain free to appoint collateral-review-counsel. In fact, all States but one have a statutory right to collateral-review-counsel in at least some cases or under some circumstances.[8] Leaving the decision of whether and on what basis to appoint collateral-review-counsel to State legislators or courts has the advantage of allowing States to target the appointment of collateral-review-counsel on cases in which it would be the most helpful and in view of scarce resources with which States must contend.

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[8] *See* fn. 12-14, 16.

V. IF PETITIONER PREVAILS, ALMOST ALL STATES AND THE FEDERAL CRIMINAL SYSTEM WILL SEE A CHANGE IN THEIR PROVISIONS FOR APPOINTMENT OF COUNSEL FOR COLLATERAL PROCEEDINGS AND MOST LIKELY WILL EXPERIENCE A SIGNIFICANT INCREASE IN CRIMINAL CASELOAD.

A. CONSIDERATION OF HOW THE RIGHT TO COLLATERAL-REVIEW-COUNSEL WOULD AFFECT THE STATES UNDERSCORES THE MAGNITUDE OF WHAT PETITIONER SEEKS.

In *Finley*, this Court stated, "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure collateral review." *Finley*, 481 U.S. at 559. *See also District Attorney's Office For The Third Judicial District v. Osborne,* 557 U.S. ___, 129 S. Ct. 2308, 2320 (2009) (A State "has more flexibility in deciding what procedures are needed in the context of postconviction relief.") The States presumably developed their systems after careful deliberation by

Legislatures or through a rulemaking process. As the *Osborne* court pointed out, "[b]y extending constitutional protection to an asserted right . . . we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* at 2322 (internal quotation marks omitted). Exercising that flexibility, the States have implemented varied approaches to statutory appointment of counsel for collateral review. Ultimately, as in *Osborne*, "[e]stablishing a freestanding right [to appointed counsel based on the claim] would force [this Court] to act as policymakers." *Id.* at 2323. Such federal interference with the State's substantial discretion is unwarranted.

Currently, three States require raising all ineffective-assistance-of-counsel claims on direct appeal: Michigan, Oklahoma, and Wisconsin. Alabama, permits ineffective-trial-counsel claims to be raised on appeal where the claim can be identified in time to file a motion for a new trial.[9] Hawaii also allows a defendant to assert ineffective-assistance-of-trial-counsel claims on direct appeal.[10] Indiana requires defendants to choose between raising ineffective-assistance-of-trial-counsel claims on direct appeal or in collateral proceedings.[11] These States are already providing constitutionally guaranteed counsel to raise ineffective-assistance-of-trial-counsel claims. The other States generally

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[9] *Ex parte Ingram,* 675 So. 2d 863, 864 (Ala.1996).
[10] *State v. Silva*, 864 P.2d 583, 591-92 (Haw. 1993).
[11] *Woods v. State*, 701 N.E.2d 1208, 1213-20 (Ind. 1998).

require ineffective-assistance claims to be raised in what Petitioner calls a "first tier" collateral proceeding. Of the States besides Michigan, Oklahoma, and Wisconsin, forty-six provide statutory or case law authority to appoint counsel in all or some collateral proceedings. Only one State does not provide for counsel in any collateral proceeding.[12]

Of the other States, twelve States and the District of Columbia[13] provide appointed counsel for all collateral proceedings attacking a conviction for

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[12] Georgia provides no counsel for any case, even in capital cases. *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999).

[13] The States providing appointed counsel for in all cases are: Arizona, Ariz. R. Crim. P. 32.4(c)(1); Alaska, Alaska Stat. Ann. 18.85.100(c) (West 2010); Connecticut, Conn. Gen. Stat. § 51–296(a) (West 2011); *but cf: Small v. State*, 920 A.2d 1024 (Conn. App. 2007); Indiana, Ind. Code § 33-40-1-2 (West 2011); Ind. PC1 (Rule) 1(9)(a); Iowa, Iowa Code Ann. § 822.5 (West 2011); Maine, Me. Rev. Stat. tit. 15, § 2129(1)(B) (West 2011), and Maine R. Crim. P. 69; Maryland, Md. Code Ann., Crim. Proc. § 7-108 (West 2011); Missouri, Mo. Rev. Stat. §§ 547.360(5) and 547.370(1) (West 2000); New Jersey, N.J. Stat. Ann. § 2A:158A-5 (West 2011), and N.J. Ct. R. 3:22-6(a); Oregon, Or. Rev. Stat. § 138.590 (West 2011); Pennsylvania, Pa. R. Crim. P. 904(C) and (H); and Rhode Island, R.I. Gen. Laws Ann. § 10-9.1-5 (2010). Alaska also provides second collateral-review-counsel for ineffective assistance of first collateral-review-counsel claims. The District of Columbia requires appointed counsel in a criminal case to represent the defendant "at every stage, including ancillary matters appropriate to the proceedings." D.C. Code §§ 11-2602, and 2603 (2001); *see also Doe v. United States*, 583 A.2d 670, 674 (D.C. 1990) (holding ancillary proceedings encompasses a motion under D.C. Code § 23-110 (2001), based on ineffectiveness of counsel.)

the first time. So a total of seventeen States provide counsel at the first opportunity to raise ineffective-assistance-of-trial-counsel claims.

Even these States could be affected by the right to collateral-review-counsel Petitioner seeks. Petitioner's claim-based right to counsel would require appointment of counsel for all of the claims listed in Argument I.A. It could also require the appointment of collateral-review-counsel in more than one collateral proceeding.

Twenty-one States[14] provide a limited right to collateral-review counsel. These States provide

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[14]Alabama, Ala. R. Crim. P. 32.7(c) (2011); Colorado, *Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007); Delaware, Del. Super. Ct. Crim. P. 61(l)(3) and 61(e)(1); Hawaii, Haw. Rev. Stat. § 802-1 (1996); Illinois, 725 Ill. Comp. Stat. 5 Art. 122-1, (2010); Kansas, Kan. Stat. Ann. § 22-4505 (1997); Kentucky, Ky. Rev. Stat. Ann. § 31.110(2)(c) (West 2011); Louisiana, La. Code Crim. Pro. Ann. art. 930.7 (2011); Massachusetts, Mass. R. Crim. P. 30(c)(5) (2009); *Commonwealth v. Conceicao*, 446 N.E.2d 383 (1983); Minnesota, Minn. Stat. § 611.14(2) (2010); Montana, Mont. Code Ann. § 46-21-201(2) (2009); *State Public Defender v. Montana Thirteenth Judicial District*, 2007 MT 333, ¶¶ 3-4, 178 P.3d 693; *Davis v. State*, 2007 MT 207, ¶ 14, 167 P.3d 892; Nebraska, Neb. Rev. Stat. § 29-3001 (2011); *State v. Victor*, 242 Neb. 306 (1993); New Hampshire, *State v. Lopez*, 931 A.2d 1186 (N.H. 2007); *State v. Hall*, 908 A.2d 766 (N.H. 2006); New Mexico, N.M. R. Ann. § 5-802(E)(2) (2011); New York, *People v. Richardson*, 603 N.Y.S.2d 700 (N.Y. Sup. 1993); North Dakota, N.D. Cent. Code Ann.§ 29-32.1-06 (2009); *Crumley v. State*, 2000 ND 110, ¶ 11, 611 N.W.2d 165; South Dakota, S.D. Codified Laws § 21-27-4 (2004); *State v. Reed*, 2010 SD 105, 793 N.W.2d 63; Tennessee, Tenn. Code Ann.§ 40-30-107 (2006); Vermont, Vt. Stat. Ann. tit. 13, § 5233(a)(3) (2004); West Virginia,

appointed counsel based on either court discretion or on some statutory criteria.[15] In these States, Petitioner's claim-based rule could require a change to non-discretionary appointment in almost all cases.

States with capital punishment are a special category. Fourteen States[16] provide at least one and

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Mugnano v. Painter, 575 S.E.2d 590 (W. Va. 2002). Wisconsin provides first collateral-review-counsel as a matter of discretion despite providing a direct appeal opportunity to raise ineffective-trial- counsel claims. Wis. Stat. § 974.06(3)(b) (2009-10).

[15] In keeping with the wide discretion recognized in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the criteria for appointment vary greatly in these States. For example, some States leave complete discretion to the judge hearing the collateral petition. Some provide counsel in all cases which survive an initial judicial screening. Some provide counsel in every case in which a hearing is held. Some provide for discretionary appointment of counsel only if a hearing is held.

[16] Arkansas, Ark. R. Crim. P. 37.3(b) and 37.5(b); California, *In re Sanders*, 981 P.2d 1038, 1051 (Cal. 1999); Florida, *Graham v. State*, 372 So. 2d 1363 (Fla. 1979); Idaho, I.C.R. 44.2(1), I.C. Ann. § 19-4904 (2011); *Gonzales v. State*, 254 P.3d 69, 72-73 (Idaho Ct. App. 2011) (If an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts.); Mississippi, *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999); Nevada, Nev. Rev. Stat. §§ 34.750 and 34.820 (West 2010); North Carolina, N.C. Gen. Stat. Ann. §15A-1420(c)(4) (2009); Ohio; Ohio Rev. Code Ann. §§ 120.16 and 2953.21(I) (West 2011); South Carolina , S.C. Code Ann. §§17-27-60 and 17-27-160 (West 2010), S.C. R. Civ. Pro. 71.1(d), *In Re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996); Texas, Tex. Code Crim. P. art. 11.07 and 11.071 (2009); Utah, Utah Code Ann. §§ 78B-9-109 and 78B-9-202 (West 2011) Virginia, Va. Code Ann. §§ 19.2-163.7 and 19.2-163.8 (West 2011); Washington, Wash. Rev. Code Ann.

sometimes two appointed counsel for capital cases. So for these States, capital cases are treated the same as the twelve States that provide counsel for all first-time collateral proceedings. The non-capital cases in most of these States fall into the limited-right category.[17] For non-capital cases, these States will suffer the same fate as the twenty-one States who statutorily provide a limited right to appointed counsel for all cases.

B. WISCONSIN'S CURRENT APPELLATE CASELOAD INDICATES A SIGNIFICANT INCREASE IN CRIMINAL APPELLATE LITIGATION.

Using data from the Wisconsin Court System and Department of Justice, Wisconsin's experience, if it is typical, demonstrates that almost all States and the federal system can expect a significant increase in their criminal caseloads if defendants have a

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§ 10.73.150 (West 2011); Wyoming, Wyo. Stat. Ann. § 7-14-104(c) (West 2011) (public defender discretion).

The Wyoming Public Defender has discretionary authority to appoint counsel. Wyo. Stat. Ann. 7-6-104(c)(ii). Wyoming states the Public Defender has done so in capital cases. Although the statute appears to allow appointment in non-capital cases, it has not happened to date. Oklahoma provides collateral-review-counsel to death-row inmates despite providing a direct-appeal opportunity to raise ineffective-trial-counsel claims. Okla. Stat. tit. 22, § 1089(B) (West 2011).

[17] Only Ohio provides counsel in all capital cases but does not provide counsel in non-capital cases. Utah provides mandatory paid appointed counsel for capital cases and discretionary pro bono counsel in non-capital cases.

constitutional right to collateral-review-counsel. This data is not published. It is drawn from computer compilations of the record of appeals in the Wisconsin Court of Appeals maintained by the Wisconsin Director of Courts and the Wisconsin Department of Justice's own records. To understand why the data can be reflective of caseloads in the federal system and the various States if Petitioner is successful, a further brief expansion on the Wisconsin system set out above is necessary.

Wisconsin distinguishes between postconviction counsel and appellate counsel. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Wis. Ct. App. 1996) (*per curiam*); *see also State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Wis. Ct. App. 1997), *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Postconviction counsel represents a defendant in post-verdict proceedings in the circuit court between the time the circuit court enters a judgment of conviction and the time an appeal commences with the filing of a notice of appeal. Appellate counsel represents a defendant in post-verdict proceedings in the appellate courts following the filing of a notice of appeal. The same lawyer often serves in both capacities. *Rothering*, 205 Wis. 2d at 678 n.4 ("We are aware that often postconviction counsel and appellate counsel are the same person.").

The performance of appellate counsel may be reviewed by filing a state petition for habeas corpus in the Court of Appeals. *State v. Knight,* 484 N.W.2d 540, 544 (Wis. 1992). The only claim cognizable in a *Knight* petition is ineffective assistance of appellate counsel. On the other hand, claims regarding post-conviction counsel must be brought in the trial court via a petition for a writ of habeas corpus or a Wis. Stat. § 974.06 motion. *Rothering*, 556 N.W.2d at 139. Since defendants must provide a "sufficient reason" for not raising ineffective assistance of trial counsel at the first opportunity in the direct appeal, these cases almost always raise a claim of ineffective assistance of "first tier" counsel as a "sufficient reason." *Id.* Both trial-court § 974.06 motions, habeas corpus petitions, and appellate-court *Knight* petitions are "second tier" proceedings as Petitioner uses the term.

The number of *Knight* petitions gives an accurate picture of how many claims of ineffective-assistance-of-appellate counsel are filed. By adding the number of appeals of § 974.06 motions to the number of *Knight* petitions, one can get a fairly accurate picture of how many claims of ineffective-collateral-review-counsel are litigated. The number is lower than the total because some unknown number of § 974.06 motions are filed in the trial court but not appealed. By adding the total of § 974.06 appeals and *Knight* petitions to the number of direct appeals, one gets the total number of appellate cases involving criminal convictions. By comparing these numbers, one can get a good approximation of the

effect on appellate caseload of litigating ineffective-assistance-of-collateral-review-counsel claims in a second-tier proceeding.

The Wisconsin Director of Courts provided the number of direct appeals and the number of § 974.06 appeals handled by the Wisconsin Court of Appeals from January 1, 2006, to August 22, 2011. Unfortunately, the court statistics do not separate *Knight* petitions from other extraordinary writs. But the Department of Justice keeps computer records of the number of *Knight* petitions served on it. Wisconsin used those figures in the calculations that follow.

The total appellate criminal case load (direct appeal, § 974.06 motions and *Knight* petitions) for the period January 1, 2006 to August 22, 2011, was 5,516. In that period the Court of Appeals docketed 4,299 direct appeals. It docketed 1,031 § 974.06 appeals. In that same period, January 1, 2006 to August 22, 2011, the Department was served with 186 *Knight* petitions. The docketed and served appellate cases beyond "first tier review" for the five year period total 1,217. From these figures one can see that for the last five years, second-tier[18] appellate litigation accounted for 22% of Wisconsin's criminal caseload.[19] Stated another way, the appellate caseload for second collateral-review

[18] The figures include some cases in succeeding tiers for repeated attempts, but those, too, are the inevitable result of a claim-based rule.

[19] 1217÷5516 = 0.2206 x 100 = 22.06%

counsel is 28% of the direct appeal case load.[20] If the Wisconsin experience is typical, and there is no reason to think it is not, at least forty-six States and the federal system that will be required to duplicate Wisconsin's system will experience roughly a 28% increase in cases at the error-correcting appeal level. And this only looks at a second round of collateral review. While this increased caseload may not be a reason to deny a significant constitutional right, in a case of weighing the benefit of the right versus its cost or in deciding where to draw a line to cut off repetitive litigation, these numbers are relevant and compelling.[21]

Creation of the right to collateral-review-counsel Petitioner seeks would likely significantly increase appellate caseloads in all fifty States and the federal criminal system. Such a right would open the floodgates for not only one tier but multiple tiers of ineffective-assistance-of-collateral-review-counsel claims.

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[20] 1217÷4299 = 0.2831 x 100 = 28.31%

[21] *See Alabama v. Shelton*, 535 U.S. 654, 679 (2002) (Scalia, J., dissenting) ("Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment. *See, e.g., Scott,* 440 U.S. at 373 (any extension of *Argersinger* would 'impose unpredictable, but necessarily substantial costs on 50 quite diverse States'); *see also Argersinger*, 407 U.S. at 56-62 (Powell, J., concurring in result)(same). Today, the Court gives this consideration the back of its hand.").

VI. PETITIONER'S PROPOSED NEW RULE WILL HAVE A DISPROPORTIONATE EFFECT ON CAPITAL CASES.

Although the instant case is not a capital case, Petitioner's proposed new rule mandating constitutional review of the performance of collateral-review counsel would have a disproportionate impact on capital cases. As noted, see Argument V.A. *ante*, the great majority of States do not automatically provide free counsel to indigent convicts on collateral review in non-capital cases, but virtually every state that has the death penalty does provide free collateral-review counsel to death row inmates.

And there are special and particular problems from Petitioner's proposed rule that would arise in death penalty cases. The Ninth Circuit's aptly characterized concern about an "infinite continuum of litigation," *Bonin*, 999 F.2d at 429, is particularly acute in death penalty cases.

In non-capital cases, Petitioners have an interest in the expeditious resolution of their claims of error, regardless of whether those claims are brought on direct or collateral review. Generally speaking, non-capital prisoners are suffering the punishment that the State has meted out for their crimes during the direct and collateral review processes, and their only hope for relief from that punishment is at the conclusion of the litigation.

In capital cases, by contrast, some—indeed, most—Petitioners have a vested interest in delaying the resolution of their claims. Capital Petitioners *thwart* the imposition of the punishment imposed by the very act of bringing and continuing litigation. And it is precisely those Petitioners who believe that they have the least chance of success on the merits of their claims that have the greatest incentive to litigate for as long as possible, because by doing so, they effectuate their best chance to stymie the States' efforts to carry out the imposed punishment for as long as possible. That is to say, capital inmates with claims they believe to be of little merit continually receive the relief they most fervently seek—and to which they are the least entitled—during the pendency of the litigation; the only risk to capital prisoners who bring claims they believe to be without merit is upon the conclusion of the litigation. Thus, to the extent avenues are available to continue collateral attacks on the judgment or sentence, capital Petitioners without meritorious claims have the greatest incentive to take advantage of those avenues.

Apparently—and appropriately—concerned that this Court might be loathe to adopt a rule that would permit endless litigation of the adequacy of trial counsel (by adopting a rule requiring successive reviews of the adequacy of appellate and collateral-review counsels' attacks on trial counsel), Petitioner seeks to draw an arbitrary line that, not surprisingly, would require the successive review he seeks to bring, but no more. However, the

arguments he offers in support of the line he draws do not bear scrutiny.

First, Petitioner argues that Arizona's relatively strict time limits for bringing collateral review petitions alleging ineffective assistance of counsel render it "virtually inconceivable" that a Petitioner could bring successive petitions challenging prior counsel in a timely manner (Petitioner's Br. at 32-33). However, this Court did not grant review of the instant case in order to announce an Arizona-only rule; indeed, the question presented admits of no such limitation. Rather, the new rule Petitioner proposes would apply equally to all the States, including States that have lengthier or less rigidly defined limitation periods. *See, e.g., Walker v. Martin*, 562 U.S. ___, 131 S. Ct. 1120, 1124-26 (2011). Thus, in many States, a Petitioner would have time to seek repeated successive review of prior collateral-review of counsel's performance. Further, to the extent this Court holds that the right of review of collateral-review counsel's performance is of federal constitutional dimension, many States would likely be loathe to impose a rigid time-bar to such claims, particularly when, as posited, the reason the claim was not brought in the earlier proceeding was because prior collateral-review counsel was ineffective.[22]

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[22] Petitioner posits that "any state would be free, under *McKane v. Durston*, 153 U.S. 684, 687 (1894), to simply prohibit all second or successive post-conviction relief petitions—or to restrict such petitions in the same manner as 28 U.S.C. § 2244(b)." (Petitioner's Br. at 34). This assertion fundamentally misapprehends the dynamic at work in federal

Petitioner further argues that "it is unrealistic to think that many convicted defendants would be able to find a succession of attorneys willing to allege that all previous trial and postconviction counsel were ineffective . . . ." (Petitioner's Br. at 34). California's experience demonstrates that Petitioner's hope is misplaced. It is not only "realistic," it is *routine* in capital cases for subsequent collateral-review counsel to allege that prior collateral-review counsel failed to present available claims. Specifically, it is common for subsequent collateral-review counsel to bring new claims of ineffective assistance of trial counsel that were not brought, or were brought in an allegedly deficient manner, by earlier collateral-review counsel. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1396-97 (2011) (second state habeas counsel brought a claim of ineffective

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habeas corpus. States are free, consistent with the federal Constitution, to fashion their direct and collateral review procedures in the manner that they best think serves the interests of justice. But Petitioner's proposed rule removes this freedom. This Court should not articulate a rule that would encourage a State to curtail an avenue of review that it might otherwise make available to its citizens in order to thwart meddling by the federal courts that undermine the finality of state court decisions. *Walker v. Martin*, 138 S. Ct. at 1125; *Beard v. Kindler*, 558 U.S. ___, 130 S. Ct. 612, 618 (2009).

assistance of trial counsel that improved upon the claim brought by first state habeas counsel)[23]; *In re Clark*, 855 P.2d 729, 779-80 (Cal. 1993) (discussing the state-law limitations on a California Petitioner arguing that prior state habeas counsel was incompetent). Wisconsin's experience in a system already in keeping with Petitioner's proposed rule is similar. See Argument V.B., *supra*.

Further, Petitioner's entire argument is undermined by his tacit concession that it is safe to assume that second collateral-review-counsel performed competently (Petitioner's Br. at 31). Although Petitioner purports to distinguish the propriety of reviewing the performance of second collateral-review counsel from reviewing the performance of first collateral-review counsel, he provides no basis in reason for the necessary premise that first collateral-review counsel is more likely to overlook claims that Petitioner thinks are very important than second collateral-review counsel.

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[23] Indeed, contrary to Petitioner's skepticism that such is unlikely to ever occur, Pinholster is now pressing his third state petition for a writ of habeas corpus (with the assistance of counsel), asserting an even newer and ostensibly more improved version of the claim of ineffective assistance of trial counsel. See *In re Scott Lynn Pinholster on Habeas Corpus*, California Supreme Court case number S193875, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1982053&doc_no=S193875 (last visited Sept. 7, 2011).

And if, as will inevitably be argued in some future case, it is alleged that both first and second collateral-review counsel were incompetent, the Petitioner in that future case will make precisely the same argument that Petitioner is making in the instant case, using precisely the same logic. And if Petitioner is correct in the instant case, and he can challenge the competence of his collateral-review counsel in order to force the state court to hear the merits of an otherwise defaulted claim of ineffective-assistance-of-trial counsel, it certainly makes no difference to Petitioner whether he had a single incompetent lawyer on collateral review, or two, or twenty. If, as Petitioner suggests, he has a federal constitutional right to have the performance of habeas counsel reviewed, then there is no basis for reining in the infinite regression of review that such a rule would require.

CONCLUSION

For the reasons stated above, amici curiae States request that this Court affirm the decision below.

Dated this 13th day of September, 2011.

Respectfully submitted,

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