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Supreme Court, U.S.
FILED
AUG 1 1 2011
OFFICE OF THE CLERK

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 OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

KEITH A. FINDLEY
PRESIDENT
THE INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 262-4763

JAMES P. ROUHANDEH,
Counsel of Record
REBECCA WINTERS
MICAH J. COGEN
KATHERINE A. MARSHALL
ALAN J. TABAK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com

Attorneys for Amicus Curiae

105630
(33)

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 66 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The work of the Innocence Network and

[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

[2] The member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State

its members has revealed wrongful convictions due in whole or in part to inadequate trial counsel. The Innocent Network has a direct interest in ensuring that criminal defendants are afforded effective assistance of counsel at trial and, to that end, that defendants also have access to counsel on first-tier review of claims of ineffective trial counsel, so as to reduce the likelihood of wrongful convictions. The Innocence Network therefore respectfully files this *amicus curiae* brief in support of Luis Martinez's petition.

SUMMARY OF ARGUMENT

Ineffective trial counsel is a substantial contributor to wrongful convictions, particularly for indigent criminal defendants. Claims of ineffective assistance of trial counsel serve as a primary vehicle both for these defendants to protect their constitutional right to a fair trial and for courts to protect the integrity of the judicial process. Because ineffective assistance claims are often legally and factually complex, non-lawyers are poorly equipped to litigate them, as this Court has

of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

recognized. The first opportunity to bring such claims may not arise on direct appeal. Indeed, the State of Arizona affirmatively prohibits criminal defendants from bringing ineffectiveness claims on direct appeal, requiring instead that defendants raise such claims in post-conviction proceedings. But if Respondent is correct that defendants possess no constitutional right to counsel at the first opportunity provided under Arizona law to challenge trial counsel's performance, then the right to effective trial counsel—a core trial right—will effectively become a right without a remedy. The Innocence Network submits this brief in support of Petitioner Luis Martinez, and urges the Supreme Court to affirm the constitutional right to counsel at a criminal defendant's first opportunity to raise his or her ineffectiveness claim.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL IS A LEADING CONTRIBUTOR TO WRONGFUL CONVICTIONS

A. Wrongful Conviction as a Result of Deficient Trial Counsel Is a Significant Problem, Especially for Indigent Defendants

"Assistance of counsel . . . is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). But simply "[t]hat a person who happens to be a lawyer is present at a trial alongside the accused . . . is not enough to satisfy" a criminal defendant's Sixth Amendment right to effective trial counsel. *Id.* Where "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," a defendant's constitutional right to counsel is violated and the integrity of the judicial process challenged. *Id.* at 692-93.

There is no question that ineffective assistance of counsel results in a substantial number of wrongful convictions. Criminal defendants brought 330 successful ineffective assistance of counsel claims in state court and an additional 122 successful claims in federal court between 2000 and 2006. *See* John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 156 (2007). In view of the particularized legal standard set forth in *Strickland v. Washington* to establish unconstitutional ineffectiveness, and the fact that many claims are raised by incarcerated defendants acting *pro se*, it is likely that many more defendants have been convicted in trials in which they were served by unconstitutionally ineffective trial counsel.

The risk that deficient trial counsel will cause wrongful convictions is widely recognized, particularly in cases where the defendant is indigent. The American Bar Association has noted that "[a]lthough there undoubtedly are a variety of causes of wrongful conviction . . . inadequate representation often is cited as a significant contributing factor." A.B.A. Standing Comm. on Legal Aid and Indigent Defs., *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 3 (Dec. 2004), *available at* http://www.american-

bar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings_authcheckdam.pdf. Speaking directly to the problems of indigent defense, the A.B.A. concluded: "Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent . . . ." *Id.* at 7; *see also* A.B.A., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 928 (2003) ("The commentary to the first edition of this Guideline noted that 'many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance' and supported the statement with numerous examples. The situation is no better today.").

Among these "deficiencies" is the fact that indigent defense counsel are overworked and understaffed. *See, e.g.*, Donald J. Farole, Jr. & Lynn Langdon, Bureau of Justice Statistics, U.S. Dep't of Justice, *Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices, 2007* 10 (Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf (finding that only 27% of county-based public defender offices reported sufficient numbers of litigating attorneys to meet professional guidelines for the number of cases received). As an example, indigent defense counsel often lack sufficient access to essential resources, such as legal and investigative services. *See e.g.*, Cal. Comm'n on the Fair Admin. of Justice, *Official Report and Recommendations on Funding of Defense Services in Cal-*

ifornia 5 (Apr. 14, 2008), *available at* http://www.ccfaj.org/documents/ reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20 DEFENSE%20SERVICES.pdf ("Over two-thirds of judges surveyed indicated that providing sufficient investigative resources for the defense was a problem in their county. In six counties, defenders had no investigative staff."). Similarly, states will often appoint private counsel to represent indigent defendants who have little experience practicing criminal law or representing indigent defendants and, in many cases, will provide no formal training in criminal practice to these lawyers. *See* A.B.A., *Gideon's Broken Promise, supra*, at 11, 16-17; *see also* Nat'l Legal Aid & Defender Ass'n, *An Assessment of Indigent Defense Services in Montana* 37 (Aug. 4, 2004), *available at* http://www.nlada.net/sites/default/ files/mt_whitevmartznlada08-04-2004_report.pdf ("There is no orientation program for newly hired indigent defense attorneys, no systematic and comprehensive training, and no technical assistance.").

These factors, along with others, create a system that threatens an indigent defendant's right to effective trial counsel. As United States Attorney General Eric Holder recently remarked:

> 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. And the problem is about more than just resources. In some parts of the country, the primary institutions for the delivery of defense to the poor—I'm talking about basic public defender systems—simply do not exist.

Eric H. Holder, Jr., U.S. Att'y General, Remarks at the Dep't 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). In these circumstances, a claim of ineffective assistance may stand as the only safeguard protecting a defendant's constitutional right to a "fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687.

B. Specific Instances In Which Ineffective Assistance of Counsel Has Been a Leading Contributor to a Wrongful Conviction

The cases described below represent a small sampling of those in which wrongful convictions occurred in whole or in part because trial counsel provided ineffective assistance, and in which defendants were only able to demonstrate trial counsel's inadequacy with the assistance of post-conviction counsel.

- Julie Baumer was convicted of first-degree child abuse after her trial counsel failed to consult with or call a single expert capable of rebutting testimony from the State's experts that CT scans and MRIs of the victim revealed injuries caused by shaking and blunt-force trauma. *People v. Baumer*, No.

2004-2096-FH, slip op. at 1, 7-8 (Macomb Cnty. Cir. Ct. Nov. 20, 2009) (unreported). A state habeas court set aside Baumer's conviction after multiple experts testified that the CT scans and MRIs actually revealed that the injuries were caused by infant stroke, a condition entirely unrelated to the charges against Baumer. *Id.* at 8-9. On retrial, a jury found Baumer not guilty. *See* Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. Times Mag., Feb. 2, 2011, at 30.

- Willie Jackson was convicted of aggravated rape and first-degree robbery based largely on expert testimony that the bite marks on the victim belonged to the defendant. *Jackson v. Day*, No. 95 CV 1224, 1996 WL 225021, at *1-4 (E.D. La. May 2, 1996) (unreported). On habeas review, the district court found that trial counsel's inexplicable failure to request funds to consult with and call an expert who would have testified that bite marks on the victim did not belong to Jackson constituted ineffective assistance of counsel. *Id.* at *4-6. Although the Court of Appeals subsequently disagreed that Jackson suffered any prejudice, *see Jackson v. Day*, No. 96 CV 30563, 1997 WL 450202, at *3 (5th Cir. 1997) (unreported), in 2003—after having already served seventeen years in prison—Jackson was exonerated by DNA evidence. *See Know the Cases: Willie Jackson*, The Innocence Project, http://www.innocenceproject.org/Content/Willie_Jackson.php.

- Appointed counsel to Ronald Williamson in a state capital murder case failed to investigate Williamson's history of severe mental illness, which included diagnoses of schizophrenia, paranoid and borderline personality disorders, and atypical bipolar illness, among others. *Williamson v. Ward*, 110 F.3d 1508, 1514-16 (10th Cir. 1997). As a result, counsel "did not move the court for a competency determination, nor did he suggest at trial that Williamson's dream confessions were not credible because they were the delusional product of Williamson's mental illness." *Id.* at 1516. The Tenth Circuit Court of Appeals overturned Williamson's state conviction on federal habeas review, agreeing with the district court that trial counsel provided prejudicially ineffective assistance. *Id.* at 1520. Then, in preparation for retrial, DNA evidence conclusively exonerated Williamson. *See* Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases* (Sept. 2010), http://www.innocenceproject.org/ docs/ Innocence_Project_IAC_ Report.pdf.
- Counsel for Earl Washington, Jr. in a state capital murder case failed to investigate evidence presented to him before trial suggesting that semen stains on a blanket in the victim's bedroom did not match Washington's blood type and therefore could not belong to him. *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993). On federal habeas review, the Fourth Circuit found that trial counsel had performed deficiently by failing

to investigate this evidence but, over a vigorous dissent, concluded that Washington did not suffer prejudice. *Id.* at 1290. Washington was later released from prison in 2000 when DNA evidence conclusively showed that, in fact, he could not have been the source of the semen. *Know the Cases: Earl Washington*, The Innocence Project, http://www.innocenceproject.org/Content/Earl_Washington.php.

- Trial counsel to Jose Garcia possessed overwhelming evidence that Garcia was in the Dominican Republic on the day that the State of New York claimed he committed murder in the Bronx. *Garcia v. Portundo*, 459 F. Supp. 2d 267, 271 (S.D.N.Y. 2006). But Garcia's counsel failed to introduce any of this evidence at trial, resulting in Garcia's conviction. *Id.* at 272-73. After Garcia had already spent fifteen years wrongly incarcerated, a federal district court granted his habeas petition, concluding that trial counsel had performed "well below the minimal standards of competence" in this "exceptionally troubling case." *Id.* at 295. Garcia was not retried. *See* Paul Davies & Phil Kuntz, *An Ex-Wife's Battle: Set Mr. Garcia Free—Contesting a Lone Murder Witness Became Ms. Ortega's 15-Year Odyssey*, Wall St. J., June 15, 2007, at A1.

These profiles illustrate the substantial risk and irreparable harm of wrongful conviction that criminal defendants face from ineffective trial counsel. Individuals who should never have been convicted in the first place have spent years incarcerated because of the inadequacy of their counsel and, as

is discussed more fully in Part II, were only able to demonstrate that inadequacy with the assistance of post-conviction counsel.

II. FIRST-TIER REVIEW BY COUNSEL IS CRITICAL TO THE IDENTIFICATION AND DEVELOPMENT OF CLAIMS BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. *Pro Se* Defendants Face Insurmountable Difficulty in Identifying and Prosecuting Claims of Ineffective Assistance of Trial Counsel

Counsel is critical for litigants to prove—and for courts to assess—both deficient trial counsel performance and resulting prejudice, as required by *Strickland*, 466 U.S. at 697. Generally speaking, to bring an ineffective assistance of counsel claim, a defendant must (a) identify instances where counsel's performance fell below legally permissible standards; (b) conduct an investigation into the facts concerning these issues; and (c) frame these issues in post-conviction briefing in a manner that is legally sufficient. These tasks, which are discussed below in detail, present clear difficulties for *pro se* defendants who, in addition to being indigent, often lack even a high school education, may not be English speakers, and suffer disproportionately from mental health conditions that impair their ability to prosecute such claims.

First, claims of ineffective assistance of trial counsel very often raise complicated legal issues that lay persons cannot reasonably be expected to

identify, much less understand and develop unaided by counsel. *See Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance."); *English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998) (same). Ineffective assistance of counsel may be based upon a spectrum of conduct—including failure to present alibi evidence, failure to present expert testimony rebutting the State's case, failure to challenge the admissibility of evidence, and failure to challenge jury selections—as illustrated by the following cases, all brought with the assistance of post-conviction counsel. *See, e.g., State v. Faust*, 265 Neb. 845, 883-84, 660 N.W.2d 844, 877 (Neb. 2003) (ineffectiveness found where counsel failed to object to prejudicial and inadmissible testimony on prior bad acts), *overruled in part on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (Neb. 2007); *Kirkland v. State*, 274 Ga. 778, 778-80, 560 S.E.2d 6, 7-8 (Ga. 2002) (ineffectiveness found where counsel failed to challenge for cause jurors with a business relationship to the corporate victim); *Sanchez v. State*, 351 S.C. 270, 272-75, 569 S.E.2d 363, 364-66 (S.C. 2002) (ineffectiveness found where counsel failed to object to hearsay testimony recounting inadmissible statements made by statutory rape victim); *State v. Bishop*, 263 Neb. 266, 276-77, 639 N.W.2d 409, 418 (Neb. 2002) (ineffectiveness found where counsel failed to advise defendant of double jeopardy defense before entry of guilty plea); *Hofman v. Weber*, 2002 SD 11, ¶ 18, 639 N.W.2d 523, 528-29 (S.D. 2002) (ineffectiveness found where counsel failed to move to suppress involuntary confessions); *Johnson v. State*, 26 Fla.

L. Weekly D2440, 796 So. 2d 1227, 1228-29 (Fla. Dist. Ct. App. 2001) (ineffectiveness found where counsel failed to move to dismiss based on dispositive precedent); *Patterson v. LeMaster*, 130 N.M. 179, 187, 21 P.3d 1032, 1040 (N.M. 2001) (ineffectiveness found where counsel failed to object to unduly suggestive showup procedure); *People v. Jackson*, 318 Ill. App. 3d 321, 326-30, 741 N.E.2d 1026, 1030-33 (Ill. App. Ct. 2000) (ineffectiveness found where counsel failed to move to dismiss after prosecution rested without introducing evidence on a necessary crime element); *Padgett v. State*, 324 S.C. 22, 28-29, 484 S.E.2d 101, 104 (S.C. 1997) (ineffectiveness found where counsel failed to challenge burglary charge when building in question was unoccupied); *Grace v. State*, 683 So. 2d 17, 19-21 (Ala. 1996) (unreported in state reporter) (ineffectiveness found where counsel failed to file written discovery motion that would have resulted in suppression of incriminating statement).

As a practical matter, it is difficult for someone without any legal background first to identify an error and then to determine whether it is sufficient to form the basis of an ineffective assistance of counsel claim. Moreover, even if an inmate were intellectually capable of educating himself or herself concerning the governing law, there are often significant barriers to doing so. For example, incarcerated defendants often have only limited access to libraries and other resources necessary to prosecute their claims. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1633 (2003) (noting a "marked contraction in the availability of law libraries and other legal services to prison inmates" and citing news reports of prison

law library closures in six states); Elizabeth Greenberg et al., Nat'l Ctr. of Educ. Statistics, U.S. Dep't of Educ., *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey* 62-64 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf (noting that "access to the Internet is typically prohibited within prisons" and that 22% of inmates had to wait between two and six days to access prison libraries, 10% had to wait seven to ten days, and another 10% had to wait more than 10 days to access those facilities).

Second, claims of ineffective assistance of counsel can require extensive post-trial investigation to supplement the trial record with evidence specific to a finding of ineffective assistance and resulting prejudice. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003) ("When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."). Criminal defendants often must identify experts or other witnesses, not previously identified or investigated by trial counsel, who can offer exculpatory affidavits or testimony. *See Baumer*, No. 2004-0296-FH, slip. op. at 9 (granting habeas petition where post-conviction counsel demonstrated that trial counsel had inexcusably failed to consult with or call several experts who would have offered exculpatory testimony directly contradicting testimony from prosecution experts); *Rios v. Rocha*, 299 F.3d 796, 812-13 (9th Cir. 2002) (reversing conviction for second-degree murder where trial counsel abandoned a misidentification

defense after interviewing only one of several dozen eyewitnesses and where post-conviction counsel showed that some of these witnesses were willing to testify that defendant did not shoot the victim); *Miller v. Anderson*, 255 F.3d 455, 457 (7th Cir. 2001) (trial counsel's failure to consult with and retain expert prejudicially ineffective in part because post-conviction counsel was able to secure exculpatory testimony from an expert).

For example, as this Court recently acknowledged, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009) (Scalia, J.); *see id.* ("One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."); *see also* Brandon L. Garrett, *Convicting the Innocent* 90 (2011) ("The analysts did this across a wide range of methods, ranging from serology, in which 58% of the testimony was invalid (67 of 116 trials); to hair comparison, in which 39% was invalid (29 of 75 trials); to bite mark comparison, in which 71% was invalid (5 of 7 trials); to shoe print comparison, in which 17% was invalid (one of six trials); to fingerprint comparison, in which 5% was invalid (1 of 20 trials)."). Criminal defendants challenging trial counsel's effectiveness on their own cannot reasonably be expected to understand increasingly complex forensic science presented at trial, identify potential defects in the science, and retain experts capable of demonstrating those flaws to a court.

Third, these claims must be presented in a way that is procedurally and substantively proper, a task that, again, is difficult without assistance of counsel. While "[a] prisoner not trained in the law or familiar with legal process might reasonably suppose that a heartfelt avowal of his or her veracity, however generalized, is sufficient to secure an evidentiary hearing," *Pham v. United States*, 317 F.3d 178, 186-87 (2d Cir. 2003) (Sotomayor, J., concurring), that is simply not the case. Courts routinely dismiss ineffectiveness claims for a myriad of reasons, including failure to timely raise that claim in the proper forum, *see, e.g., State v. Maciell*, No. 2 CA-CR 2010-0219-PR, 2010 WL 4285650, at *1 (Ariz. Ct. App. Oct. 15, 2010) (unreported); *Cleveland v. State*, 241 P.3d 504, 506-08 (Alaska Ct. App. 2010); *Martin v. State*, No. CR 99-828, 2001 WL 528246, at *1 (Ark. May 17, 2001) (unreported), and failure to plead allegations supporting the claim with sufficient specificity, *see, e.g., State v. Manley*, 664 N.W.2d 275, 289 (Minn. 2003) (unreported in state reporter); *State v. Flores*, No. 2004 AP 1695-CR, 2005 WL 2138805, at *4-5 (Wis. Ct. App. Sept. 7, 2005) (unreported).

Criminal defendants proceeding *pro se* are typically in no position to meet these demands. As this Court has recognized, literacy problems and a general lack of education often leave these defendants "particularly handicapped as self-representatives." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *see also id.* (noting that "Sixty-eight percent of the state prison population did not complete high school, and many lack the most basic literacy skills" and that "[s]even out of ten inmates fall in the lowest two out of five levels of

literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article."). A significant portion of these defendants also do not speak English as a first language, creating obvious additional barriers to successfully navigating the legal system. *See, e.g.*, Greenberg, *supra*, at 12-13 (finding that more than one in ten inmates nationally either did not speak English before starting school or is nonliterate in English). Compounding these problems is the fact that a substantial number of defendants suffer from mental illness, *see, e.g.*, Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf. ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem."), which can interfere with their ability to assemble a *pro se* defense. *See Halbert*, 545 U.S. at 621 (citing, among other handicaps for criminal defendants proceeding *pro se*, mental health impairments).

B. A Defendant's First Opportunity to Raise a Claim of Ineffective Assistance of Trial Counsel May Not Arise on Direct Appeal

Direct appeal often will not provide criminal defendants with a meaningful opportunity to prosecute claims of ineffective trial counsel because the record on direct appeal is ordinarily limited to the trial record, whereas ineffectiveness claims typically require that defendants investigate and

supplement the trial record with additional evidence showing that trial counsel provided prejudicially deficient assistance. Moreover, several state courts have either counseled against, or otherwise expressly prohibited, criminal defendants from bringing such claims on direct appeal. Accordingly, the first meaningful opportunity to prosecute claims of trial counsel's ineffectiveness will arise, either practically or legally, on post-conviction review.

This Court has previously recognized—at least in the federal system—that defendants often cannot reasonably expect to vindicate their right to trial counsel on direct appeal. In *Massaro v. United States*, a unanimous Court held that federal criminal defendants may bring claims of ineffective assistance of counsel in post-conviction proceedings under 28 U.S.C. § 2255, even if defendants could have, but did not, raise those claims on direct appeal. 538 U.S. at 508-09. Concluding that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance," the Court explained:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . . The evidence introduced at trial [ ] will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged

> error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Id. at 504-05 (internal citations omitted); *see also Kimmelman*, 477 U.S. at 378 n.3 (concluding that counsel's failure to litigate a Fourth Amendment claim in state court did not bar federal habeas review of an ineffectiveness claim based on that failure in part because "in general, no . . . meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review").

Massaro recognized that claims of ineffective assistance of trial counsel are uniquely complex and not easily resolved simply by reference to the trial record. Unless the error is plain on the face of that record, or a court on direct review permits a defendant to supplement the record, the first meaningful forum to prosecute ineffectiveness claims will be in post-conviction proceedings, and not on direct appeal.

Consistent with the ruling in *Massaro*, the Arizona Supreme Court affirmatively prohibits defendants such as Martinez from raising ineffectiveness claims on direct appeal, requiring instead that they raise such claims in post-conviction proceedings under Rule 32 of the Arizona Rules of Criminal Procedure. *See, e.g.*, *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (Ariz.

2002) (holding that ineffectiveness claims "raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit" to "ensure[ ] criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims" and to "promote[ ] judicial economy by disallowing piecemeal litigation"). Just as this Court recognized in *Massaro*, one impetus for the rule in Arizona is that direct appeal is rarely an adequate forum to prosecute ineffectiveness claims. *See State v. Kiles*, 222 Ariz. 25, 34, 213 P.3d 174, 183-84 (Ariz. 2009) ("Because we cannot consider facts outside the record, our consideration of ineffective assistance of counsel claims on direct appeal would rarely result in reversal. We caution that raising an argument such as this on direct appeal gains very little, but risks a great deal, as the defendant who asks this Court to determine issues of ineffectiveness on the appellate record faces the possibility of later preclusion."). Accordingly, in Arizona, a criminal defendant's first and only opportunity to bring an ineffectiveness claim, and to correct trial errors related to such claims, is on post-conviction review.

For the same reasons, other state courts have concluded that, unless the error is plain on the face of the record on appeal, the more appropriate forum for such claims is post-conviction review. *See, e.g., People v. Lopez*, 42 Cal. 4th 960, 972, 175 P.3d 4 (Cal. 2008) ("[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal."); *Wuornos v. State*, 21 Fla. L. Weekly S202, 676 So. 2d 972, 974 (Fla. 1996) (holding that ineffectiveness claims are not

cognizable on direct appeal, unless the claim is obvious on the existing record); *State v. Picotte*, 416 N.W.2d 881, 881-82 (S.D. 1987) (unreported in state reporter) (same); *cf. Dodson v. State*, 326 Ark. 637, 642, 934 S.W.2d 198, 201 (Ark. 1996) (holding that such claims may be considered on direct appeal, but only if presented to the trial court first in a hearing on a motion for retrial). In these circumstances, as a practical matter, a defendant's first meaningful opportunity to bring a claim of ineffective assistance of trial counsel is on post-conviction review.

C. Counsel Is Required for First-Tier Review of Ineffective Assistance of Trial Counsel Claims, Even if Such Review Occurs Outside of Direct Appellate Review

Because counsel is necessary to assist in identifying and prosecuting claims of ineffective assistance of trial counsel, and because the first opportunity to present such claims may not occur on appellate review, defendants have a constitutional right to counsel when such first-tier review occurs post-conviction. This Court has already recognized the often critical role of post-conviction counsel in prosecuting claims of ineffective assistance of counsel. As explained in *Kimmelman*:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. *A layman will ordinarily be*

> *unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.*

477 U.S. at 378 (emphasis added) (internal citations omitted); *see id.* ("Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal."); *see also English*, 146 F.3d at 1263 (relying on *Kimmelman* to hold that a defendant's failure to raise an ineffective assistance of counsel claim on direct review will not bar federal habeas review unless state procedures "(1) allow[] petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) provid[e] a procedural mechanism whereby a petitioner can adequately develop the factual basis of his claims of ineffectiveness").

As the Court's opinion in *Kimmelman* suggests, post-conviction counsel will often serve as the sole means by which a defendant may discover that trial counsel acted incompetently. Conversely, absent an opportunity to consult with counsel, a defendant proceeding *pro se* will ordinarily be unable to identify the deficient trial performance that deprived him of his constitutional right to a fair trial. And, as *Halbert* suggests, even if a defendant proceeding *pro se* were able to identify trial counsel's ineffectiveness, he or she would be ill-equipped to actually prosecute such claims on first-tier review. *See Halbert*, 545 U.S. at 620-21;

cf. State v. Lopez, 156 N.H. 193, 198, 931 A.2d 1186, 1191 (N.H. 2007) ("[W]e have no reason to believe that defendants pursuing [post-conviction] review in this court are better equipped to represent themselves than the defendants described in the *Halbert* opinion.").

A survey of case law supports this Court's understanding that assistance of counsel is critical to bringing a claim of ineffective assistance of trial counsel. For example, of 222 successful state court claims between 1984 and 2003 alleging multiple instances of deficient trial performance, only one claim involved a defendant proceeding without counsel's assistance. This survey suggests that the assistance of counsel in post-conviction proceedings is a decisive factor in determining a defendant's success on the merits. For these reasons, and for reasons more fully explained in Petitioner's Brief, *see* Brief for Petitioner at Argument I.A, *Martinez v. Ryan*, No. 10-1001 (Aug. 4, 2011), the constitutional right to counsel on first-tier review of a claim of ineffective trial counsel, even if that occurs outside of appellate review, is critical to protect a defendant's constitutional right to a fair trial and to safeguard the integrity of the judicial process.

CONCLUSION

In light of *Kimmelman, Massaro*, and *Halbert*, as well as substantial evidence that ineffective trial counsel leads to wrongful convictions and that defendants proceeding *pro se* are particularly ill-suited to identify and prosecute ineffectiveness claims, the Innocence Network joins with Petitioner Luis Martinez and asks that this Court

affirm the constitutional right of defendants to counsel at the first opportunity to pursue such claims.

Respectfully submitted,

JAMES P. ROUHANDEH,
Counsel of Record
REBECCA WINTERS
MICAH J. COGEN
KATHERINE A. MARSHALL
ALAN J. TABAK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com

KEITH A. FINDLEY
PRESIDENT
THE INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 262-4763

Counsel for Amicus Curiae

August 2011