No. 85519

IN THE NEVADA SUPREME COURT

Peter Coca,

Appellant,

v.

State of Nevada, et al.,

Respondents.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Fourth Judicial District, Elko County (CR DC-CV-22-82)
Honorable Kriston N. Hill, District Court Judge

Brief of National Association for Criminal Defense Lawyers, and Nevada Attorneys for Criminal Justice, in Support of Appellant

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Lauren D. Wigginton of Lewis Roca Rothgerber Christie LLP represents amici in this Court.

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IDENTITY OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association founded in 1958. NACDL works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of 10,000 lawyers, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to the criminally accused, criminal defense lawyers, and the criminal legal system as a whole.

Nevada Attorneys for Criminal Justice ("NACJ") is a Nevada domestic nonprofit organization comprised of approximately 250 criminal defense attorneys who practice in both the public and private sectors. NACJ members represent defendants in criminal cases at all stages, both pre- and post-conviction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The history of the right to effective assistance of counsel for indigent criminal defendants in Nevada is a cause for pride. Nevada was an early adopter of the right to counsel in criminal cases, a right this Court was instrumental in enforcing. *See* Sixth Amendment Center (SAC), *Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future*, at iv (March 2013) (hereinafter *Reclaiming Justice*) (quoting Dean Heller, *Political History of Nevada*, 66-68 (11th ed., 2006))[1]; *see also In re Wixom*, 12 Nev. 219, 224 (1877). This Court reaffirmed the state's commitment throughout the century and a half that followed, and again in 2008: setting comprehensive standards for those tasked with representing indigent criminal defendants, with a particular eye toward Nevada's underserved rural populations. *See In re Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Oct. 16, 2008). But a

[1]Available at https://sixthamendment.org/6ac/nvreport_reclaimingjustice_032013.pdf.

recent shift in the legal landscape has undercut Nevada's storied commitment to competent counsel for indigent defendants.

The right to competent counsel is protected in various ways. Most significantly, defendants may raise ineffective assistance of trial counsel (IATC) claims in state post-conviction/state habeas proceedings. But if a defendant's initial post-conviction counsel is *also* ineffective, the claim can be inadvertently forfeited. In determining whether a defendant may overcome a procedural bar stemming from the forfeiture, courts ask the defendant to show "good cause." The United States Supreme Court did so in *Martinez v. Ryan*, 566 U.S. 1 (2012), where it applied "good cause" as an equitable concept. *Martinez* held that in federal habeas proceedings, inadequate assistance from initial-review post-conviction counsel in state court constitutes good cause sufficient to overcome the procedural default of an IATC claim. *Id.* at 9.

This Court addressed the "cause" concept in state habeas proceedings in *Brown v. McDaniel*, in which it was required to determine when a defendant's failure to properly raise an IATC claim in initial post-conviction proceedings may be excused. 130 Nev. 565, 569,

331 P.3d 867, 870 (2014). A majority of this Court ruled that "cause" *excludes* ineffective assistance of counsel in initial post-conviction proceedings. *Id.*

In so limiting the definition of cause, the *Brown* majority emphasized the availability of a federal forum in which to raise such claims. And a federal forum for such review was feasible at that time under *Martinez*. But last year the Supreme Court drastically cabined *Martinez*, with the stated intention to keep federal courts from interfering with state post-conviction review. *See Shinn v. Ramirez*, 142 S.Ct. 1718, 1730-31 (2022). The unfortunate irony is that now, in non-capital cases, the interplay of *Shinn* and *Brown* severely restricts review of trial counsel's performance and effectively eliminates any review of post-conviction counsel's performance. *Brown* emphasized the federal forum that *Shinn* well-nigh eliminated; *Shinn* emphasized the state forum that *Brown* already relinquished.

While this Court is "loath to depart from the doctrine of stare decisis," it will not "adhere to the doctrine so stridently that the law is forever encased in a straight-jacket." *Armenta-Carpio v. State*, 129 Nev.

531, 535, 306 P.3d 395, 398 (2013). The changes *Shinn* wrought warrant this Court's departure from *Brown*. With a federal forum now largely excluded for state prisoners facing state procedural bars, the Court should reexamine the approach to "cause" it adopted in *Brown* and embrace the equitable approach exemplified by *Martinez*—in which ineffective assistance of initial post-conviction counsel establishes cause. History, equity, precedent, and principles of due process require that a Nevada criminal defendant have meaningful access to a forum in which to litigate IATC claims. When a petitioner receives ineffective assistance of counsel during the initial post-conviction proceedings, that access cannot be considered meaningful. And if—given the intersection of *Brown* and *Shinn*—there is no access to a forum in which the petitioner can challenge the competency of their trial counsel, the petitioner is impotent to vindicate their rights. This cannot have been *Brown*'s intent.

Amici respectfully ask this Court to reexamine and abrogate *Brown* and its definition of cause in light of *Shinn*. Amici ask this Court to expand the definition of cause excusing Nevada's procedural

bars to include the ineffective assistance of initial post-conviction counsel. This narrow shift in the Court's explanation of cause is well within this Court's authority. *See Martinez*, 566 U.S. at 13 (recognizing that the definition of cause is within the judiciary's discretion to alter); *see also Brown*, 130 Nev. at 569, 331 P.3d at 870 (recognizing that this Court defines cause for the purposes of state habeas proceedings). Such a shift will ensure that criminal defendants have access to a meaningful process for litigating IATC claims, satisfying this Court's implicit dictate in *Mack v. Williams*, 138 Nev. Adv. Op. 86, 522 P.3d 434, 450 (2022), that every constitutional right requires a remedy.

ARGUMENT

The Supreme Court's decision in *Shinn* fundamentally changed the landscape in which this Court decided *Brown*. Should *Brown* remain Nevada law, it will grossly undermine defendants' right to competent counsel by devastating their ability to seek review of IATC claims. This Court should overrule *Brown* and redefine cause to overcome state procedural bars in state habeas proceedings. *Brown*'s consequences are now intolerable from the standpoint of history, equity, precedent, and due process.

I. *Shinn* altered the availability of relief for a Nevada defendant raising an IATC claim

A. *Brown* and *Martinez* previously created a forum for Nevada defendants to vindicate such claims

Martinez addressed a fundamental problem. Namely: criminal defendants have the right to effective assistance of counsel, *see generally Strickland v. Washington*, 466 U.S. 668 (1984), but in many states, they can raise that right only during state post-conviction proceedings. *Martinez*, 566 U.S. at 11. If they do not have counsel during those proceedings—or if post-conviction counsel is ineffective—

then they effectively have no forum in which to raise IATC. *Id.*

As in Nevada state court, in federal court the events constituting cause to excuse a habeas petitioner's procedural default of an IATC claim are judicially defined. *Martinez*, 566 U.S. at 13. In *Martinez*, the U.S. Supreme Court acted within that province, establishing an equitable rule that the ineffective assistance of state post-conviction counsel is cause to excuse a petitioner's procedural default of an IATC claim in state court, and to consider its merits in federal court. For their representational circumstances to qualify as cause, the petitioner needs to show that their post-conviction counsel was ineffective within the meaning of *Strickland*; that is, that counsel unreasonably failed to raise a meritorious IATC claim, which caused prejudice. *See Rodney v. Filson*, 916 F.3d 1254, 1259-60 (9th Cir. 2019). *Martinez* was a perceptive, well-reasoned decision in which the Supreme Court stressed the importance of robust review of IATC claims and recognized what is largely common sense: to "present a claim of ineffective assistance at trial . . . a prisoner likely needs an effective attorney." *Martinez*, 566

U.S. at 12.[2]

This Court decided *Brown* in the wake of *Martinez*. A majority of this Court held—in the context of state habeas proceedings—that if a petitioner attempts to litigate an IATC claim in Nevada state court but some state procedural bar stands in the way, the ineffective assistance of initial-review post-conviction counsel is not cause excusing the petitioner's initial failure to raise the claim. *Brown*, 130 Nev. at 567, 331 P.3d at 869. Justice Michael Cherry—joined by Justice Nancy Saitta—dissented, urging that "equity and fairness require a different result." *Id.* at 577, 331 P.3d at 875. The majority disagreed, holding that in Nevada state court, the procedural defect effectively marks the end of the line for IATC claims.[3] But in so holding the majority relied on the availability of a federal forum in which to pursue IATC claims

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[2]Federal habeas courts, however, will not excuse the procedural default of a claim of ineffective assistance of counsel in direct appeal (i.e., non-habeas) proceedings. *See generally Davila v. Davis*, 137 S.Ct. 2058 (2017).

[3]A petitioner might be able to overcome default some other way, such as by showing actual innocence. *See generally Berry v. State*, 131 Nev. 957, 363 P.3d 1148 (2015).

barred from review by state procedural rules. *See e.g.*, *id.* at 575 & n.9, 331 P.3d at 874 & n.9. As discussed, *Martinez* ensured that the federal forum was available.

Indeed, when this Court decided *Brown*, federal courts held evidentiary hearings to consider whether initial post-conviction counsel in state court had been ineffective for failing to raise an IATC claim, and evaluated the evidence developed in these hearings to further determine whether petitioner's trial counsel had been ineffective so as to implicate *Martinez*. *See, e.g.*, *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (Fletcher, J., op.) ("*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him."). This process gave *Martinez* teeth. A striking example from rural Churchill County, Nevada, illustrates how this worked in practice. *See James David McClain v. State*, No. 63329, 2014 WL 504736 (Nev. Jan. 16, 2014) (Order of Affirmance).

In *McClain*, the petitioner pled guilty, receiving a 70-year sentence. *McClain v. LeGrand*, No. 3:14-cv-00269-MMD-CLB, at 1, 5 (D. Nev. March 18, 2021) (Findings of Fact, Conclusions of Law, and Order). But McClain was intellectually disabled, *id.* at 1, and his trial counsel had spent very little time with him, failing to follow up on clear indications that he did not understand his plea. *Id.* at 14. For example, before pleading, McClain repeatedly asked his attorney whether she thought his girlfriend "would wait for him until he got done with his sentence." *Id.* at 10. At the federal evidentiary hearing, trial counsel later admitted that she believed McClain never "comprehended that he could go away" to prison for a long time. *Id.* at 11.

McClain filed a pro se petition for state post-conviction relief. *Id.* at 19. The district court appointed a post-conviction attorney who "did absolutely nothing to develop the case. He did not file anything." *Id.* He took no "action whatsoever to represent [McClain]." *Id.* at 20. Given the woefully undeveloped record, this Court affirmed the district court's denial of post-conviction relief. *See McClain*, 2014 WL 504736.

Absent *Martinez*, that might have been the end of the line for McClain. But after he filed a pro se federal habeas petition and a new attorney was appointed, McClain's case was—at last—worked up. In federal proceedings, McClain relied on *Martinez* to argue that his post-conviction counsel was ineffective, which constituted cause excusing the default of his new IATC claims (which in turn dealt with his trial attorney's deficient counseling about the plea and anemic performance at sentencing). *McClain*, No. 3:14-cv-00269-MMD-CLB, at 27. The federal district court held an evidentiary hearing, at which trial and post-conviction counsel testified. *Id.* at 6, 20. The court found that, in fact, petitioner had been unlucky enough to have had ineffective assistance at both stages, granting the writ. *Id.* at 37.

As *McClain* illustrates, before *Shinn*, Nevada defendants had a meaningful opportunity to litigate IATC claims. Defendants could first pursue relief in state court via post-conviction proceedings. If counsel was appointed but that counsel was deficient and failed to investigate and raise meritorious IATC claims, defendants had a federal forum in which to present the claims that initial post-conviction counsel

ineffectively litigated. Federal courts were then able to consider new evidence to determine whether petitioner deserved relief on the IATC claims.

B. *Shinn* effectively eliminated the forum *Brown* and *Martinez* fostered

Shinn slammed shut the federal forum door that *Martinez* opened—and that *Brown* presumed would stay open—in order to advance state courts' primacy as adjudicators of criminal constitutional rights. As discussed below, *Shinn* holds that state post-conviction counsel's ineffectiveness in not raising an IATC claim does not excuse a petitioner's failure to ***present evidence*** of that same IATC claim to the state court. In practical effect, *Shinn* limits the scope of the federal forum *Martinez* established by precluding a petitioner from raising an IATC claim that relies on new evidence, even when initial post-conviction counsel was at fault for failing to present it. *See Shinn*, 142 S.Ct. at 1740, 1746-47, 1750 (Sotomayor, J., dissenting); *cf. Shinn v. Ramirez*, 136 Harv. L. Rev. 400 (2022) (explaining the effect of *Shinn* is that "habeas petitioners may *assert* . . . [IATC] claims, [but] petitioners are now unable to marshal the evidence required to *prove* them").

The Supreme Court reached this result in *Shinn* by way of the federal habeas statutes, which provide that if the applicant has "failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim . . . ." 28 U.S.C. § 2254(e)(2). The Court's interpretation of the term "failed to develop" imposes a very high bar that an applicant can primarily overcome only if someone other than the applicant (for example, the state court) is to blame for the undeveloped record. *See Shinn*, 142 S.Ct. at 1734. The crux of *Shinn* is that if the actor to blame for the undeveloped record of an IATC claim is the applicant's ineffective state post-conviction attorney, that failure is imputed to the applicant. *Id.* *Shinn* thus bars applicants with ineffective state post-conviction counsel from developing the record of the IATC claim in federal court. *See id.*

Shinn's rationale is that state courts bear responsibility for adjudicating state prisoners' claims of constitutional violations, and federal courts should not trespass on that role. *See Shinn*, 142 S.Ct. at 1730-31. "Because federal habeas review overrides the States' core

power to enforce criminal law," the *Shinn* majority reasoned, "it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id.* at 1731 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)). A federal order to retry or release a state prisoner "inflict[s] a profound injury" on the state—whose interest the majority framed as "punishing the guilty"—and "imposes significant costs on state criminal justice systems" by disturbing repose and undermining the state's investment in criminal trials. *Id.* (citations omitted).

Shinn reflects the Supreme Court's decision to ensure that state courts and state systems serve as the primary adjudicators of criminal constitutional rights. That warrants a re-examination of *Brown*, in which this Court assumed, based on *Martinez*, that petitioners would have meaningful access to a federal forum when state procedural rules bar their IATC claims. Otherwise, the intersection of these decisions "will leave many [Nevadans] who were convicted in violation of the Sixth Amendment to face incarceration . . . without any meaningful chance to vindicate their right to counsel." *Shinn*, 142 S.Ct. at 1740 (Sotomayor, J., dissenting).

This Court takes its responsibility to persons incarcerated for Nevada state crimes exceptionally seriously[4] and can provide a meaningful forum for these people to vindicate their right to effective assistance of counsel by overruling *Brown* and shifting the approach to cause to align with what the Supreme Court adopted in *Martinez.* In his dissent in *Brown*, Justice Cherry opined that there were "compelling reasons" to adopt *Martinez* in state habeas proceedings. 130 Nev. at 577, 331 P.3d at 875. This is especially clear now that the federal courthouse doors are closing.

II. The practical effects of *Brown* post-*Shinn* are unexpected, unintentional, and out of step with the ethos of this State and this Court; *Brown* should be overruled

Nevada defendants who seek an adjudication of their Sixth Amendment right to effective assistance of counsel must do so post-conviction. *See Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). Absent highly unusual circumstances, filing a timely first post-conviction petition is therefore the only way a defendant who

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[4]For example, this Court has chosen to apply more rules of criminal procedure retroactively than federal precedent requires. *See Colwell v. State*, 118 Nev. 807, 819, 59 P.3d 463, 471 (2002).

has been convicted of a non-capital crime can obtain review of their attorney's performance. This Court has recognized the importance of a meaningful post-conviction proceeding to hear IATC claims, an essential component of which is often effective assistance of post-conviction counsel. The effects of *Brown* post-*Shinn* on Nevadans' right to counsel are incongruent with Nevada's commitment to safeguarding the right. By overruling *Brown* and redefining cause in line with the Supreme Court's definition in *Martinez*, this Court can correct course.

A. Nevada was an early adopter of the universal right to trial counsel

Nevada recognized a right to counsel for indigent criminal defendants more than a century before the Supreme Court recognized it nationwide. *See Reclaiming Justice*, at 11 (quoting *Political History of Nevada*, at 66-68); *compare In re Wixom*, 12 Nev. at 224, *with Gideon v. Wainwright*, 372 U.S. 335, 337 (1963). In fact, Nevada was the first state to incentivize *competent* criminal defense counsel by guaranteeing the payment of counsel. SAC, *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* (Sept. 2018) (hereinafter *Rural*

Nevada)[5]; *see* Laws of the State of Nev., Chap. LXXXVI, Sec. 1 (1875).

Thomas Wren—a self-made man, and prosecutor-turned-congressman from Nevada—advocated and successfully obtained passage of the bill setting that requirement. *Reclaiming Justice*, at iv (calling Wren "[t]he father of the right to counsel in Nevada[, a man who] epitomizes the rugged individualism that is characteristic of Nevadans"). Wren's work was met with public accolade, even during the Reconstruction era: "hundreds of struggling and unfortunate men in this State have been aided and their rights secured through his exertions." *Id.* at 15-16 (quoting *Journal of the Senate for the State of Nevada*, 1875).

In a study and report commissioned by this Court, the SAC traced the roots of this right in Nevada back further—to a time predating Nevada's statehood—during the life of "Lucky Bill" Thorington, "a prototype Nevadan: flamboyant, gracious, and hard-working," a man who would open his home to anyone looking to play a game of chance.

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[5]Available at https://sixthamendment.org/6AC/6AC_NV_report_2018.pdf.

Reclaiming Justice, at 9. While vigilante justice reigned in the territory, this "prototype Nevadan" stood alongside others on a committee of anti-vigilantes, seeking to create a more democratic and just system of criminal justice. Lucky Bill was himself hung by the vigilantes he resisted after they accused him of harboring a fugitive. But though "the vigilantes successfully rid themselves of Thorington," the SAC notes, "the episode firmly turned the people of the [then] Carson Valley against the vigilante committee" and toward requiring competent representation of the criminally accused. *Id.* at 10 (citing Michael J. Makley, *The Hanging of Lucky Bill* 18 (1993)).

The long-standing right to competent criminal defense counsel in the Silver State—and the colorful, historical, quintessentially Nevadan stories that underlie it—is something Nevadans can take pride in. Indeed, the SAC explained that it initially hoped its historical survey could show that the right to competent counsel was something "well within Nevada's own uniquely libertarian worldview." *Id.* at iv. But the SAC identified an even more expansive commitment by this state "to equal access to justice for poor people in criminal proceedings . . .

that far predates any federal action on the issue." *Id.*

In sum, this state is historically committed, and constitutionally obliged, to provide every indigent Nevada defendant with a competent trial attorney. *See Gideon*, 372 U.S. 335. Given the structure of post-trial review, enforcing the state's obligation means ensuring a meaningful post-conviction process. *See Brown*, 130 Nev. at 577, 331 P.3d at 875 (Cherry, J., dissenting) (recognizing that "[a] post-conviction petition for a writ of habeas corpus is a defendant's first and last chance to assert a claim of ineffective assistance of trial counsel and thus is vital to safeguarding a defendant's right to counsel at trial").

B. Ensuring a forum is available to hear IATC claims and enforce standards for post-conviction counsel is a natural extension of this Court's precedent

1. *Renteria-Novoa* promises a "meaningful opportunity" to litigate IATC claims

Generally IATC claims require "additional factual development" beyond what is in the trial record. *Massaro v. United States*, 538 U.S. 500, 505 (2003). Other than in exceptional circumstances, a defendant can therefore raise IATC claims only in post-conviction proceedings. *See Renteria-Novoa v. State*, 133 Nev. 75, 77, 391 P.3d 760, 762 (2017).

Yet incarcerated people are uniquely poorly positioned to pursue IATC claims: isolated from society, without funds and, often, research materials, struggling with their mental health and limited literacy. *See, e.g.*, Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for A Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1252-53 (2012).

Consequently, in 2017 (after *Brown*), this Court recognized that the "failure to appoint post-conviction counsel *may deprive the petitioner of a meaningful opportunity to present [their IATC] claims* to the district court," and held that the district court erred by refusing to appoint such counsel in that case. *Renteria-Novoa*, 133 Nev. at 78, 391 P.3d at 762 (emphasis added). Put differently, this Court recognized a right to a "meaningful" post-conviction proceeding, which demands the appointment of post-conviction counsel in certain circumstances. *See id.* Although the decision to appoint counsel is discretionary, on review, this Court takes a hard look at district court decisions denying it, often reversing when district courts fail to appoint counsel. *E.g.*, *id.* at 78,

391 P.3d at 762; *Bolen v. State*, No. 84293, 2022 WL 4282375, at *2 (Nev. Sept. 15, 2022) (Order of Reversal and Remand) ("The failure to appoint postconviction counsel in this case prevented a meaningful litigation of the petition."); *Davis v. Gittere*, No. 82583, 2022 WL 1302179 (Nev. Apr. 29, 2022) (Order of Reversal and Remand) (same).

2. This Court established standards for post-conviction counsel

Consistent with the logical foundation of *Renteria-Novoa*, this Court has further established standards governing attorneys' responsibilities at the post-conviction stage. *See In re Issues Concerning Representation*, ADKT No. 411, at 1 (stating, "the paramount obligation of criminal defense counsel is to provide zealous and competent representation at *all stages* of criminal proceedings" (emphasis added)); Nev. Indigent Def. Standard 2-19 (providing the duties of post-conviction counsel). For example, post-conviction counsel should "continue an aggressive investigation of all aspects of the case," review and modify as needed "prior counsel's theory of the case," "maintain close contact with the client regarding litigation developments," and "seek to litigate all issues, whether or not previously presented, that are

arguably meritorious." Nev. Indigent Def. Standard 2-19(b), (e). These further evince this Court's recognition of the crucial role that post-conviction attorneys play in vindicating their clients' constitutional trial rights.

This Court has it exactly right: in some cases, telling a petitioner to litigate an IATC claim without counsel is tantamount to denying the petitioner any meaningful opportunity to present that IATC claim. Amici ask this Court to take *Renteria-Novoa* to its natural extension, ensuring an opportunity to enforce the standards the Court put in place with ADKT 411. Under a *Brown*/*Shinn* regime, a petitioner would have little recourse if a post-conviction attorney did not carry out the duties prescribed by these standards. Amici ask this Court to redefine cause so that the deficient performance of post-conviction counsel excuses procedural bars to an IATC claim in Nevada state habeas proceedings.

3. The Nevada Constitution demands that constitutional rights have remedies

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2

L.Ed. 60 (1803)). Quoting this venerable precedent, this Court recently recognized that individuals who have suffered harm under Nevada's Constitution must have an available corrective process and remedy. *Mack*, 522 P.3d at 442. In *Mack*, this Court observed that if it did not recognize a damages remedy for unreasonable searches and seizures that did not result in criminal charges, there would be no mechanism "to deter or prevent violations of important individual rights in situations like that allegedly experienced by Mack."[6] *Id.* at 448.

The philosophy animating *Mack* applies to the Nevada Constitution's corollary to the Sixth Amendment right to competent counsel. *See* Nev. Const. art. 1, sec. 8 (guaranteeing due process and providing that "the party accused [of a crime] shall be allowed to appear and defend in person, and with counsel"). Article 1, section 8 of Nevada's Constitution is meant to protect criminal defendants' right to competent counsel at least as far as *Strickland*. *Cf. Warden, Nevada*

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[6]Correctional officers strip-searched Mack when she tried to visit a person who was incarcerated, but they found no contraband. 522 P.3d at 439.

State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Vindication of that right demands a remedy: enforcing the right to counsel requires that defendants have a meaningful way to show when the right has been abridged. Nevada state post-conviction proceedings are the primary way petitioners can show a violation of their Sixth Amendment right to competent counsel, and the *only* way they can show a violation of their state constitutional right to the same. If post-conviction counsel is often needed for a meaningful post-conviction process, *Renteria-Novoa*, 133 Nev. at 78, 391 P.3d at 762, a promise of their competency is necessarily implied. *Martinez*, 566 U.S. at 12.

Martinez articulates a definition of cause based in equity—that ineffective assistance of initial post-conviction counsel can excuse procedural bars. This is a workable standard that federal courts have been refining for over a decade. Nevada state courts have long applied an analogous standard in capital cases. *See, e.g.*, *Rippo v. State*, 134 Nev. 411, 418, 423 P.3d 1084, 1094 (2018). Overruling *Brown* in light of *Shinn* and adopting *Martinez*'s definition of cause in non-capital state habeas proceedings is a natural extension of *Renteria-Novoa* and *Mack*:

it will ensure that all defendants have an adequate opportunity to show they received ineffective assistance of trial counsel.

C. If *Brown* stands, Nevada's already underserved rural counties will bear its brunt

The unanticipated intersection of *Shinn* and *Brown* will most heavily impact Nevada's underserved rural counties. Only Clark and Washoe counties are statutorily required to maintain their own public defender offices, NRS 260.010(1), while less populous counties have discretion to determine the nature of their indigent defense services. NRS 260.010(2). Most have opted for a system in which private attorneys contract with the county to provide indigent defense services. *See* Nev. Dep't. Indigent Def. Servs., *Indigent Defense Information by County*.[7]

This ad hoc system results in a vast range of practitioner competence, reflecting the sad national reality that "[n]onmetropolitan counties . . . face particular challenges to funding and delivering

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[7]Available at https://dids.nv.gov/Resources/Selection_and_Billing/Information_by_County/.

justice." Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 Ariz. L. Rev. 219, 312 (2010). In fact, the SAC has criticized the system of indigent criminal defense counsel available in Nevada's rural counties on multiple fronts, including "a pervasive lack of institutionalized attorney supervision and training . . . fixed fee contracts that pay the same no matter how few or how many cases the attorney handles, and that require the attorney to pay for overhead out of the fixed compensation . . . [and] excessive caseloads in those rural counties with populations greater than 15,000." *Rural Nevada*, at 164.

The SAC further noted that "[r]ural counties . . . for the most part, do not have standards for the selection of qualified attorneys with the experience to match the complexity of the cases to which they are assigned." *Id.* While most rural attorneys appear to be qualified to handle the criminal cases to which they are appointed, "this is serendipitous. There is nothing to prevent future local policymakers from hiring non-qualified lawyers offering the lowest costs to cover the greatest number of cases." *Id.*

Post-conviction review of trial counsel's competence is therefore of utmost importance to rural Nevadans seeking to enforce their rights to counsel. *See* Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 Wash. & Lee L. Rev. 839, 845 (2013). And as discussed, *Shinn*'s cabining of *Martinez* effectively eliminates the availability of that review federally; the Supreme Court intentionally and expressly made state courts the central adjudicators of IATC claims. *Shinn*, 142 S.Ct. at 1730-31.

Before *Shinn*, this Court narrowed the definition of cause in Nevada state habeas proceedings to streamline the post-conviction process and promote finality of convictions, relying on the availability of federal-court review. *See Brown*, 130 Nev. at 573, 331 P.3d at 873. But it cannot be that this Court intended with *Brown* to effectively sanction a lower level of counsel competence for residents of Nye and Humboldt than Clark and Washoe counties. In challenging the Legislature to comprehensively reform the public defender system—as it ultimately did with ADKT 411—then-presiding Chief Justice Michael Cherry emphasized: "We must do better at providing representation to rural

defendants. . . . Rural persons are just as deserving of representation as their urban neighbors. I encourage you to provide equal justice to rural individuals too." *Rural Nevada*, at 39. Whether residing under the bright lights of Sin City or in a lone cabin in central Nevada's vast expanse, every Nevadan should be afforded full protection of their civil liberties. As the SAC found, this principle is part of this state's rich commitment to equal access to justice for even its least powerful citizens. *Reclaiming Justice*, at iv.

Shinn was not wrong in stressing the benefits of a state forum for IATC claims. For instance, the vast disparity in resource disbursement among counties is a problem with which Nevadans and Nevada courts are intimately familiar. Concern over the inequitable burden borne by rural counties in part galvanized support for Assembly Bill 227 (1991),[8] which reformed the then-existing post-conviction process into that which currently exists. *Cf.* Nevada Ballot Questions, Arguments for Passage of Question No. 2 (Sept. 28, 1992) (noting that "because

[8]Discussed further at *infra* Section III.

prisoners are often incarcerated in the smaller rural counties, a disproportionate burden is placed on the courts in those counties to hear petitions for habeas corpus").[9] Given their familiarity with the problem, Nevada courts are best posed to address it. *See Davila*, 137 S.Ct. at 2070 (explaining that federal habeas courts have developed limiting doctrines explicitly to avoid injuring the sovereignty of state courts); *cf. Danforth v. Minnesota*, 552 U.S. 264, 275 (2008) (speaking to the authority of state courts "to provide remedies for a broader range of constitutional violations than are redressable on federal habeas"). In the aftermath of *Shinn*, meeting the challenges unique to indigent criminal defense in rural Nevada counties requires a reappraisal of *Brown* and a shift in this Court's definition of cause.

III. A core assumption underlying *Brown* was incorrect even when *Brown* was decided

Brown concluded based on the legislative history of Nevada's post-conviction statutes—specifically Assembly Bill 227 (1991)—that

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[9]Available at https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1992.pdf.

"Nevada's post-conviction statutes contemplate the filing of one post-conviction petition to challenge a conviction or sentence." *Brown*, 130 Nev. at 572, 331 P.3d at 872. *Brown* reasoned that recognizing ineffective assistance of post-conviction counsel as cause to excuse a procedural bar would "circumvent the Legislature's 'one time through the system' intent, as every petitioner who is appointed post-conviction counsel would then have an opportunity to litigate a second petition." 130 Nev. at 573, 331 P.3d at 873. Respectfully, this misapprehended the legislative history.

Before AB 227, a criminal defendant could file a statute-based post-conviction petition under NRS Chapter 177, and a habeas petition under NRS Chapter 34. AB 227 streamlined this confusing dual track into a single process. *See* Leg. Counsel Bureau, Summary of Legislation of 66th Session, AB 227 (Feb. 18, 1992) ("As a matter of judicial economy, *one process* is better and less confusing." (emphasis added)).[10]

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[10]The compiled legislative history of AB 227 is available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1991/AB227,1991.pdf.

This was not to ensure, as *Brown* suggested, that a defendant was allowed only a single petition to raise all their post-conviction relief claims. The intent instead was to "simplif[y] by eliminating a redundant procedure." Assembly Comm. on Judiciary, Minutes of the 66th Session, at 5 (Feb. 6, 1991); *see also* Senate Comm. on Judiciary, Minutes of the 66th Session, at 3 (March 20, 1991) (noting the 1991 changes were intended to consolidate tracks so that "one course of action would exist for a prisoner," and explaining that the committee that developed the bill "had attempted to make a two-tier system for post-conviction relief into a one-tier system").

Indeed, when several legislators expressed reservations that the consolidation might limit the remedies available to convicted persons, one of the drafters emphasized that "[n]o access to the courts would be cut off." Assembly Comm. on Judiciary, Minutes of the 66th Session, at 5 (Feb. 6, 1991); *see* Deputy DA Larry Guy Sage, Letter to Assembly Judiciary Committee (Feb. 4, 1991) (stating the "problem addressed by our recommendations and committee report [regarding the bill] is that a person can constantly be filing writs under *different chapters*"

(emphasis added)). Practitioners also believed the bill would operate to consolidate processes for the sake of clarity and efficiency, without eliminating available remedies. *See* Michael Mackedon, Letter to State Assemblywoman Dawn Gibbons (Feb. 13, 1991) (explaining, "I would not endorse the legislation if I felt it detracted or in any way diminished the vitality of habeas corpus law"); *cf.* Assistant Public Defender Robert D. Larsen, Letter to Assemblywoman Gibbons (Feb 4, 1991) (recommending passage to clarify current law).

Legislators recognized that even AB 227's single-track process could result in multiple collateral attacks. *Cf.* Deputy District Attorney Larry Guy Sage, Letter to Assemblywoman Gibbons (Feb 4, 1991) (describing the bill as "consolidat[ing] the habeas corpus *writ activity* . . . with that of post-conviction *petitions* available after a person has been convicted" (emphases added)). And the enacted statutes themselves further demonstrate that the Legislature understood this, allowing a petitioner to file more than one petition, on a showing of cause and prejudice. *See* NRS 34.726 (explaining petitioners can overcome untimeliness); NRS 34.810(3) (explaining petitioners can

overcome the second-or-successive claim bar). The Legislature notably left it to this Court to define both criteria.

Respectfully, *Brown* misperceived the legislative history of AB 227. The Legislature did not intend to limit those seeking post-conviction relief to a single petition. More significantly for present purposes, the legislative history does not support the effect *Brown* achieves post-*Shinn*. This Court should reexamine *Brown*, exercising its responsibility to define cause to include ineffective assistance of initial post-conviction counsel.

IV. The Court should overrule *Brown* because, post-*Shinn*, it abridges certain defendants' right to due process

Continued adherence to *Brown* will raise issues of constitutional magnitude. It will undermine the due process right to a procedurally meaningful and fair review of constitutional claims arising from a conviction or sentence. *See* Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 Hastings L.J. 1, 7 (2010).

Due process means that "every prisoner shall have *at least one full and fair adjudication* of his . . . constitutional claims." *Id.* 8-9

(emphasis added). Multiple U.S. Supreme Court decisions offer constitutional support for the ethos laid out in *Mack*: prisoners must be provided with an adequate corrective process and forum in which to litigate claims that their constitutional rights have been violated. *See Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J., concurring) (explaining "the absence of a full and fair hearing in the state courts" may violate the Constitution); *Frank v. Mangum*, 237 U.S. 309, 335 (1915) ("[I]f the state, supplying no corrective process, carries into execution a judgment . . . based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law[.]"); *see also Medina v. California*, 505 U.S. 437, 439, 445-46 (1992) (finding that conviction of incompetent defendant violates due process, and defendant must be provided with a procedure in which to show incompetency that itself comports with due process).

Overruling *Brown* in light of *Shinn* and adopting *Martinez*'s definition of cause as a sentinel of due process is not a bridge too far for this Court. At least since *Renteria-Novoa*, this Court has been rightly concerned about ensuring that petitioners have a "meaningful"

opportunity to bring IATC claims. *Renteria-Novoa*, 133 Nev. at 78, 391 P.3d at 762; *cf. Gideon*, 372 U.S. at 344-45 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.") (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding unconstitutional a system in which "[t]he indigent . . . has only the right to a meaningless ritual, while the rich man has a meaningful appeal"). And *Mack* further cemented this Court's commitment to ensuring remedies for rights.

Following this precedent, this Court can comfortably hold that, first, due process requires that a defendant have a meaningful opportunity for a full and fair adjudication of their IATC claims. It should hold, second, that a defendant does not receive a full and fair opportunity to raise IATC claims when the defendant, who needs post-conviction counsel for a meaningful post-conviction process, is appointed non-functioning counsel. *See Strickland*, 466 U.S. at 687; *cf. Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring).

A realistic scenario illustrates the potential problem. Imagine that a prisoner with limited English proficiency asks a non-lawyer friend to draft a post-conviction petition for them, alleging IATC based on counsel's failure to present a plea deal to the prisoner, which the prisoner would have taken. After reviewing the petition, the post-conviction court grants an evidentiary hearing. At that point, the prisoner needs the effective assistance of post-conviction counsel to obtain meaningful review of their IATC claim. *See In re Clark*, 855 P.2d 729, 748 (Cal. 1993) (holding that when a petitioner states a prima facie case for relief, "the appointment of counsel is demanded by due process concerns"); *cf. Martinez*, 566 U.S. at 8-9 (explaining the Court has "left open" the question whether there is a right to effective assistance of post-conviction counsel for certain IATC claims based on the same due process/equal protection rationale as motivated *Douglas v. California*).

But our hypothetical post-conviction court appoints an attorney who does not review trial counsel's files, fails to find the prosecutor's email offering a highly favorable plea deal, and calls only the prisoner at the hearing. Because of the abysmal evidentiary record, the court

denies the petition. If the prisoner has no other available forum to prove their claim, due process is denied: the prisoner has not had the meaningful opportunity to show IATC that this Court has recognized. *See Renteria-Novoa*, 133 Nev. at 78, 391 P.3d at 762. This runs afoul of the spirit of this Court's precedent; Nevada statutes, *see* NRS Chapter 34; and the Nevada and U.S. Constitutions. *See* Nev. Const. art. 1, sec. 1 (setting out the inalienable right to enjoy and defend liberty); Nev. Const. art. 1, sec. 8 (recognizing the right to due process); *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (indicating state courts' responsibility to provide an adequate corrective process for constitutional violations).[11] Indeed, the right to counsel was recognized in Nevada even before it entered the union, further underlining the right's importance here. *See Reclaiming Justice*, at 9-11. In sum, if Nevada courts are to continue to follow *Brown* after *Shinn*, constitutional problems will arise that the

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[11]Another permutation of this argument is that, when effective assistance of post-conviction counsel is constitutionally necessary for the meaningful litigation of IATC claim(s), the denial of such should be attributed to the State, which would then constitute cause. *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (raising but not resolving issue).

Court could not have anticipated when it decided *Brown*. A second look is warranted.

CONCLUSION

Amici have the utmost respect for this Court and its precedent and do not lightly ask that this Court reconsider *Brown*, recognizing that stare decisis is not easily overcome. But *Brown*'s continued standing after *Shinn* profoundly and detrimentally impacts Nevadans' right to counsel—and particularly the rights of indigent and rural Nevadans. The post-*Shinn* effect of *Brown* is contrary to this State's storied commitment to the right to competent counsel; if there were "compelling reasons to adopt the equitable exception from *Martinez* in state habeas proceedings" even when *Brown* was decided, they are doubly compelling now. *Brown*, 130 Nev. at 577, 331 P.3d at 875 (Cherry, J., dissenting). If *Brown* stands, this Court backslides from its pragmatic commitment in *Mack* to ensuring Nevadans have a remedy to vindicate their rights. The result is inequitable, and it is unconstitutional. Amici respectfully ask that this Court forge a different path.

Dated March 23, 2023.

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Dated March 23, 2023.

Respectfully submitted,

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I hereby certify that on March 23, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

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