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# DYING FOR THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN STATE POST-CONVICTION PROCEEDINGS: STATE STATUTES & DUE PROCESS IN CAPITAL CASES

LETTY S. DI GIULIO

## INTRODUCTION

In December of 1998, the Ohio state appellate court informed Kevin Scudder, a man sentenced to die, that “although the General Assembly felt it appropriate to grant indigent post-conviction petitioners access to appointed counsel,” the statutory grant did not include a right to have “effective assistance” from that counsel.<sup>1</sup> As a result, the Ohio court did not even address the alleged deficient performance of Scudder’s appointed post-conviction counsel.<sup>2</sup> Scudder’s post-conviction counsel need do little more than just exist. Likewise, the Supreme Court of Tennessee notified Paul Gregory House, a man set to die by electrocution, that while the Tennessee Post-Conviction Procedure Act provides him with appointed counsel if his own attempt to prepare a petition for relief is “unartfully drawn,”<sup>3</sup> it does not require that counsel “investigate, address, and define the allegations of his *pro se* petition [or] call witnesses or present other proof” at the post-conviction hearing.<sup>4</sup> Any issues House’s post-conviction counsel did not address are presumed waived because House had no right to be represented in the first place.<sup>5</sup>

This Note explores the constitutional and legislative bases for denying death row petitioners the right to effective assistance of counsel in state post-conviction proceedings. The ultimate implication of this Note is that death-sentenced petitioners should have a constitutional right to counsel and to effective assistance of counsel in state post-conviction proceedings. Moreover, even if the Sixth Amendment does not grant petitioners the right to counsel in state capital post-conviction proceedings, the Fourteenth Amendment requires that, where a state chooses to grant a statutory right to counsel, it must recognize a concomitant right to effective assistance from that counsel.

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<sup>1</sup> State v. Scudder, No. 97APA12-1642, 1998 WL 831475, at \*2, \*3 (Ohio Dec. 3, 1998) (citing to R.C. 2953.21(I)(2), Ohio’s statutory provision granting capital petitioners the right to appointed counsel, while denying them the right to *effective* appointed counsel).

<sup>2</sup> See *id.*

<sup>3</sup> House v. State, 911 S.W.2d 705, 712 (Tenn. 1995) (citing to TENN. CODE ANN. § 40-30-107 (1990), Tennessee’s statutory provision for the appointment of post-conviction counsel).

<sup>4</sup> *Id.* at 707 (reciting House’s allegations against his previous post-conviction counsel).

<sup>5</sup> See *id.* at 713-714.

This Note is divided into four sections. Part I describes the constitutional background underlying the Supreme Court's determination that capital petitioners have no right to effective assistance of counsel, or even assistance of counsel at all, in state post-conviction proceedings. This section also details the problems—in general and in the context of death penalty post-conviction proceedings—implicit in the Supreme Court's narrow interpretation of the Sixth Amendment. Part II highlights several state legislative enactments providing for post-conviction counsel to capital petitioners and catalogues the reasons present statutes are inadequate to protect petitioners' interests in obtaining effective assistance of counsel. Part III addresses the unavailability or inadequacy of other judicial remedies for vindicating the errors made by state post-conviction counsel. In particular, this section explores the possibilities of seeking review through a civil malpractice suit, a section 1983 civil rights suit, or federal habeas corpus. Part IV concludes by proposing that, even if the Sixth Amendment does not afford capital petitioners a right to effective assistance of counsel in state post-conviction proceedings, the Fourteenth Amendment's Due Process Clause demands that, where a state provides a statutory right to the assistance of counsel, it is required to grant a right to the effective assistance of that counsel. Finally, this section notes recent judicial decisions that recognize the inadequate protection afforded by both the Supreme Court's position on the scope of the Sixth Amendment and the state statutory schemes granting capital post-conviction counsel.

## I. BACKGROUND

The United States Supreme Court has held that indigents are not entitled to a lawyer for state post-conviction proceedings where claims of ineffective assistance are often raised. Even if the defendant is provided a lawyer to raise a claim of ineffectiveness, *the court that failed to provide competent counsel at trial is unlikely to provide any more competent counsel for post-conviction proceedings.*<sup>6</sup>

### A. *Limiting the Right to Effective Assistance of Counsel: The Supreme Court's Interpretation of the Sixth Amendment*

The Supreme Court has determined that indigent defendants have a constitutional right to counsel under the Sixth and Fourteenth Amendments at both the trial<sup>7</sup> and the initial appellate<sup>8</sup> phases of a criminal prosecution. As articulated by the Court in its decision of *Gideon v. Wainwright*<sup>9</sup> over twenty years ago,

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<sup>6</sup> Stephen B. Bright, *Glimpses at a Dream Yet To Be Realized*, THE CHAMPION, Mar. 1998, at 64 (emphasis added) (addressing the dismal conditions in each phase of the present system of representation for indigent defendants).

<sup>7</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963).

<sup>8</sup> See *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (basing its holding on the Fourteenth Amendment).

<sup>9</sup> 372 U.S. 335 (1963).

"[L]awyers in criminal [cases] are necessities, not luxuries."<sup>10</sup> Yet, the Supreme Court has interpreted that mandate as a limited one: lawyers are apparently not required at post-conviction proceedings. In fact, the Court has stated that indigent criminal defendants have no constitutional right to counsel in state post-conviction proceedings.<sup>11</sup> According to the Court in *Pennsylvania v. Finley*,<sup>12</sup> limiting the right to counsel violates neither due process nor equal protection, because a post-conviction proceeding "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."<sup>13</sup> Two years later, the Court concluded that defendants in capital cases have no greater right to counsel in post-conviction proceedings than do non-capital defendants.<sup>14</sup> Ultimately, it made no difference that "death is qualitatively different."<sup>15</sup>

Attached to the Sixth Amendment right to counsel is a concomitant right to "effective assistance" of counsel.<sup>16</sup> Conversely, *where there is no constitutional right to counsel, neither is there a right to effective assistance of counsel within the meaning of the Sixth Amendment*.<sup>17</sup> In fact, the Supreme Court has specifically addressed the implication of this fact in the context of state capital post-conviction proceedings.<sup>18</sup> In *Coleman v. Thompson*,<sup>19</sup> the Court determined that the late filing of the defendant's state habeas appeal due to attorney error "cannot be constitutionally ineffective; therefore Coleman must 'bear the risk of attorney error that results in a procedural default.'"<sup>20</sup> Capital defendants in state post-conviction proceedings continue today to be without constitutional protection from wholly ineffective counsel.<sup>21</sup>

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<sup>10</sup> *Id.* at 344.

<sup>11</sup> *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

<sup>12</sup> *See id.*

<sup>13</sup> *Id.* at 557.

<sup>14</sup> *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

<sup>15</sup> *Id.* at 21 (dissenting opinion) (quoting the plurality opinion in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

<sup>16</sup> *See Wainwright v. Torna*, 455 U.S. 586, 587 n.2 (1982).

<sup>17</sup> *See id.* at 587-88.

<sup>18</sup> *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (holding that a federal habeas corpus court may not review a state habeas claim that has been dismissed due to a state procedural default unless "cause" can be shown).

Notably, the Court did intimate the possibility of an expansion of the right to counsel to post-conviction proceedings under particular circumstances: "For Coleman to prevail . . . there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755 (suggesting that particular states' laws precluding raising certain claims on direct appeal, the last point at which defendants are protected by the right to counsel, might constitute "an independent constitutional violation"). Declaring that such a situation is "not at issue here," the Court immediately declined to consider further this avenue of relief for capital defendants represented by inadequate post-conviction counsel. *Id.* at 757.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 752-53.

<sup>21</sup> *See McFarland v. Scott*, 512 U.S. 1256, 1261 (1994) (dissenting opinion to denial of

### B. The Problem Generally

Because it is an adversarial system, the United States criminal justice system derives its legitimacy from the assurance that both the prosecuting government and the defending citizen are adequately represented by counsel.<sup>22</sup> Indeed, the Sixth Amendment right to effective assistance of counsel is what gives the system "confidence" in its own criminal convictions.<sup>23</sup> Yet, confidence in convictions requires not simply protection of the innocent—although the Supreme Court has given some indications to the contrary<sup>24</sup>—but also protection of any person forced to face criminal prosecution in an American court of law.<sup>25</sup> As the dissent in *Strickland v. Washington*<sup>26</sup> noted of the majority's formulation of the standard for effective assistance of counsel,

[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained *only through fundamentally fair procedures*.<sup>27</sup>

The impetus to obtain convictions only through fair procedures is particularly acute in the context of a justice system which imposes the death penalty. The consequences of a mistaken or faulty system are indeed severe: the execution of an innocent person is the system's greatest nightmare. Yet, correctly determining factual guilt is certainly not the only goal of the American system of justice. To withstand constitutional scrutiny, if it ever can,<sup>28</sup> a system which administers death

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writ of certiorari).

<sup>22</sup> See *Herring v. New York*, 422 U.S. 853, 862 (1975). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.*

<sup>23</sup> See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that the test for effective assistance of counsel is an "outcome-determinative" test, whereby counsel's deficient performance is deemed prejudicial and, thus, "ineffective" only if it "undermined confidence in the outcome" of the trial).

<sup>24</sup> The *Strickland* standard for assessing the assistance of counsel implies that whether a defendant received effective assistance of counsel depends on whether he or she was correctly convicted. See *id.* at 711 (dissenting opinion).

<sup>25</sup> Cf. *Gideon*, 372 U.S. at 344 (noting that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

<sup>26</sup> 466 U.S. at 711.

<sup>27</sup> *Id.* (dissenting opinion) (emphasis added). Indeed, even the majority of the Supreme Court conceded that the "purpose" of the constitutional right to effective assistance of counsel is "not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system, [but] . . . simply to ensure that criminal defendants receive a fair trial." *Id.* at 689.

<sup>28</sup> See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (dissenting opinion) (arguing that the "inevitability of factual, legal, and moral error gives us a system that we know must

as the ultimate punishment must do so pursuant to a fundamentally fair process.<sup>29</sup> While the Due Process Clause of the Fourteenth Amendment may permit the states to deprive citizens of life, it mandates that the states provide due process of law as a prerequisite to that deprivation.<sup>30</sup> As the Supreme Court has explicitly acknowledged, due process includes the right to have effective assistance of counsel in order to ensure meaningful access to the courts.<sup>31</sup> Meaningful access to the legal system could not be more crucial than when that very system is determining whether a person will live or die.<sup>32</sup>

Yet, the same system empowered to put people to death only after due process of law gives neither a right to effective assistance of counsel nor even a right to counsel at all at the state post-conviction stage of the appellate process.<sup>33</sup> According to the Supreme Court, the Sixth Amendment right to counsel does not attach in a state post-conviction proceeding because it is collateral to the criminal proceeding itself, and it is actually a "civil" proceeding.<sup>34</sup> Nevertheless, some states have enacted legislation providing for a statutory right to counsel in death penalty post-conviction proceedings.<sup>35</sup> Although due process seemingly requires that counsel provided by the state be effective,<sup>36</sup> these statutory enactments have been construed otherwise,<sup>37</sup> and some have even been *constructed* to ensure otherwise.<sup>38</sup> In effect, if the error of a petitioner's post-conviction counsel thwarts

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wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution"); *McFarland*, 512 U.S. at 1264 (dissenting opinion) (repeating the sentiment that "the death penalty cannot be imposed fairly within the constraints of our Constitution").

<sup>29</sup> See U.S. CONST. amend. XIV.

<sup>30</sup> See *id.*

<sup>31</sup> See *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985) (noting, in the context of first appeals, that due process requires effective assistance of counsel in order to prevent the right to counsel from being a "futile gesture").

<sup>32</sup> See *Murray*, 492 U.S. at 21 (dissenting opinion).

<sup>33</sup> See *Coleman*, 501 U.S. at 722.

<sup>34</sup> See *Finley*, 481 U.S. at 557. *But compare* *Jackson v. Mississippi*, 732 So. 2d 187, 191 (1999) (finding that "in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level").

<sup>35</sup> See, e.g., COLO. REV. STAT. ANN. § 16-12-205 (West 1998); FLA. STAT. ANN. § 27.711 (West 1997); N.C. GEN. STAT. § 15A-1419 (1997); VA. CODE ANN. § 19.2-163.8 (Michie 1998).

<sup>36</sup> See *Evitts*, 469 U.S. at 396-97.

<sup>37</sup> See, e.g., *Bejarano v. Warden*, 929 P.2d 922, 925-926 (Nev. 1996) (involving counsel discretionarily-appointed pursuant to statute). The Nevada court justified holding that the petitioner did not have a right to effective assistance from his counsel by reference to mere judicial economy: "[I]f counsel for post-conviction proceedings, as well as trial and direct appeal, must meet the same standards, then claims of ineffective assistance of counsel in the immediate prior proceeding may be raised ad infinitum." *Id.* at 925. Bejarano's claims were declared procedurally barred. See *id.*

<sup>38</sup> Many of the statutes have provisions disclaiming the ineffective assistance of appointed counsel. See, e.g., COLO. REV. STAT. ANN. § 16-12-205 (West 1998); FLA. STAT. ANN. ch.

a legitimate challenge to the conviction, he is held personally accountable for the error,<sup>39</sup> and he just may pay with his life.

### C. *The Problem in Context*

The significant need for effective assistance of counsel in state post-conviction proceedings results largely from the specific chronological placement of these proceedings and their function in the life of a death penalty case. Within the sequence of death penalty appeals, state post-conviction review follows exhaustion of any direct appeals but precedes federal habeas corpus review. In effect, the performance of post-conviction counsel has profound consequences for the quality of the review of the direct appeals. Indeed, as one court has articulated the precise role of post-conviction review within the appellate process, "[its purpose] is not to permit [a] defendant endless appeals on matters already decided[;] [r]ather, the purpose is to *correct errors of constitutional proportion which could not otherwise be raised on direct appeal*, such as ineffectiveness of counsel who brought the direct appeal."<sup>40</sup> Moreover, the quality of the post-conviction representation inevitably has critical implications for the review of the *trial* phase as well: a review, for instance, of the effectiveness of appellate counsel is largely determined by a review of what should have been done at trial.<sup>41</sup> Furthermore, in many jurisdictions the effectiveness of trial counsel's performance is also not actually fully reviewed until the post-conviction phase.<sup>42</sup>

More generally, state post-conviction proceedings determine whether the processes leading to the final conviction comported with the constitutional mandate of due process of law.<sup>43</sup> Indeed, in a post-conviction proceeding, "the ultimate

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27.711 (Harrison 1997); N.C. GEN. STAT. § 15A-1419 (1997); VA. CODE ANN. § 19.2-163.8 (Michie 1998).

<sup>39</sup> See *Coleman*, 501 U.S. at 754 ("A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel.").

<sup>40</sup> *State v. Whitmore*, 469 N.W.2d 527, 531 (Neb. 1991) (emphasis added). Other common constitutional grounds for post-conviction relief include violations of the Fourteenth Amendment guarantees against prosecutorial misconduct and nondisclosure of exculpatory evidence. See, e.g., *Amadeo v. Zant*, 486 U.S. 214 (1988) (prosecutor deliberately underrepresented blacks and women in jury pools); *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory evidence withheld).

<sup>41</sup> See Stephen B. Bright, *Does the Bill of Rights Apply Here Anymore? Evisceration of Habeas Corpus and Denial of Counsel to Those Under Sentence of Death*, THE CHAMPION, Nov. 1996, at 25 ("Many individuals facing the death penalty could avoid the post-conviction review process altogether if they were adequately defended at trial.").

<sup>42</sup> See, e.g., *Murray*, 492 U.S. at 25 (dissenting opinion) (noting this situation in Virginia); *State v. McQuaid*, 688 A.2d 584, 594 (N.J. 1997) (repeatedly finding "the appropriateness of asserting ineffective assistance of counsel claims on PCR [post-conviction review] because such claims often cannot reasonably be raised on direct appeal or in prior proceedings") (citations omitted).

<sup>43</sup> See *State v. Preciose*, 609 A.2d 1280, 1294 (N.J. 1992) (noting that post-conviction

inquiry is whether the petitioner received a fair trial.”<sup>44</sup> In the context of constitutional questions arising in criminal prosecutions, “permissive [post-conviction] review in the highest state court may be the most meaningful review the conviction will receive.”<sup>45</sup> While state post-conviction proceedings primarily ensure the procedural fairness of the conviction,<sup>46</sup> they are also instrumental in ensuring the “substantive” fairness of the conviction:<sup>47</sup> state post-conviction proceedings allow a petitioner to bring to the trial court’s attention any *facts* unknown at the time of the conviction which would have ultimately prevented the guilty finding.<sup>48</sup> Consequently, without effective assistance of counsel to address new issues and facts at these proceedings, a capital petitioner stands to be executed on the basis of either unfair procedures or incorrect findings.

While a claim that the conviction and death sentence were obtained in violation of the defendant’s constitutional rights might be unavailable until this moment in the process, it might also be inaccessible after this point as a result of the ineffective assistance of the post-conviction counsel. Because of the rigorous requirements on attorneys to preserve the record at each stage of the capital trial to prevent waiver in future proceedings, post-conviction review has a vital relationship to further federal habeas corpus review.<sup>49</sup> Specifically, for a capital petitioner to receive federal review, his post-conviction counsel must have raised all possible claims in state court and must have complied with all state procedural rules.<sup>50</sup> As Justice Blackmun noted in his dissenting opinion to *McFarland v.*

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relief is a safeguard that ensures that a defendant was not unjustly convicted).

<sup>44</sup> *In re Robinson*, 641 A.2d 779, 781 (Vt. 1994); see also *Preciose*, 609 A.2d at 1294.

<sup>45</sup> *Wainwright*, 455 U.S. 586, 588 (dissenting opinion).

<sup>46</sup> See *People v. Eddmonds*, 578 N.E. 2d 952, 956 (Ill. 1991) (noting that the purpose of post-conviction review is not to determine guilt or innocence, but to inquire into constitutional issues which have not been, and could not have been, previously adjudicated).

<sup>47</sup> See *Preciose*, 609 A.2d at 1293 (finding that “an error [that] denies fundamental fairness in a constitutional sense and hence denies due process of law” occurs “when a petitioner’s guilt or innocence is involved”) (citations omitted).

<sup>48</sup> See, e.g., *Williams v. State*, 669 So. 2d 44 (Miss. 1996) (post-conviction review is a process for raising issues not known at the time of the original trial); *Lowery v. State*, 640 N.E. 2d 1031 (Ind. 1994) (post-conviction proceedings are for the purpose of informing the court about facts not known at the time of judgment).

<sup>49</sup> See, generally, Andrea D. Lyon, *Record Preservation Requirements After 1996 Habeas Bill Require Extensive Trial Preparation*, THE CHAMPION, Aug. 1997, at 37 (noting that the Antiterrorism and Effective Death Penalty Act of 1996 further “changed, altered and intensified not only the need to preserve the record, but the manner in which it must be done”).

<sup>50</sup> See *McFarland*, 512 U.S. at 1261 (dissenting opinion to denial of writ of certiorari). For more on the relationship between state post-conviction proceedings and federal habeas corpus, see discussion *infra* Part III.C.



*Scott*,<sup>51</sup> “[e]ven the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel.”<sup>52</sup>

Yet, although the assistance of counsel in state-level proceedings is often most crucial to the fate of the capital defendant,<sup>53</sup> it is, ironically, also in these state proceedings that counsel is frequently “woefully inadequate.”<sup>54</sup> Indeed, statistics regarding the relationship between state and federal habeas proceedings reveal the poor quality of representation in state capital post-conviction proceedings.<sup>55</sup> As Blackmun notes, “The mere presence of ‘[s]uch a high incidence of uncorrected error’ found in capital habeas corpus proceedings testifies to the inadequacy of the legal representation afforded at the trial and state post-conviction stages.”<sup>56</sup> At the trial level, the inadequacy of capital representation is due partly to a lack of standards for court-appointed attorneys.<sup>57</sup> At the post-conviction level, however, the problem is far more fundamental. To be sure, capital defendants at the trial and appellate levels *at least* have a right to “have some ‘person who happens to be a lawyer’ . . . The same cannot be said for state post-conviction review.”<sup>58</sup>

## II. INADEQUATE STATE SOLUTIONS

Although the Supreme Court has found that the federal Constitution does not require the grant of the right to counsel in state capital post-conviction proceedings,<sup>59</sup> in recent years, various state legislatures have enacted statutes providing for the appointment, qualification, and compensation of counsel for indigent defendants seeking post-conviction review. Indeed, the 1996 enactment by Congress of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) conditions the right of each state to the federal benefits of the Act on the establishment of a system of appointment and compensation of “competent” counsel for indigent capital defendants seeking state post-conviction relief.<sup>60</sup> Notably, few states yet receive those benefits.<sup>61</sup> Instead, the states imposing the

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<sup>51</sup> 512 U.S. at 1256 (explaining that he is writing “to address the crisis in trial and state post-conviction legal representation for capital defendants”).

<sup>52</sup> *Id.* at 1263.

<sup>53</sup> See *id.* at 1256 (“[I]t is in the proceedings antecedent to federal habeas corpus—the capital trial, and to a lesser extent state post-conviction proceedings—that a capital defendant’s case is won or lost.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1263 (referring to statistics showing that, “[o]f the capital cases reviewed in federal habeas corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error”) (citations omitted).

<sup>56</sup> *Id.* (citations omitted).

<sup>57</sup> *McFarland*, 512 U.S. at 1257 (dissenting opinion to denial of writ of certiorari) (noting that the “attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases”).

<sup>58</sup> *Id.* at 1261 (citations omitted).

<sup>59</sup> See *Murray*, 492 U.S. at 1.

<sup>60</sup> See 28 U.S.C. § 2241, 2261 (1996).

<sup>61</sup> See *infra* notes 148–51 and accompanying text. Those few states responding to the Act

death penalty have enacted statutory schemes for the appointment of counsel which wholly fail to protect the capital petitioner's interest in either effective assistance of counsel or even assistance of counsel more generally.<sup>62</sup>

#### A. Discretionary and Conditional Appointments

Unfortunately for some capital petitioners, many of the statutes providing for the appointment of counsel in state post-conviction proceedings are not mandatory. Instead, the decision whether or not to appoint counsel lies within the discretion of either the courts or the attorneys.<sup>63</sup> Furthermore, the standards provided for determining whether counsel should be appointed in these proceedings are often either overly ambiguous or inherently unreasonable. As a survey of the thirty-eight states practicing the death penalty reveals, the statutory grant of the right to counsel in post-conviction proceedings turns out to be an empty protection for death-sentenced petitioners.<sup>64</sup>

First, the ambiguity of the standards for the discretionary appointment of counsel results from the language of the various state statutes. For instance, Alabama provides that a court "may" appoint counsel if the petitioner is indigent and desirous of counsel, and "it further appears that counsel is necessary in the opinion of such judge to assert or protect the right of such person."<sup>65</sup> Similarly, an Idaho procedural statute requires the trial judge to advise the convicted capital defendant of the possibility of having post-conviction counsel appointed "upon a particularized showing that there is a reasonable basis to litigate a claim of ineffective assistance of trial counsel."<sup>66</sup> If the defendant makes no such showing,

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are indeed concerned more about the benefits to the states rather than the benefits to indigent capital petitioners. For instance, Arkansas's statute provided that "an emergency is declared to exist and this Act is necessary to permit the state to take advantage of the provisions which will reduce the time for review in federal court by providing a mechanism for the appointment, compensation, and reimbursement of competent counsel for all indigent capital defendants in state post-conviction proceedings." ARK. CODE ANN. § 16-91-202 (Michie 1997).

<sup>62</sup> Indeed, perhaps any right codified under statute rather than as a constitutional amendment is bound to provide insecure protection. See *People v. Ward*, 464 N.E. 2d 1144 (Ill. App. 1984) (holding that the right to counsel at post-conviction proceedings is a "matter of legislative grace and favor which may be altered by the legislature at will").

<sup>63</sup> See, e.g., ALA. CODE § 15-12-23(a) (1975 & Supp. 1998); IDAHO CODE § (19-2720) 19-2719A (1997); KAN. STAT. ANN. § 22-4506(d)(2) (1997); S.C. CODE ANN. § 17-27-160 (1996).

<sup>64</sup> See *supra* notes 58-63 and *infra* notes 65-87 and accompanying text.

<sup>65</sup> ALA. CODE § 15-12-23(a) (1975 & Supp. 1998). Curiously, the Committee Comments to the Alabama Rule of Criminal Procedure on the "right to counsel" acknowledge this statute, but then note that "there is a serious and open equal protection problem underlying denial of appointed counsel to an indigent defendant at any stage where a defendant of means would find the presence of retained counsel a significant benefit." See AL. R. CRIM. P. 6.1.

<sup>66</sup> IDAHO CODE § (19-2720) 19-2719A (1997).

an Idaho trial judge must then attest that there are "no facts that have come to the court's attention upon which such a claim could reasonably be based."<sup>67</sup>

Second, the state statutes are often unreasonable because they inexplicably condition the appointment of counsel to an indigent petitioner on that very petitioner's ability to act as his or her own counsel at a most critical phase in the post-conviction process. Specifically, in a number of states, the courts require an indigent defendant to file his or her own petition for post-conviction review as a prerequisite to the appointment of counsel.<sup>68</sup> In some of these states, the appointment of counsel is only initiated after the defendant files a petition for post-conviction relief.<sup>69</sup> Yet, this procedure wastes both the petitioner's and the court's time and resources because an inmate is unlikely to produce a court-worthy petition without the assistance of counsel.<sup>70</sup> Appointed counsel (if and when appointed) will have to rewrite a document which he or she should have just written in the first place.<sup>71</sup> Furthermore, while the assistance of prison legal staff might theoretically eradicate the problem of wasted time and resources on inadequate petitions, it is itself not adequately supplied. For instance, the Supreme Court of Mississippi recently noted that, regardless of any contrary indications in other states, "[i]n Mississippi, repeatedly, since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers."<sup>72</sup>

Not only do some states waste time and resources by requiring inmates to file post-conviction petitions without the assistance of counsel, even more disturbing,

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<sup>67</sup> *Id.* Of course, even if the trial judge had personally witnessed the defendant's lawyer *sleeping* through his capital trial, he or she could "reasonably" find the attorney constitutionally "effective" under the *Strickland* standard for effective assistance of counsel. See, e.g., *Ex parte* Burdine, 901 S.W. 2d 456 (Tex. Crim. App. 1995) (cited in Bright, *supra* note 6).

<sup>68</sup> See, e.g., KAN. STAT. ANN. § 22-4506(d)(2) (1998); 5 ILL. COMP. STAT. ANN. 5/122-2.1 (West 1998); S.C. CODE ANN. § 17-27-160 (1998) (the "South Carolina Effective Death Penalty Act of 1996").

<sup>69</sup> See, e.g., KAN. STAT. ANN. § 22-4506(d)(2) (1997); S.C. CODE ANN. § 17-27-160(A) (1998).

<sup>70</sup> See *Murray*, 492 U.S. at 27-28 (dissenting opinion) (noting that not only is "death penalty jurisprudence unquestionably . . . difficult even for a trained lawyer to master," it is particularly difficult for capital petitioners because of the pressure of their impending death compounded by their typically low educational levels).

<sup>71</sup> See *id.* at 29-30 (arguing that "multiple filings delay the conclusion of capital litigation and exacerbate the already serious burden these cases impose on the State's judicial system and the legal department").

Amazingly, some states even delay the decision regarding appointment of counsel until after amendments are made to the petition. See, e.g., KAN. STAT. ANN. § 22-4506(d)(2) (1998).

<sup>72</sup> See *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999) (responding to Justice Kennedy's concurrence in *Murray*, 492 U.S. at 14-15, in which he noted that "'no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief'").

some require that the petition be *good* before appointing counsel.<sup>73</sup> For instance, under Mississippi's Uniform Post-Conviction Collateral Relief Act ("UPCCRA"), the court will not even consider appointing counsel until after the court reviews both the petition and the government's response to the petition and determines that the petition withstands dismissal.<sup>74</sup> If it does not dismiss the petition outright, the court will hold an evidentiary hearing on the petition, and it *may or may not* appoint counsel for the proceedings.<sup>75</sup> Yet, a petition for post-conviction relief is not a mere formality, and neither is its creation an unskilled task:<sup>76</sup> it should "present[] substantial questions of law or triable issues of fact"<sup>77</sup>—a feat which even experienced lawyers are likely to fumble.<sup>78</sup> In effect, a death-sentenced petitioner's inability to represent himself and the acute need for assistance may actually undermine his chances of obtaining counsel.

### *B. Mandatory But Minimally-Qualified Appointments*

Although some state statutes mandate the appointment of post-conviction counsel for indigent capital petitioners,<sup>79</sup> many have all but negated that concession by maintaining inapposite qualification standards. As one attorney noted, capital post-conviction work is peculiarly complex and requires a diverse range of experience: "[T]he competent collateral lawyer will bridge not only the horizontal divide between trial and appellate experience, but the vertical divide between federal and state law and courts. Few lawyers are equally at home on all sides of these divides."<sup>80</sup> The Mississippi Supreme Court likewise noted that capital post-conviction work is a uniquely "specialized, complex and time-consuming [type of] litigation."<sup>81</sup>

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<sup>73</sup> See, e.g., MISS. CODE ANN. § 99-39-23 (1972 & Supp. 1998). Cf. *Douglas*, 372 U.S. at 357 (in context of appeals, finding that procedure requiring that indigent defendant demonstrate merit of case before obtaining counsel "does not comport with fair procedure").

<sup>74</sup> See MISS. CODE ANN. § 99-39-23 (1972 & Supp. 1998).

<sup>75</sup> See *id.*

<sup>76</sup> See *Murray*, 492 U.S. at 14 (concurring opinion) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.").

<sup>77</sup> KAN. STAT. ANN. § 22-4506 (b) (1998) (describing the nature of post-conviction petitions in the context of non-capital indigent defendants).

<sup>78</sup> See *Murray*, 492 U.S. at 28 (dissenting opinion) (noting that "this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").

<sup>79</sup> See, e.g., COLO. REV. STAT. ANN. § 16-12-205 (West 1998); FLA. STAT. ANN. ch. 27.704(1) (Harrison 1997); N.C. GEN. STAT. § 15A-1419 (1997); VA. CODE ANN. § 19.2-163.8 (Michie 1998).

<sup>80</sup> Laurin A. Wollan, Jr., *Representing the Death Row Inmate: The Ethics of Advocacy, Collateral Style*, in *FACING THE DEATH PENALTY* 92, 98-99 (Michael L. Radelet ed., 1989). In fact, in his article, the author queries whether "competent representation" is even possible in capital post-conviction work. See *id.*

<sup>81</sup> *Jackson*, 732 So. 2d, at 190.

Nevertheless, state statutes require only minimal litigation experience for appointed capital post-conviction counsel.<sup>82</sup> For instance, a Florida Capital Collateral Regional Counsel ("CCRC"), or a private attorney contracting with the CCRC, must be

a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, *or* five capital post-conviction evidentiary hearings *or any combination of at least five of such proceedings*.<sup>83</sup>

In other words, although Florida may grant capital petitioners a statutory right to counsel, that counsel need only have been involved in, for example, a total of five felony shoplifting trials.

Moreover, because the statutory provisions for mandatory appointment of "qualified" post-conviction counsel emphasize the lawyer's experience with other cases instead of his or her performance in the present case, they assume that because a lawyer perhaps *can* do his job, he in fact *did* do his job. They mistake theory for practice, and potential for actual. In effect, the qualification standards highlight a key difference between the constitutional right to counsel and the statutory right to counsel: in the latter case, often no court is ever required to review the attorney's specific actions to determine if the petitioner received "effective" assistance.<sup>84</sup>

Even worse, many statutes explicitly disclaim any responsibility for the performance of the appointed capital post-conviction counsel.<sup>85</sup> For instance, Ohio's statute specifically declares, "The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or

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<sup>82</sup> See, e.g., FLA. STAT. ANN. ch. 27.704(1) (Harrison 1997); S.C. CODE ANN. § 17-27-160(B) (1998).

<sup>83</sup> FLA. STAT. ANN. ch. 27.704(1) (Harrison 1997) (emphasis added). See also S.C. CODE ANN. § 17-27-160(B) (1998) (making it possible for a death-sentenced petitioner to be represented by an attorney whose *only prior legal experience* consisted of the representation of one other capital petitioner in a state or federal post-conviction proceeding).

<sup>84</sup> See, e.g., Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 15 n.2 (1990) (noting that the "creation of a statutory right to counsel for discretionary review and state collateral attack would not yield new claims of Sixth Amendment ineffective assistance of counsel . . . [and, t]hus, claims of sixth amendment ineffective assistance of counsel after the state direct appeal would not be cognizable in a federal habeas corpus proceeding").

See also *Bejarano*, 929 P.2d at 926 (dissenting opinion) ("If, as the majority rules, an indigent defendant has no right to effective counsel and no right to judicial review of 'counsel's performance in post-conviction proceedings,' then even the kinds of gross attorney malpractice . . . would escape judicial review. This does not seem fair to me.").

<sup>85</sup> See, e.g., COLO. REV. STAT. ANN. § 16-12-205 (West 1998); FLA. STAT. ANN. ch. 27.711(a) (Harrison 1998); N.C. GEN. STAT. § 15A-1419 (1997); VA. CODE ANN. § 19.2-163.8 (Michie 1998).

in an application to reopen a direct appeal."<sup>86</sup> Indeed, an overwhelming number of state statutes include similar nullifying provisions, effectively rendering the statutory right to counsel meaningless.<sup>87</sup>

### III. UNAVAILABILITY OR INADEQUACY OF OTHER REMEDIES

#### A. Civil Malpractice Suits

Without protection under either the Constitution or state statutes, capital petitioners could explore alternative avenues to vindicate any errors made by post-conviction counsel. For instance, an inmate might pursue a malpractice claim seeking an award of damages against his or her post-conviction counsel. As a general rule, civil malpractice liability does not require the reversal of the underlying conviction on the basis of the ineffective assistance of counsel,<sup>88</sup> and, thus, a suit will not be precluded by the fact that the petitioner had no constitutional right to effective assistance in the first place. Yet, because of the specific nature of a malpractice claim in the context of a criminal prosecution and the unique character of an error at the post-conviction stage, this avenue of relief is fatally inadequate.

In the recent Florida case of *Steele v. Kehoe*,<sup>89</sup> an inmate convicted of first-degree murder brought a civil malpractice suit against his private attorney for failure to timely file a motion for post-conviction relief after having orally agreed to do so.<sup>90</sup> Recognizing the "majority view that *exoneration* is a prerequisite to a legal malpractice action arising from a criminal prosecution,"<sup>91</sup> the court articulated

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<sup>86</sup> OHIO STAT. ANN. § 2953.21(H)(I)(2) (1998).

<sup>87</sup> See, e.g., COLO. REV. STAT. ANN. § 16-12-205 (West 1998) ("The ineffectiveness of counsel during post-conviction review shall not be a basis for relief"); FLA. STAT. ANN. ch. 27.711(a) (Harrison 1998) ("An action taken by an attorney who represents a capital defendant in post-conviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel"); N.C. GEN. STAT. § 15A-1419 (1997) (ineffective assistance of prior post-conviction counsel may not constitute "good cause" for failure to file a timely post-conviction motion); VA. CODE ANN. § 19.2-163.8 (Michie 1998) ("The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding").

<sup>88</sup> See, e.g., *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991) ("[W]e see no logic in making a ruling of attorney ineffectiveness in the constitutional sense a condition precedent to the liability of an allegedly negligent criminal defense attorney"); *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989) (same); *Schlumm v. Terrence J. O'Hagan, P.C.*, 433 N.W.2d 839 (Mich. Ct. App. 1988) (same).

<sup>89</sup> 724 So. 2d 1192 (Fla. Dist. Ct. App. 1998).

<sup>90</sup> See *id.* at 1193. Although *Steele* was sentenced to life in prison, a plaintiff on death row could just as readily bring the same suit.

<sup>91</sup> *Id.* at 1193 (emphasis added).

<sup>92</sup> See *id.* Of course, unlike defendants at other stages of the criminal prosecution, capital petitioners never even have access to the "traditional attack" on the ineffective assistance of

both the rationales for and the ramifications of such a rigorous standard. Among the "logical support" for the requirement, the court noted that if a petitioner is unable to successfully demonstrate, through the traditional attack on ineffective assistance of counsel offered by criminal procedure, that counsel's performance affected the *outcome* of the criminal trial, he or she should not be able to burden the courts with the same challenge in a subsequent civil suit.<sup>92</sup> The court also noted that "public policy" mandates in favor of acknowledging that, without exoneration, "the proximate cause of the defendant's conviction is his or her commission of a crime and not legal malpractice."<sup>93</sup> Finally, the court gave the "most important" reason for the requirement of exoneration before a malpractice action will lie: an action for damages would simply be an inadequate remedy for a convict not relieved of his or her sentence.<sup>94</sup>

Yet, as the *Steele* court points out, the exoneration requirement is particularly problematic in the context of a thwarted post-conviction challenge.<sup>95</sup> In a case alleging attorney malpractice for performance during the trial or appeal, the exonerated plaintiff would be recovering damages for any time he or she spent improperly incarcerated.<sup>96</sup> On the other hand, where the alleged malpractice results from the loss of an "*opportunity to offer such proof* [that the petitioner should be exonerated]," an award of damages from a civil jury could never compensate him for continued incarceration.<sup>97</sup> Likewise, because of the uniquely irremediable character of the death penalty, an action for damages would be a particularly inadequate avenue of relief. If a capital petitioner were relegated to a malpractice suit against his post-conviction counsel, then the result would be yearly checks for each year until he were, potentially, improperly executed.<sup>98</sup>

### B. Section 1983 Civil Rights Action

As an alternative to a civil malpractice suit against his post-conviction counsel, a capital petitioner might pursue a claim for violation of his civil rights. Section 1983 of the Civil Rights Act of 1871 provides for a federal cause of action against state officials who, in the course of carrying out their duties pursuant to state

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their post-conviction counsel.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See Steele*, 724 So. 2d at 1193.

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> *See id.* (regarding this result in the context of a sentence of life imprisonment).

<sup>99</sup> *See* 42 U.S.C. § 1983 (1994). The relevant language provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

authority, violate the federal constitutional or statutory rights of citizens.<sup>99</sup> A capital petitioner might attempt to file a civil rights action complaining that his post-conviction counsel's errors resulted in a violation of his federal constitutional right to a fair proceeding. Unfortunately, however, he is unlikely to successfully state any claims under § 1983 for a number of possible reasons. Because § 1983 is a statute to enforce pre-existing constitutional rights, rather than to create new substantive rights, a plaintiff must show initially that a particular vested constitutional right actually exists.<sup>100</sup> Furthermore, because § 1983 requires that a plaintiff target a "person" who is acting "under color of" state law and who is not subject to an official immunity,<sup>101</sup> a capital petitioner will probably not satisfy this element either. Finally, as in the case of civil malpractice suits, an inmate-plaintiff in a § 1983 civil rights action would have to be exonerated of the charged crime before being able to pursue a federal civil rights remedy.<sup>102</sup>

As a general matter, a claim of violation of the Sixth Amendment right to effective assistance of counsel is not itself cognizable under § 1983. First, § 1983 provides a remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>103</sup> Yet, a capital petitioner does not have a constitutional right to effective assistance of counsel in state post-conviction proceedings,<sup>104</sup> and as a result, he would be unable to allege a violation of any vested constitutional right as is required by § 1983.<sup>105</sup> Second, § 1983 also requires that the defendant of a civil rights suit act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."<sup>106</sup> The Supreme Court has interpreted this provision to require that the defendant be, essentially, a "state actor."<sup>107</sup> In effect, even if the capital petitioner had a Sixth Amendment right to effective assistance of counsel in state post-conviction proceedings, his post-conviction counsel would have to qualify as a state actor. The Supreme Court held in *Polk County v. Dodson*,<sup>108</sup> however, that "appointed counsel in a state criminal prosecution, though paid and ultimately supervised by the State, does not act 'under color of' state law in the normal course

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<sup>100</sup> See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (holding that Title 42 U.S.C. § 1983 does not by itself confer substantive rights); see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that a plaintiff must satisfy all elements of the underlying constitutional claim, including state action, to maintain a § 1983 action).

<sup>101</sup> 42 U.S.C. § 1983.

<sup>102</sup> See *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

<sup>103</sup> 42 U.S.C. § 1983.

<sup>104</sup> See *Coleman*, 501 U.S. at 755.

<sup>105</sup> See *Chapman*, 441 U.S. at 601.

<sup>106</sup> 42 U.S.C. § 1983.

<sup>107</sup> See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 923 (1982) (holding that the deprivation must be "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible;" and the defendant must clearly "be said to be a state actor").

<sup>108</sup> 454 U.S. 312 (1981).



of conducting the defense.”<sup>109</sup> Indeed, according to the Supreme Court, imposing § 1983 liability on statutorily-appointed counsel in state post-conviction proceedings would produce a “disincentive for the States to provide post-conviction assistance to indigent prisoners.”<sup>110</sup>

Bringing a § 1983 suit alleging a deprivation of the Fourteenth Amendment due process right to fundamental fairness<sup>111</sup> would likewise be a fruitless endeavor for a capital petitioner whose post-conviction counsel was incompetent primarily for lack of a defendant. A successful claim under § 1983 can only be brought against a “person” who is acting “under color of” state law and who is also not subject to an official immunity.<sup>112</sup> Presumably, a plaintiff-inmate alleging a § 1983 violation on the ground that a state’s statutory scheme deprives him of his Fourteenth Amendment due process rights would sue either (a) the state itself, (b) the legislature promulgating the statute, or (c) the court enforcing the statute. Though on different grounds, the Supreme Court has precluded each of these governmental entities from liability under § 1983.

Specifically, in *Will v. Michigan Department of State Police*,<sup>113</sup> the Supreme Court held that a state does not qualify as a “person” within the meaning of the Civil Rights Act.<sup>114</sup> Second, in *Tenney v. Brandhove*,<sup>115</sup> the Supreme Court declared that state legislators enjoy a common-law immunity for their legislative acts, and § 1983 “‘does not create civil liability’ for acts undertaken ‘in a field where legislators traditionally have power to act.’”<sup>116</sup> Finally, while the Supreme Court held in *Pulliam v. Allen*<sup>117</sup> that “judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity,” it distinguished between using § 1983 to enjoin a judge’s unauthorized courtroom “practices” and using it to enjoin a judge’s adjudication under a statute.<sup>118</sup> Because

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<sup>109</sup> *Tower v. Glover*, 467 U.S. 914 (1984) (describing the holding of *Polk County*). The dissent in *Polk County* notes that “the Court appears to be holding a public defender exempt from § 1983 liability only when the alleged injury is ineffective assistance of counsel.” See *Polk County*, 454 U.S. at 337.

<sup>110</sup> *Polk County*, 454 U.S. at 324, n.17. The Court also claimed that recognition of appointed attorneys as acting “under color of” state law would “transform every legal malpractice into a constitutional violation.” See *id.* at 338 (dissenting opinion).

<sup>111</sup> The specific allegation might be that, by providing a statutory right to post-conviction counsel without a concomitant right to effective assistance from that counsel, the state has deprived the capital petitioner of the right to “fundamentally fair” process. See *infra* notes 155-74 and accompanying text.

<sup>112</sup> 42 U.S.C. § 1983 (1994).

<sup>113</sup> 491 U.S. 58 (1989).

<sup>114</sup> See *id.* at 71.

<sup>115</sup> 341 U.S. 367 (1951).

<sup>116</sup> *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980) (describing the applicability of the *Tenney* “legislative immunity” to actions for injunctive relief).

<sup>117</sup> 466 U.S. 522 (1984).

<sup>118</sup> See *id.* at 541-42, 536-37 (allowing a § 1983 action to enjoin a state magistrate’s practice of jailing individuals arrested for non-jailable misdemeanors when they unable to

judges generally "have played no role in the [challenged] statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest" in continued adherence to the statute,<sup>119</sup> they fail to satisfy the Article III "case or controversy" requirement of adversity to the civil rights plaintiff challenging the constitutionality of a statute.<sup>120</sup>

Even if a capital petitioner were able to target an appropriate defendant to sue for a due process violation under § 1983, he will ultimately be prohibited from pursuing the claim as a result of the Supreme Court's interpretation of the relationship between § 1983 and federal habeas corpus.<sup>121</sup> Indeed, as the Court in *Preiser v. Rodriguez*<sup>122</sup> noted, "[E]ven though the literal terms of § 1983 might seem to cover such a challenge [to the underlying conviction and sentence on federal constitutional grounds], because Congress has passed a more specific act to cover that situation," a prisoner must instead rely on habeas corpus.<sup>123</sup> Furthermore, although a prisoner may be able to bring a § 1983 claim *after* exhausting federal habeas corpus, he must have previously had an adjudication that the constitutional violation complained of did indeed invalidate his conviction.<sup>124</sup>

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meet bail).

<sup>119</sup> *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 21 (1st Cir. 1982) (cited in *Pulliam* decision).

<sup>120</sup> See *Pulliam*, 466 U.S. at 538 n.18 (citing *In re Justices* in which the First Circuit found no adverse legal interests between "a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute").

Indeed, as the First Circuit noted, "one seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official [e.g., the Secretary of Justice] authorized to bring suit under the statute." *In re Justices*, 695 F.2d at 21. That fact presents a peculiar conundrum in the context of a challenge to a state statutory provision *withholding* the right to effective assistance from appointed post-conviction counsel. Because "enforcement" of the provision at issue actually requires inaction, it is seemingly *unenforceable*. Moreover, if judges are not the proper defendants in suits challenging the enforcement of this kind of provision, then no one would seem to be.

<sup>121</sup> See *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (prisoner could not use a § 1983 action for equitable relief to challenge the "very fact or duration" of his imprisonment; instead, for a prisoner seeking release, the "sole federal remedy is a writ of habeas corpus"); *Heck v. Humphrey*, 512 U.S. 477 (1994) (prisoner seeking damages "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid" must actually have had a prior adjudication, such as habeas corpus, in his favor). Together, these decisions essentially preclude the capital petitioner from using a § 1983 action to complain of little more than bad prison food.

<sup>122</sup> 411 U.S. 475 (1973).

<sup>123</sup> *Id.* at 489.

<sup>124</sup> See *Heck*, 512 U.S. at 477. Note, however, that unlike § 1983, federal habeas corpus review has as a prerequisite the exhaustion of state remedies. See *id.* In effect, a prisoner wishing to complain of a deprivation of due process would not only have to withhold his claim through post-conviction proceedings, but would also have to complete federal habeas review before ever having an opportunity to vindicate this constitutional deprivation.

### C. Habeas Corpus

Finding no remedy in any of the various species of tort law, a capital petitioner might seek to correct the errors made by post-conviction counsel through the process of federal habeas corpus review.<sup>125</sup> Article I, Section 9, paragraph 2 of the United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>126</sup> The Supreme Court has repeatedly recognized the importance of the writ of habeas corpus as a mechanism to test the constitutionality of a state conviction and sentence in the more neutral forum of the federal court.<sup>127</sup> Indeed, to many state defense attorneys, the writ of habeas corpus represents "some arcane thing that 'federal' attorneys do to *fix what went wrong* in state court that resulted in the imprisonment or death sentence for their client."<sup>128</sup> Yet, due to a number of recent jurisprudential and statutory developments, the possibility of redressing the deficient performance of post-conviction counsel through federal habeas corpus has not only become more remote than ever, but has been explicitly precluded as an independent grounds of federal relief.<sup>129</sup>

Beginning in the 1980's, a number of Supreme Court decisions severely narrowed the availability of federal habeas corpus as a mechanism for remedying constitutional violations of *any* kind.<sup>130</sup> For instance, the "evisceration" of habeas corpus<sup>131</sup> has been effected by the various decisions in which the Court "made it more difficult for a habeas petitioner to obtain an evidentiary hearing to prove a constitutional violation, adopted an extremely restrictive doctrine regarding the retroactivity of constitutional decisions, [and] reduced the burden on the states to establish harmless error once a constitutional violation was found."<sup>132</sup>

<sup>125</sup> The federal habeas corpus statute is codified at 28 U.S.C. § 2254 (1996).

<sup>126</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>127</sup> See, e.g., *Teague v. Lane*, 489 U.S. 288, 290 (1988) ("the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards") (citations omitted); *Smith v. Bennett*, 365 U.S. 708, 712-13 (1960) ("Over the centuries [the Writ of Habeas Corpus] has been the common law world's 'freedom writ' . . . We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution") (quoting its earlier decision in *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)).

<sup>128</sup> *Lyon*, *supra* note 49, at 37.

<sup>129</sup> See generally *id.*; *Bright*, *supra* note 41, at 25.

<sup>130</sup> See *Bright*, *supra* note 41, at 26.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (finding that the cause and prejudice rather than the less rigid "deliberate bypass" standard should be applied to state court procedural defaults); *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a "new rule" of constitutional law generally cannot be announced or applied in a federal habeas proceeding); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (holding that habeas corpus relief will not be granted unless the constitutional error had "substantial and injurious effect or influence in determining the verdict"))).

Furthermore, in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a comprehensive measure to reform federal habeas corpus proceedings,<sup>133</sup> which "[changed] the landscape even further."<sup>134</sup> In particular, the AEDPA requires federal courts to defer to the legal conclusions of state courts with the only condition that the state court's decision not be "contrary to or [involving] an unreasonable application of clearly established federal law."<sup>135</sup> In effect, recent changes have both "[made] it harder to get to court in the first place, and to get to discuss the merits of the claim,"<sup>136</sup> much less actually get *relief* based on the claim.

In two respects, the Supreme Court and Congress have jointly eliminated the ability of a petitioner complaining of error by post-conviction counsel to "get to court." First, according to the rigid rules of waiver announced by the Court<sup>137</sup> and maintained by Congress,<sup>138</sup> "[if a fact or a claim] could have been raised in state post-conviction or habeas and was not, it's waived."<sup>139</sup> Moreover, attorney error can result in default of the habeas review altogether if, for instance, counsel fails to comply with a state procedural requirement.<sup>140</sup> Second, although the Court established an exception to the waiver rule, whereby a petitioner might overcome a procedural default—and, so, "get to court"—by showing "cause and prejudice,"<sup>141</sup> it has allowed only a limited number of impediments to qualify as "cause."<sup>142</sup> While the Supreme Court has held that ineffective assistance of counsel can constitute cause,<sup>143</sup> it subsequently excepted error by post-conviction counsel from the list of potential "causes" for waiver or procedural default on the grounds that attorney error must be "ineffective" within the meaning of the Sixth Amendment to constitute cause, and post-conviction petitioners have no Sixth Amendment right to effective assistance of counsel.<sup>144</sup> Of course, under the AEDPA, even if the petitioner were able to show cause, he would also have to show "innocence."<sup>145</sup>

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<sup>133</sup> 28 U.S.C. §§ 2241-2244 (1996).

<sup>134</sup> Lyon, *supra* note 49, at 37.

<sup>135</sup> 28 U.S.C. § 104(3) (cited in Bright, *supra* note 41, at 26).

<sup>136</sup> *Id.* (describing the predicament of any petitioner seeking federal review).

<sup>137</sup> See *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977); see also *Coleman*, 501 U.S. at 722.

<sup>138</sup> See 28 U.S.C. § 2254(d) (1996).

<sup>139</sup> Lyon, *supra* note 49, at 37 (cataloguing this rule of procedural default at every stage of the criminal prosecution).

<sup>140</sup> See, e.g., *Keeney*, 504 U.S. 1 (1992).

<sup>141</sup> See *Murray v. Carrier*, 477 U.S. 478, 492 (1986) (defining "cause" as one of a few "external" impediments and "prejudice" as a reasonable probability that the outcome would have been different).

<sup>142</sup> See *id.* at 496.

<sup>143</sup> See *Smith v. Murray*, 477 U.S. 527 (1986) (attorney error in the context of an appeal).

<sup>144</sup> See *Coleman*, 501 U.S. at 722. The Court did leave open the possibility of applying a "fundamental miscarriage of justice" exception to excuse the default. *Id.* at 757.

Yet, as Justice Blackmun noted in his dissent, the rationale for the "cause and prejudice" standard of procedural default—respect for state procedural laws—could not justify excusing "gross incompetence" on the part of post-conviction counsel in a capital case: "To permit a procedural default caused by attorney error egregious enough to constitute ineffective

Further, several provisions of the AEDPA make habeas review an unavailable avenue of relief following errors by post-conviction counsel.<sup>146</sup> Most significantly, the Act explicitly excepts from the possible grounds for habeas relief the "incompetent" assistance of post-conviction counsel.<sup>147</sup> Perhaps to compensate for this restriction on death-sentenced inmates, the AEDPA includes a provision encouraging states to establish a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" for indigent capital petitioners in state post-conviction proceedings.<sup>148</sup> Yet, the AEDPA makes the creation of such a scheme only optional.<sup>149</sup> Indeed, few, if any, states have enacted sufficient mechanisms for the mandatory provision of competent state post-conviction counsel.<sup>150</sup> Instead, the "mechanisms in many states have been conceded to be, or *formally held to be*, inadequate."<sup>151</sup>

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assistance of counsel . . . in no way serves the State's interest in preserving the integrity of its rules and proceedings." Furthermore, the "[external] cause and prejudice" standard for excusing a procedural default in a first appeal was deemed just precisely because defendants were "safeguard[ed]" by the right to effective assistance of counsel. *Id.* at 758, 773-74.

<sup>145</sup> See Lyon, *supra* note 49, at 37 (citing § 2254(e)(2)(A) of the AEDPA).

<sup>146</sup> See, e.g., Bright, *supra* note 41, at 27 n.3 (describing the provision for a one-year statute of limitations for non-capital habeas corpus claims).

<sup>147</sup> See 28 U.S.C. § 2244 (i). As one commentator noted, while precluding the defense attorney from "rely[ing] on someone being able to correct [her] mistakes during the collateral stage later," the AEDPA simultaneously complicates the earlier stages of the litigation. Lyon, *supra* note 49, at 39.

<sup>148</sup> 28 U.S.C. § 2261 (also encouraging states to establish "standards of competency" for lawyers assigned to try capital cases).

<sup>149</sup> See § 2255, Chapter 154. If a state creates these statutory schemes (and "opts in"), it can take advantage of the AEDPA's chapter on expedited review of capital cases. See Lyon, *supra* note 49, at 37. The Act establishes an unprecedented one-year statute of limitations for filing of federal habeas petitions, § 2244 (d) (1), and for states establishing mechanisms for the appointment of post-conviction counsel, the statute of limitations is only 180 days. See Bright, *supra* note 41, at 29 n.3. The AEDPA, then, presents a very mixed blessing to those seeking post-conviction review.

<sup>150</sup> See Larry Yackle, *Developments in Habeas Corpus (Part III)*, THE CHAMPION, Dec. 1997, at 56 (As Professor Yackle noted, "At this writing, no state has successfully invoked Chapter 154.").

<sup>151</sup> *Id.* at 56, n.40 (emphasis added) (citing cases from Pennsylvania, Montana, Texas, Indiana, Ohio, Virginia, Louisiana, Florida, Maryland, California, Idaho, and Tennessee).

Among the factors determining whether a state is adequately providing for state post-conviction counsel are "(1) the existence (or not) of a state statute or rule of court under which indigent capital petitioners are routinely given counsel for state post-conviction proceedings; (2) the way in which any such state system works in practice; (3) any instance of the state's appointing the same attorney to handle the trial or appellate stage of a prisoner's case and, in addition, the post-conviction stage; (4) any state standards for the competency of counsel appointed for state post-conviction purposes and the way in which those standards are enforced; (5) the standards under which appointed counsel are compensated for their services and reimbursed for litigation expenses." *Id.*

## IV. CONCLUSION

## BASIC PROCEDURAL FAIRNESS: THE FOURTEENTH AMENDMENT

Under the Constitution, denial of the right to counsel or to effective assistance of counsel not only violates the Sixth Amendment, but it also offends the Fourteenth Amendment.<sup>152</sup> In contrast, the Supreme Court maintains that "neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee" mandates that the state supply a lawyer when it provides for a right to a post-conviction proceeding.<sup>153</sup> A potentially different question arises, however, when the State does choose to provide capital defendants with a *mandatory* statutory right to counsel at post-conviction proceedings: does the Fourteenth Amendment require the state simultaneously to confer a right to effective assistance of counsel?

While states have the authority to enact legislation granting their citizens more rights than the federal Constitution grants them, they are, nevertheless, required to do so within the parameters of the other protections afforded to the people by the Constitution.<sup>154</sup> Moreover, as the Supreme Court held in *Evitts v. Lucey*,<sup>155</sup> "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."<sup>156</sup> Specifically, in the context of state death penalty law, "an integral component of a State's 'constitutional responsibility [is] to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.'"<sup>157</sup>

Indeed, the Court has in the realm of first appeals as of right recognized the importance of ensuring that, when a state provides a statutory right beyond that guaranteed by the Constitution, its implementation of that right is itself constitutionally sound.<sup>158</sup> For instance, although the Constitution does not itself

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<sup>152</sup> See *Gideon*, 372 U.S. at 340 (finding that the Sixth Amendment right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment") (citations omitted).

<sup>153</sup> *Coleman*, 501 U.S. at 756 (describing its decisions in *Ross* and *Finley*).

<sup>154</sup> The Supremacy Clause provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. See *Coleman*, 501 U.S. at 760 (dissenting opinion) ("Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States"); see also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985) (noting that "the sovereignty of the States is limited by the Constitution itself").

<sup>155</sup> 469 U.S. 387 (1985).

<sup>156</sup> *Id.* at 401 (applying this concept to first appeals of right).

<sup>157</sup> *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (citations omitted); see also *Evitts*, 469 U.S. at 404 (noting that due process principles are violated when a decision is made in a way that is arbitrary with respect to the issues involved).

<sup>158</sup> See, e.g., *Evitts*, 469 U.S. 393 ("the procedures used in deciding appeals must comport

give defendants the right to an initial appeal of their convictions, once a state (as all have done) chooses to provide defendants with a statutory right to appeal, it must comply with the "equality demanded by the Fourteenth Amendment" by also providing defendants with the right to the assistance of counsel.<sup>159</sup> Furthermore, because "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel,"<sup>160</sup> a state granting a statutory right to appeal is also required by the Due Process Clause to guarantee the effective assistance of that counsel.<sup>161</sup> In fact, in the context of the federal statutory right to habeas corpus review, the Court has held that the grant of a statutory right to the appointment of qualified habeas counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims."<sup>162</sup>

As in the realms of direct appellate and federal habeas corpus review, the statutory right to counsel at the post-conviction level should necessarily imply a right to the effective assistance of counsel pursuant to the Fourteenth Amendment. Recognizing the "due process problem inherent" in a case in which a petitioner is precluded from challenging his conviction due to the inaction of his appointed post-conviction counsel, the Florida court in *Steele v. Kehoe*<sup>163</sup> recently noted the "difference between the right to appointed counsel [under the Sixth Amendment] and the right to counsel": "Even if a defendant is not necessarily entitled to appointed counsel, still if one is appointed for him or if he is able to obtain his own, he should be able to rely on such counsel's at least filing within the time period."<sup>164</sup> As the Florida court concluded:

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with the demands of the Due Process and Equal Protection Clauses of the Constitution").

This requirement is not limited to the criminal context either. For instance, "although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the Due Process Clause." *Id.* at 401. Thus, though the Court defines post-conviction proceedings as "civil in nature," and "not part of the criminal proceeding itself," *Finley*, 481 U.S. at 557, it presumably would not except them from this constitutional requirement.

<sup>159</sup> *Douglas*, 372 U.S. at 358 (when state affords a right of appeal, it must make that appeal more than a "meaningless ritual" by supplying an indigent appellant in a criminal case with an attorney).

<sup>160</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

<sup>161</sup> *See Evitts*, 469 U.S. at 396 ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

<sup>162</sup> *McFarland*, 512 U.S. at 858 (holding that, because a right to appointed counsel includes a right to legal assistance in the preparation of a habeas corpus proceeding, a capital defendant need not wait until after filing a petition to invoke the statutory right). As the Court concluded, "By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *Id.* at 859.

<sup>163</sup> 724 So.2d 1192 (Fla. Dist. Ct. App. 1998).

<sup>164</sup> *Id.* at 1193 ("We are not suggesting that due process requires the appointment of an attorney in all" post-conviction proceedings . . . . The presence of counsel, appointed or

It is the defendant's right to have meaningful access to the judicial process that we urge is a due process right. If the defendant is denied the right to attack a presumptively valid criminal judgment because of counsel error and is instead limited to money damages because of an invalid conviction, he has been denied due process.<sup>165</sup>

Furthermore, like an appeal as of right, a state post-conviction proceeding is often the first "adequate opportunity to present claims fairly in the context of the State's appellate process."<sup>166</sup> As the Supreme Court intimated in *Coleman*,<sup>167</sup> if a state system wholly precludes a petitioner from presenting his claims, its operation may constitute an "independent constitutional violation."<sup>168</sup> In the context of statutes granting the right to the appointment of *ineffective* capital post-conviction counsel, there is undoubtedly such an independent constitutional violation.

Moreover, when a state statute grants a *mandatory* right to the assistance of capital post-conviction counsel, it satisfies the requirements of the Due Process Clause *only if* it also grants the right to effective assistance from that counsel. Articulating this sentiment, the Nevada court in *McKague v. Warden*<sup>169</sup> argued, "As a matter of statutory interpretation, we note that where state law entitles one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, '[i]t is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel.'"<sup>170</sup> Indeed, were the state statutes for the provision of capital post-conviction counsel construed otherwise, they would be plainly inconsistent with due process and all of the other "procedural and substantive safeguards that distinguish our system of justice."<sup>171</sup>

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employed, carries with it certain rights and restrictions.").

<sup>165</sup> *Id.* Accord *Wainwright*, 455 U.S. at 589 (dissenting opinion) ("Although respondent's Sixth Amendment right to effective assistance of counsel may not have been infringed, he was denied his right to due process. Respondent's counsel promised him that he would seek review in the Florida Supreme Court. Respondent reasonably relied on that promise. Counsel nonetheless failed to file a timely application. As a result, respondent was deprived of his right to seek discretionary review by the State's highest court." The dissent found this "fundamentally unfair.").

<sup>166</sup> *Evitts*, 469 U.S. at 396 ("While the State may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the Fourteenth Amendment, structure it in such a way as to deny indigent defendants meaningful access.").

<sup>167</sup> 501 U.S. 722 (1991) (suggesting that particular states' laws precluding raising certain claims on direct appeal, the last point at which defendants are protected by the right to counsel, might constitute "an independent constitutional violation").

<sup>168</sup> *Id.* at 755.

<sup>169</sup> 912 P.2d 255 n.5 (Nev. 1996).

<sup>170</sup> *Id.* at 258 ("Thus, a petitioner may make an ineffectiveness of post-conviction counsel claim if that post-conviction counsel was appointed pursuant to" state statute.).

<sup>171</sup> *Evitts*, 469 U.S. at 396.



