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ENVISIONING POST-CONVICTION REVIEW FOR THE TWENTY-FIRST CENTURY

Nancy J. King¹ & Joseph L. Hoffmann²

This lecture poses the following question: What would happen if we radically rethought our approach to post-conviction review? Our present system of post-conviction review has outlived its utility. New empirical research reveals that the system wastes scarce resources and produces very little tangible benefit. Drawing on several discrete ideas that others have advanced before, and adding a few new ones, we can begin to sketch out a new model for post-conviction review tailored to the needs and circumstances of criminal justice today.³

I. THE PROBLEM

The present system of review for state criminal judgments has been in place since about the mid-1960s or so. It involves multiple, often duplicative stages: (1) a direct appeal, which can include multiple proceedings in several different courts that are all considering the same questions; (2) state post-conviction

¹ Speir Professor of Law, Vanderbilt University. Professor King delivered this 2008 Otis Lecture in April 2008 based on ideas she and Professor Hoffmann worked out together. The first person—"I"—thus refers to Professor King, and "we" indicates both authors.

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³ This lecture presents our initial outline of a preliminary idea that is developed and significantly changed in a later article, *Rethinking the Federal Role in State Criminal Justice*, forthcoming in 84 N.Y.U. L. Rev. (2009).

proceedings, where again, the same questions may be considered several times by several different courts; and (3) federal habeas corpus review, where constitutional questions are raised in the district court, then in the federal court of appeals, and often in yet another certiorari petition to the U.S. Supreme Court.

This system was created to cope with a revolution in the regulation of the criminal process—the incorporation of the protections in the Bill of Rights against the states through the Fourteenth Amendment’s Due Process Clause. In 1950 relatively few state prisoners would have been able to seek relief in federal court because the Due Process Clause had been interpreted to protect against only those actions by states that infringed fundamental fairness; many of the criminal procedure protections enjoyed by federal defendants had been denied to state defendants.⁴ Then, in a series of cases decided over twenty years, the Court simultaneously expanded both the reach of federal law and its enforcement in federal court. By the mid 1970s, the Court had extended to state prisoners dozens of new constitutional claims⁵ and a wide-open invitation to raise them before federal judges.⁶ To fend off federal interference and provide their own review, states responded by creating post-conviction mechanisms of their own that a prisoner must navigate before heading to federal court.⁷

Why rethink this system now? Because it has outgrown its usefulness. Rights have continued to expand, while prison populations and average terms served⁸ have grown even faster.⁹

⁴ See generally 1 WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 2.4 (3d ed. 2007); see also *id.* at § 2.6(b) n.34 (collecting cases in which the Court extended a criminal procedure guarantee to state defendants in the 1960s and overruled precedent from the 1930s and '40s).

⁵ *Id.*

⁶ For a discussion of the expansion of habeas corpus review from “jurisdictional” error to constitutional violations, see LAFAVE ET AL., *supra* note 4, at § 28.3(b).

⁷ See 1 DONALD E. WILKES, JR., STATE POST-CONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS § 2:5 (2007-08) (noting the expansion of criminal procedure rights and habeas review “put pressure on and also encouraged the states to upgrade the quality of their postconviction relief machinery”).

⁸ BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 511 tbl.6.44 (Ann L. Pastore & Kathleen Maguire, eds., 2003) (finding that, excluding life sentences, the average time served jumped seven months for first releases from state

We think that the cost of this multi-layered review system has far surpassed its benefits, at least in all but the relatively small number of cases that involve the death penalty. The Constitution would be better served by abandoning the effort to prop up the complex remedial system that state and federal courts are struggling to provide long after conviction and shifting those resources into indigent criminal defense earlier in the process.

A. Wasted Effort on the Backend

This country has the highest imprisonment rate in the world.¹⁰ Among the many consequences of this dubious distinction is the record number of petitions that prisoners file each year in federal and state court seeking relief from convictions and sentences. This litigation consumes an enormous amount of taxpayer dollars.¹¹

In 1996, Congress passed a law—the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)¹²—in an effort to streamline federal habeas review of state criminal judgments and reduce post-conviction litigation costs in federal courts.¹³

prison between 1990 and 1999, and the percentage of sentence served increased from thirty-eight to forty-nine percent); PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 7–9 (1999).

⁹ BUREAU OF JUSTICE STATISTICS, *supra* note 8, tbl.6.29.2006 (showing that nationwide, the number of state prisoners per 100,000 population doubled from 130 in 1980 to 272 in 1990, then nearly doubled again to 445 by 2006); *id.* tbl.6.28.2006.

¹⁰ International Centre for Prison Studies, Prison Brief for United States of America, <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/> (follow “North America” hyperlink; then follow “United States of America” hyperlink) (last visited Oct. 17, 2008) (noting that the United States has an imprisonment rate of 7,621 per 100,000 population).

¹¹ Both state and federal courts have seen an increase in post-conviction filings. *See, e.g., Growing Number of Inmates Turning to Post-Conviction Relief*, NEWSDAY, Sept. 10, 2006 (the number of cases growing 46 percent over the past four years); source cited *infra* note 14.

¹² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

¹³ *E.g., Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001) (“The scant legislative history discussing the purpose of AEDPA’s habeas restrictions indicates that Congress was concerned with delay and finality”).

Last fall, together with researchers at the National Center for State Courts and with funding from the Department of Justice, I completed the first empirical study of habeas litigation after AEDPA.¹⁴ The study examined separate samples of capital and non-capital state prisoner filings in habeas, but the focus here is on the non-capital cases. Over 18,000 federal habeas cases are filed each year by state prisoners.¹⁵ The sample examined in the study was a random sample of all non-capital habeas cases filed by state prisoners nationwide.¹⁶ We found that not only are these cases taking a long time to process—longer than before AEDPA¹⁷—but also that the vast majority of the time, energy, and money spent on federal habeas is wasted. Federal habeas is essentially a futile exercise for state prisoners serving non-capital sentences.

In the first place, federal review is essentially out of reach to most prisoners. Only those with particularly long sentences have meaningful access. The study showed that state prisoners take on average at least five years to reach federal court.¹⁸ This rules out access to habeas review for most people convicted of felonies in state court, sixty percent of whom don't go to prison

¹⁴ NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 26 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (hereinafter HABEAS STUDY).

¹⁵ FRED L. CHEESMAN, II ET AL., NAT'L CTR. FOR STATE COURTS, A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (2004), http://www.ncsonline.org/WC/Publications/Res_PreCiv_TwoLawsRevPub.pdf; JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURT, JUDICIAL BUSINESS OF THE U.S. COURTS 90-94 tbl.B-1A,145-47 tbl.C-2, <http://www.uscourts.gov/judbus2007/contents.html>.

¹⁶ HABEAS STUDY, *supra* note 14, at 15-16.

¹⁷ *Id.* at 56, 59 (median processing time for completed cases increased from 6 to 7.1 months; taking into account cases still pending, average processing time was over a year). For pre-AEDPA statistics, see ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL BUREAU OF JUSTICE STATISTICS, HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS (1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrscc.pdf>; Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 327 (1995).

¹⁸ HABEAS STUDY, *supra* notes 14, 55-56 (noting the average filing period is 5.1 years excluding cases challenging administrative decisions and excluding cases found to be time barred; average filing period for all cases was over six years). This actually is longer after AEDPA's statute of limitations than it was before. *Id.*

at all.¹⁹ The median sentence of those that do receive prison time is less than three years,²⁰ so most state prisoners are no longer incarcerated by the time they are in a position to file a federal petition. Not surprisingly, the study found that only twelve percent of noncapital habeas were filed by prisoners with a sentence of five years or less,²¹ while nearly thirty percent were filed by prisoners serving life sentences, even though lifers make up fewer than two percent of people in prison.²² In short, for most of those who enter state prisons, the Great Writ is inaccessible.

Secondly, even those that *do* reach federal habeas court don't get relief. Federal judges deny or dismiss almost every petition that is filed. In our sample, only seven petitioners (out of nearly 2,400) received any sort of relief (and at least one of these has already been overturned on appeal).²³ That is a one third of one percent chance the prisoner will succeed in getting an order to be retried, resentenced, or else released. These cases represent a substantial drain on the limited resources of the American criminal justice system for almost no return. Another important cost, albeit an indirect one, is the likelihood that meritorious claims of error will get lost or overlooked in the constant barrage of meritless claims.

B. Missed Opportunities at the Front End

Not only do we spend far too much on futile, successive post-conviction proceedings, but we spend these scarce resources in the wrong place. The cost of post-conviction review squanders state and federal criminal justice dollars, instead of spending them where they are needed most. Forty years after the Court announced the right to counsel in state criminal proceedings in

¹⁹ MATTHEW DUROSE & PATRICK LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf>.

²⁰ *Id.*

²¹ HABEAS STUDY, *supra* note 14, at 20.

²² *Id.* at 20, 54; DUROSE & LANGAN, *supra* note 19.

²³ HABEAS STUDY, *supra* note 14, at 52.

Gideon v. Wainwright,²⁴ and nearly twenty-five years after the Court outlined the test a prisoner must meet in order to receive relief for errors of his counsel in *Strickland v. Washington*,²⁵ inadequate indigent defense remains the most pressing challenge affecting constitutional rights in criminal justice today. Lack of training and experience, heavy caseloads, low pay, and little funding for investigation continue to plague defense services in state criminal cases.²⁶

Because defense lawyers must preserve issues for review, the crisis in indigent defense at the trial and appellate levels is directly related to the wastefulness of post-conviction proceedings. The mistakes of counsel show up as procedural defaults—forfeitures of claims that were never raised when and where they should have been. Post-conviction litigation too often focuses on these forfeitures and whether they should be excused instead of on the merits of constitutional claims.

Twenty-five years of enforcing *Strickland* has not improved the situation. At one time, some may have hoped that it would have. In practice, however, relief under *Strickland* remains essentially hypothetical in non-capital cases. It is available only if the defendant (1) does not waive through his plea the right to raise a *Strickland* claim in post-conviction review,²⁷ (2) is sentenced long enough to reach a post-conviction stage where a record can be made,²⁸ (3) can show that his lawyer's action was

²⁴ 372 U.S. 335 (1963)

²⁵ 466 U.S. 668 (1984).

²⁶ See, e.g., AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 342-45 (2006) ("States are unable to fund adequate indigent defense systems or provide sufficient resources for oversight, training, and management of cases.").

²⁷ See Douglas A. Morris, *Waiving an Ineffective Assistance of Counsel Claim: An Ethical Conundrum*, 27 CHAMPION 34 (2003) (noting the increasing use of such waivers by federal prosecutors, and arguing that defendants should require the advice of independent counsel in order to make them).

²⁸ The complaints about the futility of ineffectiveness litigation are not new. Professor Eve Brensike Primus argued last year in the Cornell Law review that

not strategic, and, hardest of all, (4) can show a reasonable probability of a different outcome had the error never happened.²⁹ And because even winning a *Strickland* claim carries no consequence for those providing representation, its deterrent power is practically nil.³⁰

Anyone involved in the criminal justice system for very long will have a story to tell about oversights of defense attorneys at the trial or appellate level that *Strickland* could not correct. One particularly egregious example is described by Professor Jon Gould, Chair of the Innocence Commission for Virginia, in his new book *The Innocence Commission*.³¹ The case involved a lawyer who both failed to cross-examine the detective who presented the defendant's confession and failed to check whether his client's blood, semen, and prints matched what the police had found during the investigation.³² The defendant was convicted of rape, and he later alleged in post-conviction proceedings that he had received ineffective assistance of counsel. *Strickland* proved utterly useless. The federal courts reviewing his case found that because of the overwhelming evidence of guilt, including his confession, the defendant could not demonstrate adequate "prejudice" from his attorney's incompetence, which is the showing required for relief under *Strickland*.³³ Years later, the defendant was exonerated by DNA tests, and even won a civil judgment against the detective

ineffective assistance of counsel ("IAC") claims are out of reach for most defendants so long as they are relegated to state post-conviction proceedings years after conviction. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

²⁹ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

³⁰ For commentary on the anemic regulatory effect of *Strickland* litigation, at least in non-capital cases, see Primus, *supra* note 27, at 688-97.

³¹ JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 79-83 (2008).

³² *Id.* at 170. In another case, a defendant was convicted of rape even though he testified at trial that he had had a vasectomy and thus could not have been the source of the sperm found in the victim. The medical records proving the defendant's vasectomy prior to the rape were never obtained by defense counsel, and the defendant remained imprisoned for ten years until DNA, and those medical records, exonerated him. *Id.* at 169-70.

³³ *Id.* at 81.

who had pressured him to confess to a crime he never committed.

The statistics from the recent study of habeas cases confirm what a waste of resources *Strickland* claims presently entail, at least for non-capital prisoners seeking relief in federal court. Although half of the non-capital cases in the study raised a claim of ineffective assistance,³⁴ in only one case out of nearly 2,400 was relief granted, and that grant was later overturned on appeal.³⁵ Nearly twenty percent of the non-capital cases filed involved a procedurally defaulted claim,³⁶ but in none did a federal court grant relief after concluding that a procedural default should be forgiven because of the denial of effective counsel.³⁷

II. RESPONDING TO THE PROBLEM

A. Doomed Strategies for Repair

Many maintain that the problems with futility at the post-conviction stage can be traced to the restrictions on access to post-conviction relief and the refusal to provide lawyers after direct appeal. They argue, in other words, that relief is rare not because there are so few meritorious claims but because so many meritorious claims are never raised or, if raised, never remedied.³⁸ Put differently, the rare habeas grant is not a needle in a haystack; it is the tip of an iceberg.

Some who share this view believe the solution is obvious: add lawyers to post-conviction phases;³⁹ repeal the restrictions

³⁴ HABEAS STUDY, *supra* note 14, at 28.

³⁵ *Id.* at 52, 116.

³⁶ *Id.* at 48. The failure of prisoners to secure adequate legal advice also contributes to the remarkably high proportion of federal petitions by non-capital prisoners that are dismissed as time barred—more than one in every five petitions. *Id.* at 46.

³⁷ *Id.* at 115-16.

³⁸ See, e.g., Stevenson, *supra* note 25; Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541 (2006); Roger Berkowitz, *Error-Centricity, Habeas Corpus and The Rule of Law as The Law of Rulings*, 64 LA. L. REV. 477 (2004).

³⁹ Stevenson, *supra* note 25, at 358.

in AEDPA;⁴⁰ beef up the *Strickland* test so that it is easier to meet;⁴¹ and, as one professor recently proposed, overrule *Stone v. Powell* and consider Fourth Amendment claims on habeas.⁴²

We believe that this is exactly the wrong response. Without speedier access to these phases of post-conviction review, making these phases more defendant-friendly would benefit only those sentenced to the longest sentences. Moreover, the extra strain these reforms would place on state resources would make review even more unobtainable for everyone else. Even for the small portion of inmates who actually receive post-conviction review, a lawyer is useless without better representation at the trial level to preserve objections to error. Lawyers at the back end can do very little to remedy claims of error which have been defaulted back at trial or on appeal.

B. A New Way: The Trade-Off

We propose a very different approach to thinking about the future of post-conviction review. In our view, the starting point must be the recognition that the two problems discussed above—the wasteful efforts *after* direct appeal and the continued deficiencies in the provision of adequate counsel *before and during* appeal—are joined at the hip. Changes in one can and should be linked to changes in the other. What is needed is a solution that would allow the states to shift dollars that they now waste at the back end forward to trial and appeal at the front end, where those resources can make the kind of meaningful difference for the accused that *Strickland* and post-conviction review never could. Even if federal habeas cannot be repaired as a reliable means of error correction for most prisoners, if recast it can serve a useful role as a political and economic incentive to encourage the states to provide a reliable means of error prevention.

Implementing this idea would probably require Congress to

⁴⁰ *Id.* at 358-59.

⁴¹ Yackle, *supra* note 37, at 567.

⁴² See Steve Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 34 SEARCH & SEIZURE L. REP. 49 (2007)

amend the habeas statute to provide a quid pro quo.⁴³ If a state takes specified steps to effectively reform its system of defense representation at the trial and appellate level, then federal habeas review could be scaled back drastically from what it is today, and federal funds would be made available to assist in maintaining adequate defense representation. Conversely, if a state fails to implement front-end reforms, existing habeas review could be expanded (for example, by returning to the “deliberate bypass” standard for procedural default),⁴⁴ and federal funds—say for additional custodial corrections expenditures—could be withheld.

As Professor James Liebman once wrote about capital cases: “[T]he logical cure for an error-prone system that chronically cycles products from a shoddy fabrication process to a long, expensive inspection process and back again is to devote more resources to the fabrication process in hopes that quality control eventually will require fewer resources.”⁴⁵ We think it’s best to pay now, and try to fix the problem at the front end, rather than waste our societal resources on inefficient and ineffective litigation at the back end.

That’s the big picture. The details of such a reform proposal, of course, will be crucial to its success or failure. Although we have yet to work out these details, we can offer some preliminary thoughts about how some of them might look.

1. The State’s Duty

In order to qualify for a new, leaner form of federal habeas review, Congress could require a state to meet clearly defined, federal standards for ensuring that

- all defendants, including indigent defendants, are provided quality defense representation;

⁴³ See Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 944 (1998) (“The point at which additional review is no longer producing a sufficient net increase in accuracy to justify its cost and delay is a policy question, and policy questions belong to Congress.”).

⁴⁴ See LAFAYE ET AL., *supra* note 4, at § 28.4.

⁴⁵ James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 326 (2002).

- all exculpatory evidence that is material is made available to defense counsel before trial or the entry of a guilty plea (e.g., by implementing police and prosecutorial “open file” policies);⁴⁶ and
- all post-trial claims of new evidence of factual innocence receive meaningful review, are investigated where necessary, and are referred to the state courts for remedial action where appropriate. This could be achieved through either (1) an open-ended opportunity for convicted defendants to present *new* evidence of factual innocence in state post-conviction proceedings or (2) an opportunity for review by an “innocence commission”⁴⁷ with the authority and resources to review and investigate claims of factual innocence made by convicted defendants and to refer cases involving such claims of factual innocence to the state courts for remedial action where appropriate.⁴⁸

Under this radically shifted system, case-by-case adjudication about the trial, plea, or appellate performance of individual attorneys in non-capital cases would end. Neither

⁴⁶ *E.g.*, GOULD, *supra* note 30, at 190-93 (recommending open-file discovery as a response to wrongful convictions).

⁴⁷ One model might be the Innocence Inquiry Commission recently established in North Carolina. Patterned after the review of claims of innocence in the United Kingdom, the commission’s members are appointed by the Chief Judge and must include a judge, prosecutor, victim advocate, defense attorney, sheriff, and member of the public, plus two other members. Claims of innocence would be screened by Commission staff and require new evidence not previously considered. The defendant must waive all privileges and agree to cooperate. The commission has independent investigative authority, including subpoena power. If the Commission finds there is sufficient evidence to merit judicial review, the case is referred to a three judge panel that, in turn, has the power to dismiss charges or find the defendant has not proven innocence. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1354-60 (2007).

⁴⁸ We also assume that states will continue to provide some judicial review of claims of illegal custody that do not question the validity of conviction or sentence: parole and goodtime violations, claims of sentence miscalculation, unconstitutional or illegal civil commitment under mental health or sexual predator laws, unlawful confinement prior to trial, etc. But these questions are handled in most states, we think appropriately, under procedures that are separate from those authorized for prisoners who file state post-conviction petitions challenging convictions and sentences.

state nor federal courts would consider claims of ineffective assistance. Instead, enforcement of federal standards could take several forms, so long as it occurs state-wide, and is not litigated on a case-by-case basis. For example, a state agency could regulate the certification and appointment of counsel in criminal cases in its state, following a number of standards promulgated by Congress. Or a federal agency could take on more of the oversight functions. Either way, ensuring ongoing state compliance could be part of federal agency oversight, with recourse to courts, to determine whether Congress's mandates have been carried out.⁴⁹

This approach could do more to improve defense representation at the trial and appellate levels than *Strickland* ever could because effective representation would be ensured not by the unrealistic threat of post-conviction relief, but pervasively and systematically, without regard to the individual guilt of particular defendants, and impervious to waiver during negotiations.⁵⁰

We do not presume to offer a definitive list of the requirements for the provision of adequate defense representation. Rather, Congress could draw upon the excellent and extensive research that already has been conducted in this area to craft individual standards or could charge a federal agency to do so. Some of the many ideas already proposed by

⁴⁹ The idea of prophylactic measures to prevent violations rather than case-by-case litigation over whether reversal is warranted as a remedy also has a storied history. Prior to *Strickland* scholars and courts argued that "preventative measures" such as improved training offered the primary route to achieving competent attorney performance. In an earlier time, the Court, fed up with case-by-case post-conviction review of custodial interrogations, substituted *Miranda* warnings and waivers. And few critics today bemoan the inability to overcome in post-conviction proceedings, the presumption of intelligence and voluntariness of each and every guilty plea that attaches upon compliance with certain prophylactic rules and standards that apply before the plea is accepted. *E.g.*, FED. R. CRIM. P. 11.

⁵⁰ Nancy J. King, *Regulating Settlement: What Is Left Of The Rule Of Law In The Criminal Process?* 56 DEPAUL L. REV. 389, 399 (2007) (arguing that "revisions in the resources allocated to public defenders' offices—changes that are not subject to waiver by the parties—may have a greater impact than tinkering with the postconviction rules governing ineffective assistance claims.").

the ABA, adopted by some states, or both include the following:⁵¹ (1) a statewide mechanism for oversight, such as a state agency, independent of the state judiciary and not dependent upon county funding, with the mission, legal authority, and adequate resources provided by the state to oversee the provision of high-quality defense representation in that state; (2) minimum qualifications for defense counsel; (3) a process for the initial certification and recertification of defense counsel; (4) caseload limits;⁵² (5) peer review of the counsel performance,⁵³ and (6) data collection of all complaints, peer reviews, and case results for individual attorneys⁵⁴ that the oversight body could review

⁵¹ See LAFAVE ET AL., *supra* note 4, at § 1.4 nn.113-126 (collecting sources). See also UNITED STATES DEPARTMENT OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES, <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf>; THE STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

⁵² See BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001), <http://www.ncjs.gov/pdffiles/bja/185632.pdf>.

⁵³ See, e.g., THE STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 50 (collecting performance standards). Our proposal would require each state to set up a system of meaningful peer review that would apply to both appointed and retained defense counsel. Without trying to prejudge the most appropriate specific features of such a system in every jurisdiction, we would anticipate a system that relies on a statewide Peer Review Committee composed of highly competent, deeply committed defense lawyers (e.g., the best of the state's public defenders). This committee would be given the primary responsibility to oversee defense counsel performance throughout the state. The committee would set and apply the standards of education, training, and experience for certification of defense lawyers, and would also ensure the integrity of the state's process for appointing defense counsel for indigent defendants.

⁵⁴ This empirical evidence could include information about the outcomes of trials and plea proceedings involving each defense lawyer and complaints filed by defendants against their defense lawyers. With the help of such a database, the overseers would be in a position to look for patterns of substandard outcomes and defendant complaints that would tend to show that a particular defense lawyer perhaps should be investigated. Prior initiatives to collect data about the performance of criminal defense attorneys has tended to focus on aggregate data, which can be used to analyze systemic problems with defense representation systems, but which would be of limited use in assessing individual performance. See, e.g., THE SPANGENBERG GROUP, INDIGENT DEFENSE STUDIES, http://www.spangenberggroup.com/work_indig.html; Letter from David J. Carroll, Director to the Michigan Supreme Court, http://www.sado.org/publicdefense/carroll_2005-09-27.pdf (proposing expanded data collection on performance of Michigan criminal defense attorneys).

as part of the recertification process.⁵⁵

2. What's in It for the States: The Trade-Off

There are three potential sources of funding for this improved system of assuring that the constitutional rights of those accused of crime are honored. The first two sources are resources currently devoted to post-conviction litigation.⁵⁶ Institutionalizing competent counsel in the trial court and on direct appeal, open-file discovery, and innocence review will largely dispense with the need to maintain the kind of complex post-conviction apparatus that we currently have. It should be possible to shift significant resources from the "back end" of the criminal justice system to the "front end," where those resources can do more good. This shift could occur in three separate ways:

First, states that provide reliable and robust defense representation at the trial and direct appeal for every criminal defendant could decide to eliminate post-conviction review of criminal judgments in the state courts entirely, except for

⁵⁵ De-certification would not necessarily provide any ground for relief for defendants who had previously been represented by that lawyer (although a state could choose to provide a remedy for such defendants). Instead, such defendants would still have to satisfy, in federal habeas, the same standards as all other defendants, including the requirement of demonstrating likely innocence. But de-certification would at least ensure that no future defendants would suffer bad outcomes as a result of that lawyer's failings.

⁵⁶ The idea of trading aspects of federal habeas review for better defense representation earlier is not new to habeas commentary. Professor Daniel Meltzer raised the possibility at the end of an article criticizing the limitations of habeas review in 1993. Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2526-27 (1993). Justice Powell's commission recommended over eighteen years ago that federal review be scaled back in return for better state post-conviction counsel in death cases, and a version of this opt-in scheme was endorsed by Congress, but these particular provisions have yet to be implemented. See Liebman, *supra* note 44, at 333. Also in death cases, Professor James Leibman recommended in the *Ohio State Law Journal* six years ago, for many of the same reasons we outline today, that in exchange for better counsel at the trial level defendants should *wave* post-conviction review. See Liebman, *supra* note 44, at 337. Unlike these earlier proposals, the suggestion floated here would have Congress *deny* federal habeas as we know it to defendants from states that meet these standards, and give states even more incentive and capacity to meet these standards by encouraging them to scale back their own state post-conviction review.

innocence review.⁵⁷

Second, in return for providing better representation and discovery earlier in the process, the states would also enjoy a drastically cheaper *federal* habeas litigation bill. Congress could scale back federal habeas relief in these states. Rather than litigating, over and over again, thousands of meritless claims that are unrelated to innocence, states could target their post-conviction resources to only those cases remaining cognizable: those with promising claims of innocence of conviction or those involving retroactive application of a new rule. This change in the scope of habeas relief would slash the workloads of federal courts and states attorneys that now respond to habeas petitions. In many jurisdictions the money spent to provide post-conviction review (and defend post-conviction cases) may come from a different pot, so to speak, than funding for indigent defense. This will pose a political challenge for those advocating reallocation of these moneys—from the state’s budget to a county or metropolitan budget or vice versa.

A third revenue source may be needed because the cost of providing adequate counsel to all of those facing felony charges probably dwarfs, in most states, the present cost of post-conviction review for those locked up long enough to seek it. That third source might be federal funds—which would assist and incentivize states to meet their Sixth Amendment obligations. Some federal funding could be reclaimed from the savings from scaling back federal post-conviction review, but we anticipate additional funds would be required both to set up the standards system and create enforcement mechanisms. Direct financial incentives for states that continue to demonstrate compliance with the higher standards could take many forms, including matching funds or conditioning related federal funding (say, for new prison beds, for example) on the provision of adequate defense statewide.

⁵⁷ Because federal habeas review of almost all claims will be conditioned on a showing of “clear and convincing evidence” of factual innocence, there will be no reason for defense counsel ever to “sandbag,” or otherwise deliberately default a claim.

3. Letting Go of *Strickland* and *Brady*

Abandoning case-by-case post-conviction litigation in favor of prophylactic safeguards would mean that some very tiny fraction of defendants, who under the present system might have won the habeas lottery, would lose out. It is true that even under this tentative scheme, defense representation will never be perfect, and some clients will indeed pay for attorney errors if they have no convincing new evidence of innocence. Someone could spend his life in prison because his lawyer failed to file a suppression motion, when in another identical case, for example, where the lawyer did not make such a mistake, the defendant may go free. This is undoubtedly the most controversial part of our proposed rethinking of post-conviction relief. Yet if shutting down case-by-case litigation of such claims will help to provide *better* protection for *more* defendants, it is well worth the trade-off. The net result should be fewer instances of error overall, and that's exactly what the federal constitutional regulation of state criminal justice should produce.⁵⁸

Post-conviction litigation presently works for too few, and too rarely, to provide deterrence of future violations. Abandoning these ineffective yet expensive tools would provide needed funds to furnish better counsel and information for far more defendants. Instead of the occasional person receiving a new trial or sentencing after a finding of ineffective assistance as the only check on state's failure to provide good lawyers, the new system would regulate counsel at the front end, through institutional sanctions that do not depend upon a defendant's ability to show that the errors of his counsel were so bad and the states' case against him so weak, that he deserves a new trial.

⁵⁸ Although we believe a radically shifted system would protect the right to counsel better than *Strickland* claims do now, states may choose to reap the benefits of reduced federal review and meet federal indigent defense standards while still preserving a case-by-case remedy for attorney failings. This would mean fewer freed-up state funds to provide for trial and appellate defense services. If a state did preserve review of IAC claims in state court, however, we would recommend implementation of a mechanism for speedy factual development of non-record claims in a motion for new trial or during appeal so that the appellate process could provide review of all claims (including IAC) *with an attorney in less time* than a subsequent post-conviction proceeding. See Primus, *supra* note 27 (recommending a unified appellate process including IAC claims).

Overall, more defendants should receive better assistance in more cases.

III. CAPITAL CASES

Although the focus of this presentation is the review of non-capital cases, the review of capital cases deserves mention. One of the main problems with current habeas law is that it is built almost entirely in response to concerns about the post-conviction review of the small number capital habeas petitions filed in federal court each year, ignoring the over 18,000 non-capital filings.⁵⁹ The problems in capital cases are specialized, and the two types of cases need not be addressed in the same way. Already many states have entirely different procedures for death penalty cases, and we believe it makes sense to follow this dual pattern in proposing any post-conviction reform.⁶⁰

IV. CONCLUSION

Encouraging the states to concentrate their scarce criminal justice resources on improving defense representation, and freeing them from post-conviction litigation, will simultaneously address two of the most persistent problems in the criminal justice system today: the inadequate delivery of defense services,

⁵⁹ See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURT, JUDICIAL BUSINESS OF THE U.S. COURTS, 145-47 tbl.C-2, <http://www.uscourts.gov/judbus2007/appendices/C02Sep07.pdf>.

⁶⁰ At the least, we would suggest that if a similar trade-off is considered for capital cases, federal habeas review should remain available in more circumstances than we suggest for non-capital cases. See generally Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65 (1994) (arguing for concept of “two-track” federal habeas). Merits review should be preserved not only to those defendants who can make a “clear and convincing” showing of factual innocence or to those who are entitled to the retroactive application of new rules (as in non-capital cases) but also to those who demonstrate that the aggravating circumstance on which the death sentence was premised was not adequately proven (i.e., “actual innocence” of the sentence), or that the death sentence is an unconstitutional penalty in light of the defendant’s crime, see, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (unconstitutional to impose death penalty for rape of child when victim is not killed), or status, see, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (unconstitutional to impose death penalty for crime committed by mentally retarded defendant); *Ford v. Wainwright*, 477 U.S. 399 (1986) (unconstitutional to execute defendant who is insane).

and the years and years of wasteful and misdirected litigation after appeal.

Of course, this represents a kind of compromise, and compromises tend to make nobody happy and everybody suspicious. States may argue that federal standards for defense representation go well beyond existing constitutional mandates for the right to counsel, that Congress has no business conditioning federal remedies on state policy choices, or that money saved by reducing state and federal post-conviction review could be more wisely spent on something other than padding the pockets of criminal defense attorneys. Defense advocates, including many of our own academic colleagues, may complain that scaling back of already meager post-conviction remedies for serious violations of constitutional rights, particularly the right to effective assistance of counsel, will result in even more constitutional violations and wrongful convictions. More post-conviction review of the merits of claims, not less, they may argue, is needed.

We think that both of these positions are shortsighted and that Congress and state governments together can do a better job providing the procedures mandated by the Constitution without bankrupting the states. Whether one's metric is accuracy or constitutional compliance, any meaningful shift of resources from the post-conviction review now in place to defense representation earlier in the process would be an improvement over what we have today. Certainly the number of defendants who could use better lawyers before conviction far exceeds the number of defendants that might be harmed by eliminating existing post-conviction litigation after appeal, especially when review is retained for convincing claims of innocence.

The triple-layered, expensive process of state and federal review of criminal judgments now in place was constructed during a historical period when federal judges were at odds with state judges in criminal cases, when a smaller proportion of our population was sentenced to lengthy prison terms, and when DNA testing had yet to reveal how those innocent of crime could be found guilty. It is time to consider whether the structure

built upon the outdated assumptions of this earlier era has outlived its usefulness. We believe that it has, and that post-conviction policy should take a new direction. The most formidable barrier to the enforcement of the Constitution is not the state judiciary; it is inertia.

