The Journal of Appellate Practice and Process

Volume 5 | Issue 2 Article 7

2003

Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot

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EFFECTIVE PERFORMANCE GUARANTEES FOR CAPITAL STATE POST-CONVICTION COUNSEL: CUTTING THE GORDIAN KNOT

Andrew Hammel*

I. INTRODUCTION

Flaws in America's death-penalty justice system have received a great deal of attention lately. The steady trickle of death row exonerations,[1] former Illinois Governor George Ryan's blanket commutation of all Illinois death sentences,[2] and the eighty-five recommendations of the commission he created have focused attention on the death-penalty process.[3] Public concern centers on high-profile, obvious breakdowns in the death-penalty justice process: innocent inmates exonerated by

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1. As of August 16, 2003, the Death Penalty Information Center listed 111 inmates as having been released from death row on grounds of innocence since the resumption of capital punishment in 1973. *See* Death Penalty Info. Ctr., *Innocence: Freed From Death Row* (available at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *Innocence*].

2. *See* Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life Without Parole*, Chi. Trib. 1 (Jan. 12, 2003) (reporting Illinois governor's blanket commutation of all existing death sentences, and noting his description of Illinois's capital punishment system as "an absolute embarrassment" and "a catastrophic failure").

3. Governor's Commission on Capital Punishment, *Report of the Commission on Capital Punishment* (2002) (available at http://www.idoc.state.il.us/ccp/ccp/reports /commission_report /index. html) (accessed Nov. 14, 2003; copy on file with the Journal of Appellate Practice and Process) [hereinafter *Ryan Commission Report*].

DNA,[4] sleeping-lawyer ineffectiveness claims,[5] or misconduct by prosecutors.[6] The issues get attention because they are easy to understand: Journalists can write about them for a general audience.

Yet one weak link in the chain of "super due process"[7] that is claimed to ensure reliable death sentences has received comparatively little public attention. Incompetent habeas corpus representation occurs all too frequently in death-penalty appeals—especially in Southern states, which are less than eager to spend public funds to ensure adequate representation to indigent inmates. The issue of incompetent habeas representation is not one for the masses: Understanding the vital role post-conviction plays, and the arcane rules that control it, takes legal training.

However, post-conviction proceedings are, after trial, perhaps the most common and effective means of forestalling substantive injustice in capital cases. The American Bar Association, in its recently updated *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*,[8] observes that post-conviction claims are generally driven not by issues the layman might call "technicalities" but by

> information concealed by the state, . . . witnesses who did not appear at trial or who testified falsely, [inadequate investigation by the original] trial attorney, . . . new

4. *See Innocence*, *supra* n. 1, at 6 (noting that twelve death-row exonerations have been based on DNA evidence).

5. *See* Lisa Teachey, *Convicted Killer Avoids Death Row*, Hous. Chron. A29 (June 20, 2003) (reporting that former death row inmate Calvin Jerold Burdine, who had won a new trial because his original trial counsel had slept through portions of his Harris County, Texas, death-penalty trial, had avoided a second trial by pleading guilty to a variety of offenses).

6. *See e.g.* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor; How Prosecutors Sacrifice Justice to Win*, Chi. Trib. A1 (Jan. 10, 1999) (reporting results of study that found 381 cases of homicide convictions tainted by prosecutorial misconduct, including sixty-seven death-row cases).

7. "Super due process" refers to the network of enhanced procedural protections that is intended to ensure heightened reliability in death-penalty trials. *See generally* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980).

8. *See* ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) [hereinafter *ABA Guidelines*].

> developments [that] show the inadequacies of prior forensic evidence, . . . [and] juror misconduct.[9]

The importance of competent counsel in these critical appeals is growing. The Supreme Court's jurisprudence in the area, coupled with recent reforms such as the AEDPA[10] and changes in state post-conviction laws, have removed the already-tattered safety nets hanging below post-conviction litigators. A state post-conviction lawyer must now discover and present all potential claims in the first habeas corpus petition or waive them forever. These recent changes place an incalculable premium on competent representation by talented, adequately funded lawyers.

By way of review, it is important to note that the Sixth Amendment standard for effective assistance of counsel has been construed by the Supreme Court to require provision of competent, but not error-free, representation. The leading decision, *Strickland v. Washington*,[11] articulates a two-step burden in establishing a constitutional violation. The party challenging counsel's performance must first demonstrate that the attorney performed deficiently and not as a result of an objectively reasonable strategy or matter of tactics.[12] The challenger must then demonstrate that but for counsel's defective performance, there was a reasonable probability of a different outcome in the proceeding.[13]

The Court's *Strickland* test has been applied to counsel's performance at trial, including those cases resolved by guilty plea,[14] and to sentencing proceedings,[15] including capital sentencing proceedings.[16] The test also applies to representation

9. *Id.* at 1086 (Commentary to Guideline 10.15.1B).

10. The Antiterrorism and Effective Death Penalty Act of 1996 effectively altered federal habeas corpus and post-conviction practice by amending portions of 28 U.S.C. § 2254 and 28 U.S.C. § 2255 (2002) (available at http://uscode.house.gov) that create remedies for constitutional violations occurring during the criminal-trial process in state and federal proceedings, respectively.

11. 466 U.S. 668 (1984).

12. *Id.* at 668, 690-91.

13. *Id.* at 687-88, 694.

14. *Hill v. Lockhart*, 472 U.S. 52 (1986).

15. *See Glover v. U.S.*, 531 U.S. 198 (2001).

16. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

on direct appeal.[17] However, the Sixth Amendment guarantee has been limited only to representation of the criminal defendant in the trial and direct-appeal process. Because the Constitution does not recognize any requirement for post-conviction process,[18] even for a defendant sentenced to death,[19] the Court has rejected the argument that counsel's ineffectiveness in representing the defendant in post-conviction litigation represents a constitutional violation.[20] Consequently, the issues of competence and effectiveness in post-conviction representation on the state level are matters of state law, rather than federal constitutional right.

This Article will first survey the steps that states are taking to ensure that inmates actually receive high-quality representation. The survey will show that state habeas regimes can be divided into three categories. In the first are those that both recognize a standard for effective assistance of counsel that requires competent performance and that provide remedies for ineffective performance by state post-conviction lawyers. In the second are states that do not recognize a general right to competent performance by appointed post-conviction counsel, but that may provide relief in certain cases of manifest injustice. In the third category are states that may pronounce standards for appointed habeas counsel competency, but that offer no remedy for poor performance. Texas, which has become a charnel-house of constitutional protections, is the most prominent member of this last group.

Next, I will assess the trends in guaranteeing competent performance by state post-conviction counsel. The only meaningful guarantee of competent performance, I will argue, is the traditional remedy of oversight of an appointed lawyer's performance. Although many states have taken this step, I will argue that recent developments demonstrate no discernible movement towards enforcing a guarantee of competent

17. *Evitts v. Lucey*, 469 U.S. 387 (1985).

18. *Pa. v. Finley*, 481 U.S. 551, 559 (1987).

19. *Murray v. Giarratano*, 492 U.S. 1 (1989).

20. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *see also Wainwright v. Torna*, 455 U.S. 586 (1982) (holding no constitutional violation based on counsel's defective performance in representation in state discretionary review proceeding following direct appeal).

performance where it is most desperately needed: the large states of the Deep South that have collectively carried out the overwhelming majority of post-*Furman* executions.[21] Nor is there any discernible doctrinal trend that would empower a federal court to require these states to provide such a guarantee. Next, I will assess two recent proposals for reform that have lately attracted scholarly attention. I will finally propose a potential reform that is conceivably politically workable in that it can be portrayed as streamlining the death-penalty system: collapsing post-conviction appeals and direct appeals into one unified proceeding. I will then sketch out the consequences of this move, using Idaho's existing combined-appeal system as an example.

II. TRENDS IN STATE-LEVEL GUARANTEES OF EFFECTIVE PERFORMANCE.

A. Introduction

Every state now offers inmates some form of post-conviction review.[22] These review schemes go under a bewildering variety of rubrics and have structures which are "too diverse and protean for easy generalization."[23] However, at the most general level, virtually all state post-conviction schemes share the following characteristics:

- They occur separately from, and often after, the prisoner's direct appeal.

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21. *See* NAACP Leg. Def. & Educ. Fund, *Death Row USA: Summer 2003*, at 9 (available at http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process) (reflecting that, as of October 1, 2003, Texas had conducted more executions than any other state—a total of 305, or 35.7% of the 842 executions carried out in the modern era of the death penalty—and that Virginia, South Carolina, Georgia, Florida, Oklahoma, Louisiana, Alabama, and Arkansas were all in the top ten states with the most executions).

22. *See generally* Donald E. Wilkes, Jr., *State Post-Conviction Remedies and Relief* (Harrison Co. 1996 & Supp. 1999) (describing procedures available in the states to adjudicate post-conviction claims).

23. *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice & Procedure* vol. 1, § 6.1, 286 (4th ed., LEXIS L. Publg. 2001) (listing various names for post-conviction remedies).

- They permit the prisoner to develop extra-record evidence through traditional fact-development techniques such as expert consultation, discovery, depositions, and evidentiary hearings.

- Generally, jurisdiction in state post-conviction is limited to claims of a constitutional, rather than statutory, dimension.

State post-conviction proceedings are governed by widely varying procedural rules and restrictions. Although the scope and force of these rules vary widely from state to state, they all stem from a common decisional lineage and can be grouped into general categories:

- An inmate who could have raised a claim on direct appeal (for instance, because all evidence necessary to decide the claim was already present in the record) may not raise the claim in post–conviction proceedings.[24]

- An inmate who already has raised a claim (either in a previous post-conviction petition or on direct appeal) may not raise the same claim again.

- An inmate who has already filed one state habeas corpus petition and received an adjudication of it may not file another petition unless he can demonstrate good cause for bringing additional claims before the court. Cause generally tracks the Supreme Court's definition of that term, which requires a factor "external to the defense" (i.e.,

24. This rule is subject to caveats. First, it generally applies only when all the information necessary to resolve the claim is present in the record of the trial. *See Massaro v. U.S.*, 123 S. Ct. 1690, 1694 (2003) (holding that defendants need not "exhaust" claims of ineffective assistance of trial counsel by raising them on direct appeal because only post-conviction proceedings allow such claims to be developed "on a . . . record developed precisely for the object of litigating [and] preserving the claim"). Second, a defendant can raise a claim that should have been raised during direct appeal proceedings but was not raised if he also alleges that the failure to raise the claim constituted ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

prosecutorial misconduct, or newly established law) that excuses the failure to raise the claim earlier.

This last rule, generally known as a "successor bar," is the most important for our purposes. Prisoners need some forum in which to protest the ineffectiveness of a prior habeas attorney, but state post-conviction proceedings are themselves the "end of the line" of the state court appellate process. Therefore the proper forum for such a claim, if it is to be recognized, is generally assumed to be a successive habeas corpus application raising the ineffectiveness of prior habeas counsel. In the next Part, I will survey the current answers states have given to the question of whether ineffective assistance of post-conviction counsel can be "cause" for failing to properly raise a claim in a previous post-conviction application.

B. Differing State Approaches

I will focus exclusively on the question of whether the state in question actually guarantees competent performance by appointed state post-conviction counsel. Although there are other potential benchmarks for state performance in this area, I believe, as I will argue later, that actual guarantees of competent performance, coupled with remedies for their breach, are the only realistic benchmark. Thus the focus of the following survey will be on what steps states have taken to create procedurally enforceable guarantees of actual competent performance on the part of capital post-conviction counsel.

1. Full Guarantee

By "full guarantee," I mean states that confer upon inmates a guarantee of effective performance of counsel that is analogous to *Strickland*'s general guarantee. That is, these states guarantee that counsel must do more than simply show up in court or file a document on time. The substance of their representation must be competent. The states also provide some procedure by which inmates can invoke the powers of the court to review counsel's performance. States that offer this level of protection are Alaska, California, Connecticut, Idaho, Iowa, Maryland, New Jersey, Pennsylvania, South Dakota and

Wisconsin. The rationales for these decisions break down into two broad categories. Some states base their decisions on state constitutional grounds; others rely on principles of statutory construction, or common sense, in concluding that statutes that provide for counsel to represent offenders in state post-conviction proceedings necessarily imply that counsel must be effective.

The Connecticut Supreme Court's 1992 decision of *Lozada v. Warden*[25] deserves pride of place, since its forceful and vivid language has had a considerable impact on later courts. In *Lozada*, the court concluded that the Connecticut Legislature, in providing for the appointment of counsel to inmates in post-conviction proceedings, intended that they receive effective assistance of counsel: "It would be absurd to have the right to appointed counsel who is not also required to be competent," the court declared.[26] The court mildly chided the State for countering Lozada's argument: "Surely, fundamental fairness opens the door for relief by habeas corpus when the state, in discharging its statutory duty, appoints incompetent counsel."[27] An inmate who received ineffective assistance of post-conviction counsel should file a successive habeas corpus application and "must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective."[28] The Connecticut Supreme Court later even reversed the judgment of a lower court in order to guarantee the right of effective assistance of counsel on discretionary appeal from a trial-court level denial of post-conviction relief.[29]

The Alaska Court of Appeals relied on the Due Process clause of the Alaska Constitution to confer a guarantee of effective post-conviction representation on that state's inmates.[30] Because Alaska guarantees inmates the right to appointed

25. 613 A.2d 818 (Conn. 1992).

26. *Id.* at 821 (citations omitted).

27. *Id.* at 822.

28. *Id.* at 823. The court's formulation appears to be tailored to the facts of the case before it, in which the underlying claim of constitutional error was a claim of ineffective assistance of trial counsel.

29. *Gipson v. Commr. of Correction*, 778 A.2d 121, 129-30 (Conn. 2001), *reversing Gipson v. Commr. of Correction*, 735 A.2d 847 (Conn. App. 1999).

30. *See Grinols v. State*, 10 P.3d 600, 604 (Alaska App. 2000).

counsel to file their initial state post-conviction applications,[31] the court reasoned, inmates are "entitled to expect that their attorneys will provide competent representation" as a matter of due process.[32] To invoke his right to a subsequent state post-conviction proceeding to litigate claims omitted or mishandled during the first proceeding, an inmate must establish that

- he diligently and promptly raised the claim of ineffective assistance of post-conviction counsel;
- his former post-conviction lawyer's representation fell "below the acceptable minimum of skill expected of criminal law practitioners";
- the legal issue overlooked owing to prior counsel's incompetence was meritorious; and
- the error was harmful, i.e., that the "flaw in the prior post-conviction relief proceeding prevented the defendant from establishing a demonstrable and prejudicial flaw in the original trial court proceedings."[33]

The court declined to provide court-appointed counsel to all inmates to litigate their claims of ineffective representation by prior post-conviction counsel, but it did authorize trial-court judges to appoint state-paid counsel when "needed for a fair and meaningful litigation of the defendant's claim."[34]

The Idaho courts took a somewhat different approach to the question. In 1981, the Idaho Supreme Court held that an inmate's failure to raise an issue in his original habeas application could be excused. The court pointed to the language of the governing habeas statute, which provided that any alleged waiver of grounds for relief by an inmate must be made "knowingly, voluntarily and intelligently."[35] The prisoner alleged that his failure to raise a particular claim in his first post-

31. *See* Alaska Stat. § 18.85.100(c) (West 2003).
32. *Grinols*, 10 P.3d at 618.
33. *Id.* at 619-20.
34. *See id.* at 604.
35. *Palmer v. Dermitt*, 635 P.2d 955, 957 (Idaho 1981) (quoting Idaho Code § 19-908).

conviction application was not done knowingly, but rather because of the "ineffective assistance of his prior post-conviction counsel."[36] The court reasoned,

> The allegations of ineffective assistance of prior post-conviction counsel, if true, would warrant a finding that the omission in the prior post-conviction proceeding of the allegations now being raised anew by Palmer was not a result of an active, knowing choice made by Palmer through this prior court-appointed attorney, and would therefore provide sufficient reason for permitting the newly asserted allegations to be raised in the instant petition.[37]

In 1999, a lower Idaho court extended this reasoning to protect an inmate whose prior post-conviction attorney had filed the claim in question but had litigated it "inadequately."[38]

Although Idaho's approach provides robust protection, it rests on a thin reed. The knowing, voluntary, and intelligent waiver standard found in section 19-4908[39] was adopted in 1967, and it appears to be explicitly modeled on language found in the United States Supreme Court's 1963 decision in *Fay v. Noia*.[40] As any student of habeas knows, intervening Supreme Court decisions have undermined *Fay*.[41] Should the state legislature choose to update its state post-conviction statute to reflect a more contemporary understanding of procedural default doctrine, the reasoning underpinning the Idaho courts' performance guarantee would be swept away.[42]

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36. *Id.* at 959.

37. *Id.* at 960.

38. *Hernandez v. State*, 992 P.2d 789, 793, 800 (Idaho App. 1999) (reversing lower court's dismissal and remanding for consideration of petitioner's allegation that claim was previously dismissed only because previous post-conviction attorney supported it only with inadequate, conclusory allegations).

39. Idaho Code § 19-4908 (West 2003).

40. 372 U.S. 391, 439 (1963) (holding that state post-conviction petitioner may not be held to have procedurally defaulted a habeas claim unless, "after consultation with competent counsel or otherwise, [he] understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts").

41. *See e.g. Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992) (overruling *Fay* in part, establishing new "cause and prejudice" standard for reviewing state-court procedural defaults, and holding that incompetent performance by appointed state post-conviction counsel did not excuse procedural default).

42. The Idaho courts have rejected constitutionally based arguments in favor of a right to the effective assistance of post-conviction counsel. *See Hernandez*, 992 P.2d at 793 n. 2 (collecting authorities).

California has not explicitly attached a performance guarantee to post-conviction representation, but it has established precedent that appears to convey a full guarantee of competent performance and a remedy for its breach. In 1993, the California Supreme Court, in a capital case, held that "[r]egardless of whether a constitutional right to [post-conviction] counsel exists, a petitioner who is represented by counsel has a right to assume that counsel is competent and is presenting all potentially meritorious claims."[43] The court considers sufficiently serious errors or omissions on the part of a death row inmate's court-appointed post-conviction lawyer as good cause to permit exceptions to its rules requiring timely filing of petitions[44] and barring successive petitions.[45]

California is worthy of special consideration because, unlike many states that simply declare that an inmate is entitled to effective post-conviction representation, California has actually attempted to define, in the context of capital cases, what effective post-conviction representation actually entails. Policy 3 of the California Supreme Court, adopted in 1998, requires capital habeas counsel to investigate "factual and legal grounds" for potential habeas claims.[46] Habeas counsel is to begin by consulting a list of potentially meritorious issues compiled by appellate counsel and should continue by discussing the case with "the defendant, trial counsel, and appellate counsel."[47] Instead of performing an "unfocused investigation having as its object all factual bases for a collateral attack on the judgment," appointed counsel should "investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim."[48]

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43. *In re Clark*, 855 P.2d 729, 748 (Cal. 1993).

44. *See In re Sanders*, 981 P.2d 1038, 1053-54 (Cal. 1999) (permitting inmate to file untimely petition when untimeliness was product of former counsel's essentially abandoning his client during the period for filing the petition).

45. *See Clark*, 855 P.2d at 748 ("If, therefore, counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another application.").

46. *See Sanders*, 981 P.2d at 1052 n. 12 (quoting *Supreme Court Policies Regarding Cases Arising from Judgments of Death*, Policy 3, Stds. 1-1 (1989, as amended 2/4/1998)).

47. *Id.*

48. *Id.*

New Jersey follows what is perhaps the most generous post-conviction scheme. The New Jersey Supreme Court recently described its "unique" approach to post-conviction review:

> In keeping with our view of the overarching importance of providing defendants a final opportunity to raise constitutional errors that could not have been raised on direct appeal, our court rules, in an initiative unique among our sister-jurisdictions, state that every defendant is entitled to be represented by counsel on a first [post-conviction] petition; that if a defendant is indigent, counsel will be assigned; that assigned counsel may not withdraw based on the ground of "lack of merit" of the petition; and that "counsel should advance any grounds insisted on by the defendant notwithstanding that counsel deems them without merit."[49]

Thus, not only is New Jersey one of the very few states that guarantee appointment of post-conviction counsel without a preliminary screening of the merits of the petition, it also provides a guarantee of counsel's performance that exceeds the scope of the federal constitutional guarantee, in that it guarantees counsel's help in presenting claims counsel believes to be meritless.[50]

The Maryland Supreme Court, in 1997, held that inmates who qualified for assistance from the public defender's office were entitled to effective assistance of counsel.[51] The Maryland court flatly rejected the State's argument that a statutory entitlement to counsel should not entail a right to effective assistance from that counsel, intoning that a right to a lawyer would be "hollow indeed unless the assistance were required to

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49. *State v. Rue*, 811 A.2d 425, 433 (N.J. 2002) (citing N.J. Sup. Ct. R. 3:22-6).

50. By contrast, the federal guarantee of effective appellate counsel permits attorneys in criminal appellate proceedings to exercise their judgment by refusing to file even meritorious claims, and to file so-called *Anders* briefs if they are convinced their client has no meritorious claims. *See e.g. Jones v. Barnes*, 463 U.S. 745, 754 (1983) (while federal guarantee of effective assistance of counsel applies to direct appeal proceedings, it does not require appointed counsel to file and argue all meritorious claims, even if the client wishes they be pursued); *Anders v. Cal.*, 386 U.S. 738, 744 (1967) (setting out procedure to be used by appellate counsel in criminal cases in which appellate counsel is unable to discern any meritorious claims of error arising from the client's trial).

51. *State v. Flansburg*, 694 A.2d 462,465 (Md. 1997).

be effective."[52] The court did not rely on an explicit constitutional rationale, but rather simply assumed the proposition as a matter of common sense.

Iowa relied on the same brisk approach in a 1994 case, presenting a précis of its former case law on the subject and declaring that "once counsel was appointed to represent him, [the petitioner] had a right to the effective assistance of counsel."[53] The State urged the Iowa court to follow the then-recent Supreme Court precedent of *Coleman v. Thompson*,[54] which affirmed that the federal constitution contains no guarantee of effective assistance of post-conviction counsel. The court, however, observed that *Coleman*, whose reasoning was in part founded on the Supreme Court's interpretation of the federal Constitution, was inapposite, because the right to effective assistance of post-conviction counsel was not constitutionally based in Iowa.

To ensure Iowa petitioners a remedy, the court ruled that ineffective assistance of post-conviction counsel "constitutes sufficient 'cause' . . . to [excuse a petitioner's failure to] adequately raise an issue in prior proceedings."[55] To obtain merits review of his claim, the petitioner must "state the specific ways in which counsel's performance was inadequate and identify how competent counsel representation would have changed the outcome."[56] Pennsylvania[57] and Wisconsin justify a right to competent post-conviction counsel using a broadly similar rationale.[58]

The latest addition to the ranks of states that guarantee effective performance is South Dakota. In *Jackson v. Weber*,[59] the South Dakota Supreme Court observed that the last time it

52. *Id.* at 467 (quoting *Wilson v. State*, 399 A.2d 256, 260 (Md. 1979)).

53. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

54. 501 U.S. 722 (1991).

55. 515 N.W.2d at 15.

56. *Id.*

57. *See Commonwealth v. Priovolos*, 715 A.2d 420, 422 (Pa. 1998).

58. *State ex rel. Rothering v. McCaughtry*, 556 N.W.2d 136, 139-40 (Wis. App. 1996). Although the *Rothering* court declined to rule on the petitioner's claims of ineffective post-conviction counsel, it declined to do so only for procedural reasons, and informed the petitioner that he would be entitled to raise his claims of ineffective post-conviction counsel in the trial court. *Id.* at 139 n. 6.

59. 637 N.W.2d 19 (S.D. 2001).

had addressed the question, it had suggested that effectiveness of post-conviction counsel was to be assessed under a due-process standard less generous than *Strickland*.[60] The court, however, elected to disavow the former case and adopted *Strickland* as the proper standard for determining whether post-conviction counsel had performed effectively. The court quoted an Illinois court's reasoning that the "legislature could not have intended to provide an individual . . . with the right to counsel and to permit that counsel to be prejudicially ineffective."[61] The court recognized that its decision entailed that "more than one claim of ineffective assistance of counsel may be brought on occasion," while countering that any abusive litigation would be controlled by the requirement that the claim be "eventually be directed to error in the original trial or plea of guilty."[62] In any event, the court reasoned (ungrammatically quoting the Connecticut Supreme Court's landmark decision in *Lozada*) that "refusal to acknowledge that the requirement of counsel means *constitutionally effective counsel* would weaken the habeas mechanism to ensure 'as a bulwark against convictions that violate fundamental fairness.'"[63] A dissenter objected that the policy of extending a guarantee of effectiveness to post-conviction proceedings, while a "rational alternative," was "constitutionally the sole prerogative of the Legislature" to enact.[64]

2. Limited Protection

A few states approach the issue on a case-by-case, ad hoc basis. In extreme cases, they will recognize exceptions to their previous successor-bar decisions or will read exceptions into statutory successor bars and permit inmates a second hearing. These exceptions, however, fall far short of generating any generally applicable right to the effective assistance of counsel.

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60. *Id.* at 22 (relying on *Strickland*).

61. *Id.* at 23 (quoting *In re Carmody*, 653 N.E.2d 977, 983 (Ill. App. 4th Dist. 1995) (holding that statutory grant of counsel to persons challenging mental-health commitments necessarily implied right to effective assistance of counsel)).

62. 637 N.W.2d at 23.

63. *Id.* (quoting *Lozada v. Warden*, 613 A.2d 818, 822 (Conn. 1992) and *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (emphasis in original)).

64. *Id.* at 26 (Gilbertson, J., dissenting).

Rather, they are tailored to the facts of the case at hand and generally provide relief only in extreme cases.

South Carolina is such a state. In *Case v. State*,[65] a pro se petitioner had filed a post-conviction petition which was dismissed without a hearing on the basis that it lacked "specificity."[66] He did not appeal. Almost two years after filing his initial petition, he filed a successive petition which apparently set out his claims more clearly. The court, after "reviewing the entire record and considering the unique combination of facts," granted Case a hearing on his second writ, "despite its successiveness."[67]

In a pair of 1991 cases, the South Carolina Supreme Court affirmed indigent defendants' statutory right to counsel on discretionary appeal from the trial-court-level denial of their post-conviction writs. In *Austin v. State*,[68] the appellant received counsel's assistance during a trial court hearing, but counsel later failed to seek discretionary appellate review of the trial court's ruling. The appellant filed a subsequent post-conviction petition "alleging only that his [previous] PCR counsel was ineffective in failing to seek appellate review of the denial of PCR."[69] The court acknowledged that there was no constitutional right to counsel on discretionary review of a denial of a PCR motion, but that an appellant was assured such a right by statute.[70] The court concluded that, to remedy "unfairness," it would remand for a hearing into whether he had requested that a petition for discretionary review be filed and evaluate the claim under an ineffectiveness rubric if the hearing revealed he "requested and was denied an opportunity to seek appellate review."[71]

The appellant was less fortunate in *Aice v. State*.[72] Aice had a full round of post-conviction proceedings, culminating in a

65. 289 S.E.2d 413 (S.C. 1982).
66. *Id.* at 413.
67. *Id* at 413-414.
68. 409 S.E.2d 395 (S.C. 1991).
69. *Id.* at 396.
70. *Id.*
71. *Id.*
72. 409 S.E.2d 392 (S.C. 1991).

discretionary appeal of the trial court's denial of relief.[73] He then filed a successive petition, claiming his first post-conviction counsel had been ineffective for failing to raise three meritorious issues.[74] In this case, the South Carolina court demurred. It held that any claim which "could have been raised" in a petitioner's first habeas proceeding must be raised in that proceeding and that any possible ineffectiveness of the first defense lawyer would not justify a new habeas proceeding:

> As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view. . . . Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.[75]

South Carolina thus illustrates what might be called the "ad hoc protection" view of counsel performance guarantees. The state supreme court evaluates allegations of post-conviction counsel's incompetence on a case-by-case basis, determining whether, in any particular case, the system has "failed" a defendant to the extent that justice requires a remedy.

Alabama also illustrates this approach. The Alabama Court of Criminal Appeals has squarely held that there is no constitutional or statutory right to counsel in state post-conviction proceedings.[76] There is also no right to the assistance of counsel preferred by the petitioner.[77] Nevertheless, in a brief paragraph in *Gooch v. State*,[78] the court observed that it had

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73. *Id.* at 393.

74. *Id.* at 394.

75. *Id.* at 451.

76. *See Mayes v. State*, 563 So. 2d 38, 39 (Ala. Crim. App. 1990). *See also* Ala. R. Crim. P. 32.7(c) (providing counsel to post-conviction petitioners only when petition is not suitable for summary dismissal, petitioner is indigent, and assistance of counsel is "necessary to assert or protect the rights of the petitioner").

77. *See Hamm v. State*, 2002 WL 126990 at *6 (Ala. Crim. App. Feb. 1, 2002) (approving replacement of Rule 32 petitioner's long-time counsel and holding that petitioner "clearly had no right to counsel of his own choice").

78. 717 So. 2d 50 (Ala. Crim. App. 1997).

agreed to consider the petitioner's successive post-conviction application because the first petition was "not heard on the merits" and because the successive petition "raises the issue of ineffective assistance of trial counsel and is the first petition filed by someone other than the appellant's trial counsel."[79] The court provided no citations to support these brief conclusions nor any argument reconciling its previous holdings with its decision to hear Gooch's claim. However, the court suggests that under circumstances amounting to an effective denial of counsel, the Alabama court system will permit petitioners a second bite at the appeal.

Also in this camp is Indiana. In 1989, the Indiana Supreme Court refused to discern a guarantee of effective assistance of counsel in the state or federal constitutions.[80] The court accordingly declined to accord inmates any right to competent post-conviction counsel. The court did, however, declare that inmates had the right to counsel who, at the minimum, managed to appear and perform:

> We adopt the standard that if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set out in [*Strickland*].[81]

The Arkansas Supreme Court, in *Jackson v. State*,[82] reviewed an order denying the petition for post-conviction relief in a capital case as untimely filed. The untimely filing rested in part on the trial court's failure to comply with a requirement for appointment of second counsel when the original attorney could demonstrate a potential conflict of interest based on prior representation of the petitioner. In this circumstance, the Arkansas court concluded that due process, a matter of fundamental fairness, required that the petition be considered on the merits.[83] The court did not establish a broad right to effective assistance of counsel in *Jackson*, and its decision might be read

79. *Id.* at 52.

80. *See Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989).

81. *Id.*

82. 37 S.W.3d 595, 597-98 (Ark. 2001).

83. *Id.* at 599. Jackson's petition was ultimately rejected on the merits. *Jackson v. State*, 105 S.W.3d 352 (Ark. 2003).

as limited to the peculiar facts of the case. Nevertheless, the court did apply due process analysis to at least the failure of counsel to perform a ministerial duty of timely filing,[84] even though review of counsel's performance in the litigation of a post-conviction action is not so clearly contemplated in the opinion.

3. No Protection

The states surveyed above at least temper their enforcement of procedural bars in habeas proceedings to avoid unjustly harsh outcomes[85] or ensure that prisoners do not suffer by procedural problems caused ultimately by the State's failure to appoint competent counsel. The following states, however, decline to go even this far.

a. No right to counsel

The first category of states that do not recognize the right to effective assistance of post-conviction counsel are those that recognize no right to post-conviction counsel at all, for any class of inmates. There are currently two states in this category, Georgia and Alabama. In 1999, the Georgia Supreme Court held, in *Gibson v. Turpin*,[86] that indigent Georgia habeas corpus petitioners had no right to the appointment of counsel to assist them in state habeas corpus post-conviction proceedings. The court relied primarily on two lines of reasoning. First, borrowing from the Supreme Court's analysis of criminal proceedings, the Georgia court argued that because habeas corpus proceedings are far removed in time and importance from the original criminal trial, their reliability is of less importance to the state and prisoner.[87] The Georgia court also deployed the familiar argument that recognizing a right to effective assistance of post-

84. *See also Porter v. State*, 33 S.W.3d 73, 73 (Ark. 1999) (holding that counsel's failure to comply with necessary filing rules required relief).

85. *See In re Sanders*, 981 P.2d 1038, 1054 (Cal. 1999) (excusing procedural default caused by abandonment by former habeas counsel in order to avoid "incongruous" and "harsh" result of forfeiting a habeas petitioner's claims without the habeas petitioner's knowledge or consent, owing only to the actions of his court-appointed attorney).

86. 513 S.E.2d 186 (Ga. 1999).

87. *Id.* at 189-90.

conviction counsel would give rise to an endless series of appeals.[88] Gibson attracted an unusual amount of attention because the petitioner, Exzavious Gibson, had been required to represent himself unaided by counsel during a post-conviction evidentiary hearing.[89]

b. Counsel provided by statute but need not perform effectively

Most death-penalty states are in this category. They provide for mandatory appointment of counsel to all death row inmates, but they either do not provide any explicit guarantee of competent performance, or they specifically disclaim any such guarantee. Most states in this category arrived there by statutory pronouncement, as will be discussed below.

Some states, however, have arrived there by court decision. Nevada provides a statutory guarantee of post-conviction representation to capitally sentenced inmates. However, the Nevada Supreme Court, in *Bejarano v. Warden*,[90] overruled a previous case and reached the "regrettable" conclusion that it would not afford petitioner, a death row inmate, any guarantee of effective performance of post-conviction counsel.[91] The court again relied on the endless-appeals argument: "[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 proceedings may be raised ad infinitum."[92]

Clearly the most restrictive state in the "no-protection" category is Texas, where the Texas Court of Criminal Appeals has determined that death row inmates are not entitled to competent performance by appointed post-conviction counsel, even though Texas law specifically guarantees that death row inmates will be represented by "competent" counsel. In 1995, the legislature added a new provision, Article 11.071, to the

88. *Id.* at 191.

89. *See e.g.* Bob Herbert, *The Hanging Tree*, 146 N.Y. Times A17 (Jan. 6, 1997) (describing Gibson's hearing).

90. 929 P.2d 922 (Nev. 1996).

91. *Id.* at 925.

92. *Id.*

Texas Code of Criminal Procedure. The new law established a specialized framework for capital post-conviction appeals, and guaranteed all death row inmates who desired representation the appointment of "competent" counsel who would "expeditiously" investigate the factual and legal grounds for habeas claims.[93] The legislation charged the court with adopting "rules" and standards ensuring competent counsel.[94] Because Texas does not have a statewide public defender system, the court recruited attorneys from private practice to represent the State's death row population, then nearing 500 prisoners.[95] The court never explained what standards it was using to evaluate the appointed lawyers, appointing several lawyers with limited or no capital experience.[96]

Pressure for the Court of Criminal Appeals to define what constituted "competent" counsel grew with evidence that the court had tolerated instances of apparent incompetent performance. For instance, the court refused to address the merits of several habeas petitions that had been filed late by court-appointed counsel.[97] The court also, over dissenters' protests, refused to investigate whether the extremely brief and superficial habeas applications being filed by many court-appointed counsel were a sign of ineffective performance.[98] Federal courts, assigned to review the work of court-appointed state post-conviction counsel, joined in the chorus of criticism.[99] Finally, in 2002, the Court of Criminal Appeals agreed to

93. Tex. Code Crim. Proc. Ann. art. 11.071 § 2(d), 3(a) (West 2003). Article 11.071 applies only to capital cases. In non-capital cases, appointment of counsel is still discretionary and rare.

94. *Id.* at § 2(d).

95. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 20-21 (2002) (describing initial phases of Article 11.071's implementation).

96. *Id.* at 21.

97. *See e.g. Ex Parte Smith*, 977 S.W.2d 610, 610 (Tex. Crim. App. 1998) (noting previous dismissal of application for untimely filing); *id.* at 612 (Baird, J., dissenting) (writ containing "twenty claims for relief which allege serious constitutional violations" dismissed as untimely); *Ex Parte Colella*, Writ No. 37,418-01 (Tex. Crim. App. July 15, 1998) (writ dismissed as untimely). In 1999, the Texas Legislature later amended Article 11.071 to permit these inmates to re-file their writs with new counsel. *See* Tex. Code Crim. Proc. art. 11.071 § 4A (West 2003).

98. *See* Hammel, *supra* n. 95, at 23-25 (detailing several such cases).

99. *Id.* at 29-31 (describing criticism of Texas state post-conviction system by federal judges in the Ricky Kerr and Johnny Joe Martinez cases).

address the issue of what the Texas legislature meant by the term "competent counsel."[100]

The court first held, as is common in these cases, that no constitutional right to the effective assistance of habeas counsel exists.[101] However, the court took a unique approach to interpreting the intent of the legislature in passing a law guaranteeing "competent" counsel. "Competent," the court decided, meant that a condemned inmate's lawyer was deemed competent by virtue of his "qualifications, experience, and abilities at the time of his appointment."[102] Whether the lawyer actually provided effective assistance to the inmate, the court ruled, was irrelevant. The Legislature, the court held, did not

> evince any intention that its choice of the term "competent counsel" as it applies to the appointment of a habeas attorney *also* applies to the final product or services rendered by that otherwise experienced and competent counsel. To require the trial court to appoint "competent counsel who will render effective assistance to his client in this case" would legislatively mandate a degree of prescience that not even Texas trial judges can be expected to display.[103]

Even if the term "competent" had any performance component, the court contended the inmate had no right to any remedy, because the Legislature did not authorize condemned inmates to file successive habeas applications raising the incompetence of their court-appointed habeas counsel during initial proceedings.[104]

Graves provoked several spirited dissents. Judge Price, invoking the reasoning endorsed by the majority of courts to consider the question, declared that "[t]he appointment of counsel is meaningless without the requirement that counsel be competent."[105] Judge Johnson canvassed the many decisions by other state courts holding that the promise of counsel necessarily

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100. *Ex Parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002).

101. *Id.* at 110-11.

102. *Id.* at 113-14, 114 n. 45 (citing Tex. Code Crim. Proc. Ann. art. 11.071 §§ 2(a) & 2(c) (West 2003)).

103. *Id.* at 116 (emphasis in original).

104. *Id.* at 116-117.

105. *Id.* at 121 (Price, J., dissenting).

created a promise of competent assistance by that counsel and observed further that the Texas statute's guarantee of competent counsel makes that rationale apply "even more forcefully" to the Texas statute.[106]

III. ANALYSIS AND TRENDS

A. Expansion in a Few States

At first, the news might appear to be good for advocates of a right to effective performance of post-conviction counsel. Ten states recognize such a right. Many have recognized it in the very recent past, which could indicate a trend in that direction. However, upon closer inspection, the picture is decidedly more mixed. The first complication to note is that few of the states that actually recognize an enforceable, *Strickland*-esque right to counsel are death-penalty states. Pennsylvania, in fact, is the only state with a substantial death row population that affords the full protection of effective assistance at all phases of capital and non-capital cases alike.[107]

The second observation is that many of the states that have extended guarantees of effective post-conviction performance

106. *Id.* at 126 (Johnson, J., dissenting).

107. Although this Article addresses only the problem of effective assistance in the context of capital cases, the issue of a right to post-conviction counsel for all inmates is worth discussing. However, as I and other authors have concluded, the discussion must focus first on capital cases, for three principal reasons. First, the consequences of shoddy post-conviction representation are much more serious in the capital context than in the non-capital context. Second, the distinction between capital and non-capital cases recognized by the Supreme Court's so-called "death is different" doctrine provides an existing conceptual framework to justify a capital-only emphasis. Third, the considerable cost and expense of mandating the universal appointment of post-conviction counsel to America's large prison population would ensure that any such broad reform proposal would be deemed "dead on arrival" at most any state legislature. *See* Hammel, *supra* n. 95, at 60-61 (arguing that splitting off capital from non-capital cases first in the habeas reform context is both workable and necessary); Celestine Richards McConville, *The Right to Effective Assistance of Capital Post-Conviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 36 n. 25 (arguing that even though non-capital petitioners also have a significant interest in quality habeas representation, reform should initially be limited to capital cases because the punishment is "irrevocable" and because, since the 1980s, the legislative activity surrounding this issue has concerned mostly capital appeals).

are generally recognized as being among the most liberal and progressive. States in this category tend to go beyond the dictates of the federal Constitution in matters other than post-conviction counsel,[108] set up study commissions to examine the fairness of their criminal justice systems,[109] and almost without exception entrust the defense of criminal cases, including capital cases, to large and comparatively well-funded public defender agencies. Even the states on this list that have the death penalty enforce it with extreme care. New Jersey, South Dakota, and Connecticut—all death-penalty states which offer a full guarantee of performance in post-conviction—have collectively managed to execute zero offenders in the modern era of capital punishment.[110]

B. Restriction and Retrenchment in the States that Count

When the decisions of the ten states that have extended a *Strickland*-like guarantee of effective performance are put into broader context, it becomes clear that the trend, such as it is, is a minor one. As a recent thorough study of the landscape of state post-conviction by Professor Celestine Richards McConville

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108. Alaska, for instance, has held that its state constitution requires police agencies to record incriminating statements "where feasible." *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985).

109. Maryland has convened not one but two studies of its capital sentencing regime—one that reported its results in 1994, and one targeted to the question of racial bias in death sentencing, which reported its results in 2003. *See* Raymond Paternoster, Robert Brame, et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (2003) (available at http://www.urhome.umd.edu /newsdesk/pdf/finalrep.pdf) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process); Governor's Commission on the Death Penalty, *Report of the Governor's Commission on the Death Penalty: An Analysis of Capital Punishment in Maryland 1978-1993* (1994) (available at http://www.sailor.lib.md.us/md/docs/death_pen/) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process). The New Jersey Supreme Court ordered a study of potential racial bias in capital cases in *In re Proportionality Review Project (II)*, 757 A.2d 168 (N.J. 2000), following an earlier study, *In re Proportionality Review Project (I)*, 735 A.2d 528 (N.J. 1999). The study was completed in 2001. *See* David S. Baime, *Report to the Supreme Court Systemic Proportionality Review Project 2000-2001 Term* (available at http://www.judiciary.state .nj.us/ baime/baimereport.pdf) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process).

110. *See* Death Penalty Info. Ctr., *State Execution Rates* (available at http://www .deathpenaltyinfo.org/article.php?scid=8&did=477) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process).

revealed, "as many as twenty of the thirty-eight death-penalty states" have recently "address[ed] issues relating to post-conviction counsel."[111] Ten added a mandatory right to post-conviction counsel to their statutes, elevating to thirty-two the number of death-penalty states providing mandatory counsel to death row inmates.[112] Further, twenty-seven states have now enacted standards which post-conviction counsel appointed in capital cases are required to meet.[113] However, Professor McConville observed, when it comes to states actually monitoring the performance of appointed counsel, the "picture is pretty bleak."[114] Only three states even provide for any sort of monitoring, and one of those, Texas, has repudiated any notion that a statutory guarantee of competent counsel requires competent performance by counsel.[115]

In fact, many of these states, following the federal government, explicitly rejected any right to competent counsel even as they created a right to mandatory representation. This indicates a more decisive and relevant trend toward relying solely on standards to ensure competent performance by appointed post-conviction counsel. The Antiterrorism Act added a provision to the federal habeas statute which read: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a [federal habeas] proceeding."[116] Many states, even as they revamped the sections of their post-conviction statutes to provide representation to condemned prisoners, added similar language to their post-conviction statutes.[117]

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111. *See* McConville, *supra* n. 107, at 64.

112. *Id.* at 64-65.

113. *Id.* at 65.

114. *Id.* at 66.

115. *See id.* at 66-67.

116. 28 U.S.C. § 2254(i) (2002) (available at http://uscode.house.gov).

117. *See e.g.* Colo. Rev. Stat. § 16-12-205(f)(5) (West 2003) ("The ineffectiveness of counsel during post-conviction review shall not be a basis for relief."); N.C. Gen. Stat. § 15A-1419(c) (West 2003) ("[A] claim of ineffective assistance of prior post-conviction counsel [cannot] constitute good cause [to file a successive application]"); Ohio Rev. Code § 2953.21(I)(2) (West 2003) (providing that the "ineffectiveness or incompetence of counsel" in state capital post-conviction proceedings cannot constitute "grounds for relief"); Va. Code Ann. § 19.2-163.8(D) (West 2003) ("The performance of habeas corpus

Most death-penalty states thus fall into the category of guaranteeing inmates counsel, but distinctly and explicitly refusing to guarantee them competent counsel. There is obvious tension in this position. The Supreme Court has long considered it self-evident that "the right to counsel is the right to effective assistance of counsel."[118] It has also endorsed the obverse observation—when the defendant "had no right to counsel, he could not be deprived of the effective assistance of counsel."[119] The recent trend in state capital post-conviction cases, however, seeks to drive a wedge between these two guarantees. The states have created a right to counsel—but have chosen to regulate competence *ex ante*, by setting out minimum qualifications for counsel while affirmatively forbidding any *ex post* challenges to counsel who, although ostensibly qualified, rendered deficient performance. This framework leaves inmates in the "pointless and frustrating"[120] position of enjoying a right without a remedy. The creation of a right without a remedy is usually frowned on by the courts[121]—indeed, courts often construe statutes under the express assumption that the lawmaker could not have intended to create a right without a remedy.[122] Why was it taken by these various states?

I believe the answer is simple: because these states perceive any sort of enforceable guarantee of competent performance as posing an unacceptable threat of delay in carrying out the death penalty. It should be noted that every one of the states that guarantees effective performance by state post-conviction counsel has done so by court decision, not by legislative enactment. By contrast, most of the decisions to strip inmates of a potential right to effective assistance of counsel have been taken by legislatures (although courts have done their fair share

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counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.").

118. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (citations omitted).

119. *Wainwright v. Torna*, 455 U.S 586, 587-88 (1982).

120. *Parden v. Terminal Ry. of Ala. St. Docks Dept.*, 377 U.S. 184, 190 (1964), *overruled, Welch v. Tex. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987).

121. "[O]ur Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

122. *See e.g. Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60.

as well). These developments illustrate that not only state courts but also state legislatures have received the Supreme Court's message—"you are not obliged to guarantee death row inmates effective performance by their post-conviction attorneys"—loud and clear. A look at these extra-judicial developments helps illustrate the real-world political context in which policy is made.

Recent developments in three critical death-penalty states, Texas, Florida and Alabama, illustrate this swift and sophisticated resistance that proposals to create an enforceable right to effective assistance of post-conviction counsel face in serious death-penalty jurisdictions.

1. Texas

Although it has not been widely debated in most other states, the question of courts tolerating questionable or incompetent performance by appointed habeas counsel in capital cases has attracted public attention in Texas, likely owing to the severity and frequency of the problem and to Texas's reputation as the most active executioner. A watchdog group recently found enough horror stories to fill a seventy-nine-page report.[123] The documented instances—all of which involved death-penalty cases, and all of which involved lawyers appointed by the Texas Court of Criminal Appeals—included lawyers who

- filed two-page habeas corpus applications;[124]
- missed mandatory state and federal deadlines;[125]
- filed no extra-record claims, or filed petitions which merely "plagiariz[ed] claims and arguments from previous

123. *See generally* Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002) [hereinafter *Lethal Indifference*].

124. *Id.* at 14 (reprinting two-page habeas corpus application filed on behalf of Carlos Granados); *Ex parte Granados*, Writ No. 51,135 (Tex. Crim. App. Sept. 18, 2002).

125. *Lethal Indifference*, *supra* n. 123, at 39 (noting that court-appointed habeas counsel for Joe Lee Guy failed to ensure that his federal habeas corpus application was timely filed); *id.* at 16 (describing late filing of Paul Colella's state habeas corpus application). *Ex parte Colella*, Writ No. 37,428-01 (Tex. Crim. App. 1998).

appeals only to file them in the same court that had already rejected them";[126]

• confessed, in sworn affidavits, that they had poorly served their death-row clients because of their ignorance of basic principles of habeas corpus representation;[127]

• filed motions with the court confessing to their incompetence and asking to be removed and replaced.[128]

Federal judges in Texas, presented with the product of ineffective representation by state habeas counsel, have harshly criticized the state's post-conviction system. One judge recently described the lawyer appointed by the Court of Criminal Appeals to represent Gregory Demery as "'sorry'" and termed his effort "disgraceful."[129] Another described the decision to appoint an inexperienced and unqualified lawyer to represent Ricky Eugene Kerr as a "cynical and reprehensible attempt to expedite [the inmate's] execution at the expense of all semblance of fairness and integrity."[130]

The recent case of Leonard Rojas brought the Court of Criminal Appeals in for another grilling. In 1999, the court appointed Rojas a lawyer who was suffering from bipolar disorder, already serving two probated suspensions from practice for his actions in other cases, and only two weeks away

126. *Lethal Indifference*, *supra* n. 123, at 13; *see id.* at 15 (finding that twenty-eight percent of the habeas petitions filed since 1995 contained no references whatsoever to facts outside the trial record).

127. *See e.g. id.* at 20 (appointed post-conviction lawyer admits in affidavit that when he was appointed to represent Anibal Rousseau, "I was not familiar with how to litigate a capital habeas corpus case and was not aware of the need to investigate facts outside of the trial record"); *Rousseau v. Johnson*, No. 00-CV-27 (S.D. Tex. 2000); *Lethal Indifference*, *supra* n. 123, at 36 (state court appointed lawyer for Napoleon Beazley admits that he was unable to properly supervise investigation of his client's claims and described his own work as "woefully inadequate"); *Ex parte Beazley*, Writ No. 36,151-02 (Tex. Crim. App. Apr. 17, 2002).

128. *Lethal Indifference*, *supra* n. 123, at 32 (citing motion filed in the Texas Court of Criminal Appeals by court-appointed attorney for Johnny Joe Martinez). The court refused to permit the attorney to withdraw. *See Ex parte Martinez*, Writ No. 36,840-02 (Tex. Crim. App. Apr. 29, 1998); 977 S.W.2d 589, 589 (Tex. Crim. App. 1998).

129. *Demery v. Cockrell*, Civ. A. No. H-02-4545, slip op. at 2 (S.D. Tex. Jan. 13, 2003).

130. *Lethal Indifference*, *supra* n. 123, at 23 (quoting *Kerr v. Johnson*, No. SA-98-CA-151-OG, slip op. at 1, 16-17 (W.D. Tex. Feb. 24, 1999)).

from receiving a third probated suspension.[131] After the lawyer's fourteen-page petition was dismissed, the lawyer failed to secure representation for Rojas within the deadline for federal habeas review, causing him to lose the opportunity to pursue federal habeas review of his conviction. As a result, Rojas received no substantive federal habeas review of his conviction or sentence. When new lawyers stepped in shortly before Rojas's execution, the Court of Criminal Appeals voted six to three to deny Rojas an additional opportunity to file for state habeas relief. He was executed on December 4, 2002.

More than two months later, as Rojas lay cold in his grave, three dissenting Court of Criminal Appeals judges issued a blistering post-mortem opinion. "This Court should have granted relief to the applicant," they wrote, because "it appointed an attorney who should not have been appointed to represent a capital defendant in his one opportunity to raise claims not based solely on the record."[132] After describing appointed counsel's licensing problems and disabilities, the dissenters opined that appointed counsel "did not meet even the low standards set by the Court in *Graves*."[133] As a result of appointed counsel's incompetence, Rojas was executed even though the court "had no way to be certain that there were no cognizable and meritorious claims" he could have litigated had he been properly represented.[134] Finally, the dissenters criticized the majority's decision to deny Rojas's appeal without "setting this case for review [i.e. authorizing oral argument] and without issuing a published opinion explaining the decision."[135] Given the importance of the issue, "the criminal jurisprudence of Texas could benefit from an explanation beyond 'motion denied.'"[136]

131. *See Ex Parte Rojas*, No. 39,062-01, at *2 (Tex. Crim. App. Feb. 12, 2003) (unpublished) (Price, J., dissenting from denial of Motion to Protect Applicant's Right to Federal Habeas Review) (available at http://www.cca.courts.state.tx.us/Opinions-Non%20Published/3906201a.htm) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process).

132. *Id.* at *1.

133. *Id.* at *3.

134. *Id.* at *6.

135. *Id.*

136. *Id.*

News coverage of the problems with capital habeas review in Texas, coupled with the fallout from the *Rojas* case, resulted in a torrent of criticism of the Court of Criminal Appeals. Shortly after Rojas's execution, *The Texas Lawyer* published a lengthy article detailing allegations of the Court of Criminal Appeals's lax oversight of the list of qualified habeas counsel. When confronted by a reporter with a watchdog group's charge that the court's list of approved counsel contained one attorney who had been dead for over three years, the court's presiding judge, Judge Sharon Keller, replied, "No one ever told us he was dead."[137] One major Texas newspaper declared editorially that the habeas report showed that the court "has a consistent record of appointing incompetent lawyers";[138] another opined that its "failure to recognize and confront problems in the face of hard evidence only perpetuates the appearance that the court is more interested in efficiency and moving people through the system than in justice."[139] The post-mortem *Rojas* opinions sparked renewed criticism. An article appearing in the court's hometown newspaper, under the headline *Appellate Dissent Backs a Dead Man*, commented that the "rare rhetorical exchange fueled long-simmering questions about the court's own competence."[140] The same day, the paper editorialized in favor of abolishing the Texas Court of Criminal Appeals entirely, to "bring some detachment to the review of death penalty cases."[141]

Amid these expressions of public concern, members of the Texas Legislature resolved to enhance the state's capital post-conviction program. The end result of that reform effort, however, highlights the political difficulty any proposal which

137. Mary Alice Robbins, *Habeas Hullabaloo: Report Alleges CCA Ruling Thwarts Statute's Competent-Counsel Requirement*, 18 Tex. Law. 1, 21 (Dec. 9, 2002).

138. Editorial, *Legislature Must Act to Reform Process*, Express-News (San Antonio, Tex.) B6 (Dec. 3, 2002).

139. Editorial, *Poor Defendants Deserve Competent Appellate Lawyers*, American-Statesman (Austin, Tex.) A16 (Dec. 5, 2002).

140. David Pasztor, *Appellate Dissent Backs a Dead Man*, American-Statesman (Austin, Tex.) A1 (Feb. 14, 2003).

141. *See* Editorial Staff, *Improve Texas Justice by Combining Courts*, American-Statesman (Austin, Tex.) A10 (Feb. 18, 2003) (pointing out that Texas is one of two states with separate supreme courts for civil and criminal cases, and advocating abolition of the Court of Criminal Appeals and combination of its jurisdiction with that of the Texas Supreme Court).

can be portrayed as lengthening the appeals process necessarily faces. State Democratic Senator Rodney Ellis introduced Senate Bill number 1224 during the 78th Texas Legislature. The bill mandated specified standards for post-conviction counsel in Texas capital cases, and it amended the Texas Code of Criminal Procedure to permit the filing of successive habeas corpus applications containing new claims when "the applicant was represented by incompetent counsel during the initial application" and "as a direct result of the incompetence, a meritorious claim or issue raised in the current [successive] application was not raised in the initial application."[142] This second habeas application would be required to be filed "not later than the 60th day after the date on which the federal court of appeals denies the applicant relief."[143] The bill passed the Texas Senate unanimously.

In the Texas House, however, a state representative substituted his own version of the bill, which kept the explicit statutory standards for counsel but removed the language permitting the filing of a successive habeas corpus application in cases of prior attorney incompetence.[144] The bill later died in conference. The rejection of the successor-permission standards, it bears noting, may not be a signal of disapproval. Shortly before the conference committee met, forty-one Democratic members of the Texas House of Representatives relocated to Ardmore, Oklahoma, to prevent passage of a Republican redistricting bill.[145] The mass Democratic defection created a poisoned atmosphere[146] in the Texas Legislature that doomed most Democrat-sponsored bills, including the original habeas reform proposal.[147]

Nevertheless, the remedy permitting the filing of successive

142. Texas Sen. 1224, 78th Leg. Sess. at §§ 4(a)(4)(A), (B) (filed Mar. 12, 2003).

143. *Id.* at § 4(g).

144. *See* Tex. Sen. 1224, 78th Leg. Sess. (substitute drafted by Rep. Terry Keel, R-Austin).

145. *See* Dave Harmon & Laylan Copelin, *Home to the Capitol: Wayward Lawmakers Journey to Austin Now that Redistricting's Dead*, American-Statesman (Austin, Tex.) A1 (May 16, 2003).

146. *Id.* (quoting Democratic lawmaker's prediction that remainder of post-walkout session was "not going to be a love fest").

147. Interview with Andrea Keilen, Staff Atty., Tex. Defender Serv. (July 30, 2003) (notes on file with author).

petitions based on ineffective assistance of prior post-conviction counsel was one of the more controversial provisions of the bill. The Office of the Attorney General of Texas (OAG) insisted that a "fiscal note" be added to the bill, a procedure required for any proposed legislation that would have necessitated new spending. According to the OAG, the bill, by weakening procedural bars, would have a "significant, immediate impact on the OAG":[148]

> The effect of Section 4 of the proposed legislation is that capital inmates will now have a second bite at the apple in state court, the federal procedural bar will be worthless, and the OAG (who represents the [State of Texas] in federal habeas appeals) will be in the position of either waiving the inmate's failure to exhaust claims in state court (and acquiescing to federal court adjudication of the claims in the first instance) or filing motions to dismiss without prejudice for failure to exhaust to give the state courts the opportunity to pass on the claim first (which will result in massive delays and likely a "ping-pong" effect between state and federal court).[149]

Given that the State of Texas was running a $10 billion budget deficit during the 78th Legislative Session, the attachment of a fiscal note to any piece of legislation (signifying that it would require the outlay of extra funds) was its death knell. The Legislative session ended without any reform at all to Texas's post-conviction scheme.

2. *Florida*

Florida's situation also shows the entrenched real-world political forces with which habeas reform proposals must contend. In Florida, some legislators are seeking to legislatively overrule *Olive v. Maas*,[150] the state supreme court decision striking down Florida's caps on compensation for state capital post-conviction counsel. An advisor to the Speaker of the Florida House of Representatives suggested statutory language that "expressly precludes any right of the defendant to raise

148. Memorandum from Gena Bunn, Chief, Post-Conviction Litig. Div., Off. of Tex. Atty. Gen., to Fiscal Note Staff, Budget & Purchasing Div., Off. of Tex. Atty. Gen., at 1 (Apr. 28, 2003) (copy on file with Journal of Appellate Practice and Process).

149. *Id.* at 2.

150. 811 So. 2d 644, 654 (Fla. 2002).

issues as to the adequacy of the post-conviction representation."[151] Language such as this would eliminate any possibility of the Florida Supreme Court again striking down the competency caps, it is thought, because "since competency can't be challenged [on constitutional grounds], caps can't be challenged either."[152] The legislature "promptly" passed a bill striking from the rolls of eligible counsel any lawyer who sought compensation above the statutory maximum.[153]

What is striking about these episodes of retrenchment is how the rhetoric they generate makes specific reference to the "permission" states have been given not to expand an inmate's right to effective assistance of counsel in post-conviction litigation. The Nevada Supreme Court, as noted above, in 1996 overruled a prior decision in which it had found that post-conviction counsel had "failed to provide the required caliber of representation."[154] Arguing that habeas petitioners "have made a sham out of the system of justice and thwarted imposition of their ultimate penalty with continuous petitions for relief that often present claims without a legal foundation," the court stated that it did not "want to go beyond [*Pennsylvania v.*] *Finley*."[155]

2. *Alabama*

A recent National Law Journal article provides some insight into the situation in Alabama, which does not guarantee any appointment of counsel to death-sentenced inmates at all. Alabama Attorney General Bill Pryor, defending Alabama's system in a 2001 letter to the Senate Judiciary Committee, declared that "those inmates who do not have reasonable ground to seek collateral review of their sentence . . . do not need a lawyer."[156] The question thereby begged—how inmates are to

151. Leonard Post, *A Fight Over Limits on Pay, Hours: Florida Faces a Suit From a Death Penalty Lawyer*, 25 Natl. L.J. A1 (Mar. 31, 2003) (quoting David De La Paz).

152. *Id.* (paraphrasing De La Paz)

153. *Id.*

154. *Bejarano v. Warden*, 929 P.2d 922, 925 (Nev. 1996) (quoting *Grondin v. State*, 634 P.2d 454, 456 (Nev. 1981)).

155. *Id.* at 925.

156. Leonard Post, *On Their Own: In Alabama, Some Inmates Don't Have Lawyers as They Near the Last Bid for Life*, 26 Natl. L.J. 1, 14 (Dec. 1, 2003) (quoting Pryor).

determine whether they have reasonable ground to seek collateral review without the assistance of a lawyer—was answered by Clay Crenshaw, chief of the Capital Litigation Division of the Alabama Attorney General's Office:

> The inmate himself would know what evidence could and should have been presented at the guilt or penalty phase[.] Say if he has an alibi that he told his lawyer about, but his lawyer didn't raise it. I've seen that happen.[157]

The views of Alabama officials are determined by their answer to the question of whether death penalty post-conviction petitions should be treated like non-capital ones. In non-capital cases, the right to appointment of counsel in most states is contingent: An inmate must first file a post-conviction petition that states a potentially meritorious claim (or which, in the trial judge's view, merits a hearing) before obtaining the assistance of a lawyer.[158] Virtually the entire rest of the nation has determined that capital post-conviction petitions require special treatment and that death-sentenced inmates should receive assistance from a lawyer as they prepare their petitions.[159] Even the Supreme Court, notably reluctant to endorse any constitutional guarantee of counsel, has long interpreted the federal habeas statute to ensure that death-sentenced inmates receive counsel and stays of execution before they are required to file their petitions. Responding to the argument that a capitally sentenced federal habeas petitioner should be required to file a petition on his own in order to trigger the right to counsel, the Court demurred, declaring that the assistance of an attorney at the pre-petition phase was "crucial" and that "[r]equiring an indigent capital petitioner to proceed without counsel in order to obtain counsel . . . would expose him to the

157. *Id.*

158. *See generally* Hammel, *supra* n. 95, at 83-99 (describing state laws on the right of non-capitally sentenced inmates to habeas representation, and finding that most states provide no right to the appointment of counsel to help an inmate investigate claims and draft a petition, but rather make the right to a lawyer contingent on an inmate's previously filed claims satisfying a certain standard of meritoriousness, or requiring a hearing).

159. *See generally id.* (observing that all death penalty states except Alabama and Georgia now, either de jure or de facto, guarantee the pre-petition appointment of counsel to all capitally sentenced prisoners who wish to pursue appeals).

substantial risk that his habeas claims never would be heard on the merits."[160]

Even though Alabama thus represents a position that has already been abandoned by virtually all other jurisdictions, and even by the Supreme Court, one of its supreme court justices recently affirmed that Alabama in fact does afford "adequate representation" to its capitally sentenced inmates.[161] It is not hard to imagine how a reform package that appears to confer procedural benefits on death-row inmates (or one that could be so portrayed) would fare in such a political climate.

III. LOOSENING THE GORDIAN KNOT.

Thus, there seems to be policy gridlock—the Gordian knot of habeas reform. Doctrinal arguments, no matter how well-crafted, appear unlikely to convince federalism-minded federal courts to intervene in the state post-conviction arena in any systemic, organizational way (by, for instance, mandating the creation of post-conviction defender agencies). At the state level, the states can be grouped into two general categories. In the first category are states whose policy favors robust and vigorous protection of the appellate rights of defendants. These states will voluntarily exceed the minimum of federal constitutional compliance in the area of post-conviction appeals without prompting. In another category are states that are well aware that the Supreme Court has deprived federal courts of any federal constitutional mandate to regulate state post-conviction process and, it appears, are generally only disposed to improve offenders' representation in return for a quid pro quo of some sort or another.

Few dispute the problems caused by ineffective representation in capital post-conviction cases, coupled with the well-established federal rule that "the most egregious negligence of counsel in representing a prisoner seeking state post-conviction relief cannot violate the Constitution and thus cannot establish cause for procedural default."[162] Indeed, it is

160. *McFarland v. Scott*, 512 U.S. 849, 855, 856 (1994).

161. Post, *supra* n. 156, at 15 (quoting Alabama Supreme Court Justice Harold See).

162. Larry W. Yackle, *Federal Courts: Habeas Corpus* 208 (Found. Press 2003).

precisely this realization that has stimulated the development of competency standards, and the AEDPA's quid pro quo. There are two reform proposals that purport to provide some safeguard of counsel competency without creating an additional layer of review: mandatory standards of competency and "during-performance review." In this Section, I will describe why I believe that these proposals, although promising, do not completely resolve the problem.

A. Why Standards Aren't Enough

The first proposed solution, and the one adopted by the AEDPA, is counsel-competency standards. Many commentators—this one included—think that a standards-only approach is ineffective,[163] and I believe it may do more harm than good. First, no set of standards will keep marginal performers off the list, for many reasons. The first might be termed the "experienced loser" effect. As Stephen Bright has observed, many trial lawyers who have appeared in many capital trials would appear well-qualified owing to their experience. They have handled several capital cases—but have won few or none.[164] The same can be said about post-conviction appeals. In Texas, most of the lawyers currently approved for appointment to death-penalty post-conviction appeals have turned in apparently superficial appeals in previous cases.[165]

Thus, as a practical matter, there may simply not be enough lawyers with the requisite specialized experience to handle a

163. *See* McConville, *supra* n. 107, at 101 (noting that counsel standards, even if "rigorous and enforced," are "insufficient standing alone"); Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. Crim. L. & Criminology 467, 583-85 (2000) (arguing that standards are difficult to calibrate in such a way as to ensure a large enough pool of qualified lawyers to handle the demand, and that in any event standards alone often prove ineffective because "some of the worst lawyers are the ones with the greatest caseloads and the largest docket" and thus the "significant experience" called for by many standards).

164. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1871 n. 209 (1994)

165. *Lethal Indifference*, *supra* n. 123, at 46-47 (2002) (observing that eighteen percent of the attorneys on the Texas Court of Criminal Appeals list of approved post-conviction counsel as of October 2002 had previously filed at least one post-conviction writ raising no extra-record claims, and fifty-seven percent had previously filed at least one post-conviction petition that contained no extra-record proof).

particular state's death-penalty case load. California, for instance, is famously unable to find enough lawyers who are qualified to represent its inmates in state direct appeals, a fact that has led to ever-increasing appellate delays.[166] And post-conviction representation in capital cases is somewhat more technical—and vastly more time-consuming—than direct appeal work. Commentators in Florida have observed that the Governor's proposal to farm capital post-conviction work out to private counsel will run into the inevitable brick wall—competency standards rigorous enough to genuinely restrict the list to qualified and experienced lawyers with a demonstrated expertise in capital post-conviction appeals will result in a list insufficient to address the need.[167]

Post-conviction representation of death-row inmates is time-consuming, difficult to master, and poorly compensated relative to other forms of legal work. There are therefore very few lawyers in private practice who have made post-conviction representation such a significant component of their practice that they can be relied upon to perform competently in every case. Therefore, at least some death-row inmates will have to be represented by lawyers selected for their general ability, but who may, in certain cases, make serious mistakes. The only way to ensure that these inmates receive full and fair review of their convictions is to enable them to challenge their previous lawyers' performance. But, of course, it is precisely that component of performance guarantees that excites the political resistance described above.

Bound up with the ineffectuality of a standards-only approach is its strong "legitimation effect"—defined by

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166. *See e.g.* Ryan S. Hedges, Student Author, *Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. Cal. L. Rev. 577, 591-92 (2001) (observing that in California, stringent qualifications and inadequate compensation have resulted in a shortage of lawyers to file direct appeals on behalf of California death-row prisoners, leading to a delay of up to four years before the average California death-row prisoner is appointed counsel).

167. Kappler, *supra* n. 163, at 584; *see also* Post, *supra* n. 156 (paraphrasing veteran Florida capital litigator Mark Olive's comment that there are not enough Florida lawyers "up to the task" to adequately represent Florida's 360 death row prisoners, and reporting on study of Florida death-penalty cases by the Spangenberg Group which concluded that death-penalty post-conviction appeals are "too complex and time-consuming for an attorney without substantial experience" to competently perform, and that there is a "paucity" of lawyers in Florida and in the country with the requisite experience).

Professors Jordan and Carol Steiker as stemming from

> reforms [that] do very little to change the underlying practice but may offer the appearance of much greater procedural regularity than they actually produce, thus inducing a false or exaggerated belief in the fairness of the entire system of capital punishment.[168]

Competency standards, at least when put forward as the sole means of guaranteeing effective performance, are a classically legitimizing reform. The only truly effective guarantee is one that requires counsel to actually *perform* competently and that provides a workable remedy for the petitioner when that does not happen.

B. During-Performance Review

Professor McConville has recently sketched out such a potential reform. She first sets out the case against a standards-only approach, noting the political hostility toward solutions to the counsel-competency problem that contemplate "post-performance" review—that is, an additional appellate proceeding after the inmate's first habeas corpus petition has been resolved, in which the inmate would litigate his challenges to the initial habeas counsel's competency.[169]

So far, as should be clear from the tone of this article, I am in complete agreement with Professor McConville. Her solution is *during-performance* review—that is, at some defined point during the post-conviction representation (perhaps after the initial post-conviction application is filed), either the court or an independent body would be required to assess post-conviction counsel's performance. Post-conviction counsel who are clearly not making the grade could be replaced, and substitute counsel would be given additional time to properly finish the job of representing a particular inmate.[170] She readily admits that her proposal will not catch every instance of substandard

168. Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?* 63 Ohio St. L.J. 417, 422 (2002).

169. *See* McConville, *supra* n. 107, at 105-08 (criticizing workability of post-performance review on the ground of its obvious potential to add significant delay to the capital review process).

170. *Id.* at 101-03.

representation.[171] But she makes a strong case that it is a workable and politically palatable compromise solution that will prevent some of the most disturbing outcomes tolerated under current law. She is currently developing her idea of during-performance review, and it could certainly prove an attractive proposal.

The principal weakness in McConville's idea as presently proposed is its reliance on changes in doctrine. As a constitutional justification for her proposal, she argues that the Due Process Clause of the Fourteenth Amendment, properly construed, requires states to enforce some modest guarantee of competent performance once they have undertaken to provide indigent death row inmates with lawyers. She critiques in particular the current Supreme Court's reliance on *Wainwright v. Torna*,[172] which the later Court has taken—incorrectly, she maintains—to rule out any "middle ground" of rights protection between a full *Strickland* guarantee and no protection at all.[173] She argues that *Torna* actually does not resolve "the specific question whether the Constitution imposes due process obligations on the state and federal governments once they voluntarily decide to provide counsel."[174] Professor McConville draws on an alternate line of Supreme Court precedents to argue that, when states promise death row inmates representation by counsel, the Due Process Clause of the Fourteenth Amendment requires that prisoners be able to "meaningfully" enjoy this right.[175] This argument, she proposes, can prod states to provide at least some level of protection through during-performance review.

However, as I have elsewhere maintained, I think doctrinal change—even on the modest scale proposed by Professor McConville—is simply not going to happen in today's political climate.[176] A survey of recent decisions of the United States

171. *Id.* at 103 (conceding that "during-performance reviews do not fully protect the capital defendant," because "the reviewing bodies realistically cannot scrutinize each and every decision made by counsel").

172. 455 U.S. 586, 587-88 (1982).

173. McConville, *supra* n. 107, at 35-36.

174. *Id.* at 68 (footnote omitted).

175. *Id.* at 68-80.

176. *See* Hammel, *supra* n. 95, at 55-61 (2002) (arguing that United States Supreme Court decisions demonstrate that, at least in the short term, there is no indication that the

Court of Appeals for the Fifth Circuit provides insight into how her arguments have fared in a federal court that hears appeals from Texas, Mississippi, and Louisiana—three states with very active death rows. As death-row inmates who had been represented by questionably qualified or incompetent state post-conviction lawyers in the Texas state courts have reached the Fifth Circuit, resourceful federal habeas counsel have desperately sought to escape from the straitjacket of procedural default that prevents them from obtaining merits review of issues overlooked by state post-conviction counsel. Counsel have presented the Fifth Circuit not only with the standard, doomed invitations to overrule *Coleman* or to recognize an exception to it, but with more nuanced and creative arguments similar to those advanced by Professor McConville.

The Fifth Circuit has, however, brushed all such arguments aside, often in unpublished opinions. In *In re Goff*,[177] the Fifth Circuit, citing "strong [contrary] precedent," rejected an argument very much like Professor McConville's—i.e., that the "substantive and procedural due process requirements of the Fourteenth Amendment" required Texas to follow through on its promise of "competent" state habeas counsel to death-sentenced inmates.[178] Other petitioners have sought to rely on a provision of the federal habeas statute that excuses capital habeas petitioners from the requirement that they exhaust their claims in state court upon a showing that the state process is "ineffective to protect the rights of the applicant."[179] When the state promises a death row inmate competent counsel and then reneges on that promise, this argument holds, the corrective process it offers is inadequate to protect the applicant's rights. In a recent unpublished decision, the Fifth Circuit rejected this argument by a brief citation to an earlier published decision which had treated the argument in passing.[180]

Court intends to overrule any prior decisions definitively rejecting any right to effective assistance of state post-conviction counsel).

177. 250 F.3d 273 (5th Cir. 2001).

178. *Id.* at 276 (quoting, and recognizing abrogation of, *Welch v. Beto*, 355 F.2d 1016, 1020 (5th Cir. 1966)).

179. 28 U.S.C. § 2254(b)(1)(B)(i) (available at http://uscode.house.gov).

180. *Jones v. Cockrell*, No. 02-41459, at *7 (5th Cir., July 28, 2003) (unpublished) (available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41459.0.wpd.pdf) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process). The

Perhaps the most dramatic attempt to obtain some recognition of any obligation on Texas's part to provide competent counsel came in *Martinez v. Texas Court of Criminal Appeals*.[181] *Martinez* involved claims brought by three death row inmates approaching their executions. Each of them had been represented by state habeas counsel, appointed under Texas's guarantee of "competent" state habeas counsel, who, the inmates alleged, had failed to plead "obvious and potentially meritorious claims of constitutional error" during state post-conviction proceedings.[182] "Each Plaintiff," the court observed, "was unsuccessful in his subsequent attempt to secure federal habeas relief, because the federal courts were procedurally barred from considering the constitutional claims omitted from the state habeas petition."[183] As a result, "the Plaintiffs were never afforded an opportunity to present these claims to any state or federal court."[184]

The plaintiffs sued the state of Texas—and each of the nine judges of the Court of Criminal Appeals—in federal court pursuant to 42 U.S.C. § 1983, alleging that state officials had "violated the Plaintiffs' rights under the Sixth, Eighth and Fourteenth Amendments by engaging in a policy of 'knowingly and intentionally' appointing incompetent lawyers to represent indigent death row inmates in their state habeas proceedings."[185] The plaintiffs requested that their imminent executions be stayed, that the federal court enjoin the state of Texas to provide them with competent counsel, and that the federal court enter a

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Jones court, in turn, cited *Martinez v. Cockrell*, 255 F.3d 229, 240-41 (5th Cir. 2001). However, on the text of the pages cited, the *Martinez* court had addressed only the constitutional framework governing the potential use of incompetent state post-conviction representation to excuse procedural default. The *Martinez* court only addressed the statutory argument in a footnote which, in its entirety, reads, "Contrary to Martinez's assertion, under these facts, failure to provide 'competent' counsel for a state habeas petition does not fall under the general catch-all exception provided in 28 U.S.C. § 2254(b)(1)(B)(ii)." *Id.* at 239 n. 10. The *Jones* court rejected Jones's argument that the *Martinez* court had provided "insufficient reasoning" for its rejection of this argument and his request that it "fairly address the argument." *Jones*, No. 02-41459, at *7 (quoting briefing from petitioner). Instead, it treated the matter as definitively resolved by *Martinez* and noted that it was bound by the decision of a coordinate panel of the court.

181. 292 F.3d 417 (5th Cir. 2002).

182. *Id.* at 419.

183. *Id.*

184. *Id.*

185. *Id.*

declaratory judgment that federal courts need not apply a procedural default bar to "procedural defaults occasioned by incompetence of state habeas counsel."[186]

The court rejected all of the plaintiffs' arguments. First, the court noted, the plaintiffs' request for injunctive relief preventing their approaching executions was "the functional equivalent of a request for a stay of execution," which could be requested only as part of a habeas proceeding, not in a civil-rights action.[187] Even if the requests had been brought before the court in the procedurally correct posture, the court held, it would interpret them as "effectively asking [the court] to reverse long-standing Supreme Court precedent and to rewrite the federal habeas statute."[188] For good measure, the court alternatively construed the plaintiffs' civil-right suit as a request to file a successive habeas corpus application pursuant to 28 U.S.C. § 2244(b),[189] and preemptively denied that as well.[190] All three plaintiffs were later executed on schedule.[191]

Of course, Professor McConville's notion of during-performance review stands on its own as a workable solution for states that wish to ensure a certain level of performance by state post-conviction counsel without taking on very many burdens. However, to the extent that she invokes constitutional doctrine to force reluctant states to set up some mechanism for during-performance review, it faces significant hurdles. The example of the Fifth Circuit shows a federal court that is simply unconcerned with the quality of representation death row inmates receive in state post-conviction proceeding and unwilling to take any doctrinal steps in the direction of (1) recognizing or enforcing any right to any particular level of quality of post-conviction representation or (2) recognizing any form of substandard representation—no matter how evident—as cause to excuse a procedural default.

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186. *Id.* at 420.

187. *Id.* at 423.

188. *Id.* at 424.

189. 28 U.S.C. § 2244(b) (available at http://uscode.house.gov).

190. *Id.*

191. *See* Tex. Dept. of Crim. Justice, *Executed Offenders* (available at http://www.tdcj.state.tx.us/stat/executedoffenders.htm) (accessed Nov. 14, 2003; copy on file with Journal of Appellate Practice and Process) (reflecting that Gary Etheridge was executed on August 20, 2002; Napoleon Beazley on May 28, 2002; and Johnny Joe Martinez on May 22, 2002).

Finally, it must be noted that a proposal to monitor the effectiveness of a particular death row inmate's post-conviction representation is only as effective as the body that performs the monitoring. Even assuming diligence and good faith on the part of the monitoring body, Professor McConville has acknowledged that an outside observer, viewing the appeal mid-stream, will only be able to form a rough approximation of the quality of appointed counsel's performance. However, there is a deeper problem. In states such as Georgia or Texas, state courts have shown no hesitancy to affirm clearly incompetent representation. In Texas, the high court and its supporters have consistently justified the performance of lawyers who have filed superficial appeals by speculating that these lawyers' clients were evidently clearly guilty and deserving of death, and therefore that the lawyers simply had no complex, substantive, case-specific claims to raise.[192] In such a legal climate, it is certainly questionable whether a high court or appointed commission would recognize a truly exacting standard of competent performance—and even whether it would risk delaying an execution to remedy a violation of a proper standard.

IV. CUTTING THE GORDIAN KNOT

Another potential solution to the seemingly insoluble political and legal problem that arises in states such as Texas and Georgia bears thinking about. Perhaps instead of stretching the right to effective assistance to cover post-conviction appeals—something many state or federal courts simply will not do, no matter how ingenious and persuasive the legal justification—post-conviction appeals could instead be folded back into a level of the process that is already governed by effective assistance guarantees—direct appeal. That is, make the

192. *See e.g.* Charles Rosenthal, *Habeas Process Works Fine*, Houston Chron. A47 (Dec. 14, 2002) (quoting, in letter to the editor written while serving as Harris County District Attorney, comment by Court of Criminal Appeals Presiding Judge Sharon Keller that "[t]he fact that that not everyone is getting [relief] is not an indication that anything is wrong with the system," and attributing brevity of some petitions to the fact that "[f]actual claims do not arise in all death penalty cases, and a very small proportion of death penalty cases have meritorious factual claims, regardless of the amount of publicity given to that small handful").

direct appeal a forum for deciding not only record-based claims, but also claims based on new facts and evidence relevant to the fairness of the trial. This, to be sure, would be a significant break from existing practice in many states. Most death-penalty states currently provide that post-conviction attacks may be filed only upon completion of an inmate's direct appeal.[193] But, as I will argue, combining the steps should, under current Supreme Court precedent, result in the automatic extension of the full *Strickland* guarantee to the entire state appeals process.

A. Traditional Rationales for Affording Fewer Procedural Safeguards to Post-conviction Appeals

At this point, it may make sense to canvass the rationales offered by the Supreme Court when it reaffirms that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception" and relegates the writ of habeas corpus to the a "secondary and limited," if nevertheless "important," role in safeguarding constitutional rights.[194] The three main rationales are the conditional or secondary role of habeas corpus proceedings, the fact that they represent an attack upon a final and presumptively valid conviction, and the fact that they occur years after the original trial. In the next section, I will argue that, in the modern era of rigid deadlines and overlapping appeals, these rationales are quickly losing persuasive force.

1. Conditional and Secondary Nature

In non-capital cases, post-conviction appeals are not considered routinely necessary because trial and direct appeal suffice (or at least are deemed to suffice) to address the vast majority of the allegations of error the justice system is willing to spend the resources to correct.[195] The state is not even

193. *See Ryan Commission Report*, *supra* n. 3, at 170 (observing that eight death-penalty states "condition the filing of a post-conviction petition upon completion of proceedings on direct appeal," and recommending that Illinois do the same).

194. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

195. *See Pa. v. Finley*, 481 U.S. 551, 557, 558 (1987) (stressing that by the time prisoner had filed her post-conviction attack, she had already received representation at trial and in

constitutionally obliged to provide a direct appeal forum for convicts. Its obligation to provide a post-conviction forum, this line of reasoning goes, is yet more tenuous, and therefore the procedural safeguards attaching to post-conviction proceedings are even less grounded. Thus, there is no objection to the state enforcing a watered-down or "second-class" counsel guarantee in post-conviction proceedings that would not pass constitutional muster in the direct-appeal context.[196]

Of course, these dismissive pronouncements coexist with other statements, many taken from capital cases, that emphasize the importance of collateral review. The Court's ambivalence about collateral proceedings perhaps stems from the writ's history as an equitable and discretionary remedy.[197] Originally, the writ was an "extraordinary" writ available only "where the ordinary legal remedies [against unjust confinement] were unavailable or inadequate."[198] This historical conception of the writ's status helps to explain the Court's peculiar statements about the writ, which alternate between dismay at the writ's tendency to "strike at finality" and recognition of its critical role in securing adherence to constitutional norms.

2. *Attack on Finality*

Collateral attacks undermine finality in two separate senses. First, they seek to upset convictions "to which a presumption of finality and legality" has attached by virtue of their having been affirmed on direct appeal.[199] Thus, unlike direct appeals, they are filed only by persons who have already had the presumption of innocence stripped from them at trial, and who further have had

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the Supreme Court of Pennsylvania during direct appeal, which appeal guaranteed her an "independent review of the record by competent counsel").

196. *Finley*, 481 U.S. at 556-57 (disputing assertion that the "'right to counsel' can have only one meaning, no matter what the source of that right, and affirming that post-conviction counsel's assistance need not rise to the level of constitutionally effective assistance of counsel).

197. *See e.g. Stone v. Powell*, 428 U.S. 465, 478 n. 11 (1977) (citing previous precedents, which stressed the "equitable" and "discretionary" nature of the writ).

198. William F. Duker, *A Constitutional History of Habeas Corpus* 4 (Greenwood Press 1980).

199. *Barefoot v. Estelle*, 463 U.S. at 887; s*ee also Pa. v. Finley*, 481 U.S. at 557 (describing post-conviction relief "normally" occurring "only after the defendant has failed to secure relief through direct review of his conviction").

the fairness of that trial proceeding confirmed by at least one court.[200] In capital cases, habeas proceedings also undermine finality in the more direct sense that the convict, by common consensus, may not be executed when they are still pending.[201]

3. Remoteness of Trial

Related to finality is temporal remoteness. When the Court decided the leading modern habeas cases, federal law contained no statute of limitations for post-conviction claims except for a frail "laches" provision, which forbade a federal court to consider a delayed petition only when the state had satisfied a "heavy" burden to prove it had been prejudiced by an inmate's delay in filing his petition.[202] Delayed attacks on a final conviction harm confidence in the justice system because "when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory" and "dispersion of witnesses" that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication."[203]

B. Do These Justifications Still Persuade?

The Supreme Court has yet to explicitly acknowledge this fact, but significant changes in the scope, role, and nature of post-conviction proceedings in capital cases have drained every one of its arguments of much of their persuasive force. This observation is especially true concerning state post-conviction systems that have unitary appeal structures, as I will discuss later.

Even in non-unitary states, however, the rationales are weak. First, collateral attacks, in capital cases, are commonplace and crucial. They are commonplace because every state now provides a post-conviction forum to every condemned inmate, the vast majority of them now also provide lawyers, and every

200. *Murray v. Giarratano*, 492 U.S. 1, 7 (1989).

201. *McCleskey v. Zant*, 499 U.S. 467, 492 (1991).

202. *See Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir. 1994) (interpreting former Rule 9(a) of the Rules Governing § 2254 Proceedings).

203. *McCleskey*, 499 U.S. at 491 (quoting *Kuhlmann v. Wilson*, 477 U.S. 433, 453 (1986)).

capital prisoner who does not wish to volunteer for execution pursues post-conviction relief—sometimes multiple times.[204] The Mississippi Supreme Court has, in fact, recognized post-conviction appeals as a routine "appendage" of the capital-case review process.[205] Professor Larry Yackle has noted that the structure and function of modern federal habeas review is hardly exotic, but rather has "an undeniable appellate flavor."[206] One might also question why, if post-conviction remedies in capital cases are "secondary and limited," so much attention has been paid to them. Law journals and blue-ribbon commissions have devoted an extraordinary amount of intellectual energy to analyzing the proper scope and nature of post-conviction proceedings in capital cases.[207] Further, the consensus that collateral attacks are bulwarks against injustice every bit as important as direct appeal—especially in the wake of Professor

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204. *See e.g.* Kappler, *supra* n. 163, at 579:

> However, on a practical basis, every state offers some form of post-conviction remedy and post-conviction litigation has become a standard part in the lifecycle of a capital case. Furthermore, the analogy to a sword which the prisoner uses at his discretion to initiate the collateral attack is inapt, because the federal habeas corpus statute requires exhaustion of state remedies. For a prisoner to choose not to pursue state post-conviction remedies is a procedural default and a bar to federal habeas corpus review. Direct appeal and post-conviction attack are not simply options for the capital prisoners; they are required steps he must take to be vindicated.

205. *Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999).

206. *See* Yackle, *supra* n. 162, at 4. Professor Yackle later summarizes the work of other scholars who have argued that "federal habeas corpus only *appeared* formally to contemplate original civil actions against state prison wardens" but that in reality habeas was an "appellate matter long before *Brown* [*v. Allen*, 344 U.S. 433 (1953)]." *Id.* at 293-94 (citing and discussing law review articles by Professors Daniel J. Meador, Jordan Steiker, Barry Friedman, and James S. Liebman). These debates take place in a considerably more remote and rarefied sphere than does this Article, which is intended to take the gritty realities of the political context of post-conviction reform into account. They nevertheless demonstrate that the modern federal writ of habeas corpus, considered in terms of the practical role it fulfills, is little more than an "extra" appeal to be pursued after state-court appeals are final.

207. *See* McConville, *supra* n. 107, at 37-38 nn. 26-28, 48-52 (citing scholarly commentary on capital post-conviction proceedings and discussing Powell Committee Report and American Bar Association study of capital post-conviction proceedings); Kappler, *supra* n. 163, at 580 (reporting on same commissions and citing to comments by "[s]cholars, academics, judges, practitioners and students" supporting right to counsel).

James Liebman's influential study of error rates in capital cases[208]—has now become reasonably settled.

The fear that post-conviction attacks will be filed many years after trial and direct appeal have concluded is also no longer justified. Most death-penalty states have imposed procedural deadlines that will, as a practical matter, require all post-conviction challenges to be filed with a specific time after the defendant's conviction is upheld on direct review. These laws will ensure that state post-conviction appeals will almost without exception be filed within three to four years of conviction. In Illinois, for example, collateral attack deadlines are structured in such a way that it is possible that the post-conviction appeal will be filed before the direct appeal against the conviction has even been resolved.[209]

Other states have gone even farther than Illinois and have expressly created unitary appellate systems for death-penalty cases. Such systems are explicitly contemplated by the AEDPA, which added a section to the federal habeas statute that explains how they are to be treated under the AEDPA's expedited-review quid-pro-quo framework.[210] So-called unitary review systems, which are currently in force in Colorado,[211] Texas,[212] Ohio,[213] and Idaho,[214] present the clearest picture of how outdated the

208. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Error Rates in Capital Cases, 1973-1995* (2000) (available at http://justice.policy.net/cjedfund/jpreport/) (accessed Dec. 31, 2003; copy on file with Journal of Appellate Practice and Process).

209. The Ryan Commission criticized existing Illinois law, which requires an Illinois defendant to file his post-conviction attack within three years of conviction regardless of the status of his direct appeal, on the grounds that "requiring a capital defendant to file a post-conviction petition before his original appeal is complete represents an unwise policy choice." *Ryan Commission Report, supra* n. 3, at 170.

210. *See* 28 U.S.C. § 2265 (2002) (available at http://uscode.house.gov).

211. *See* Colo. Rev. Stat. §§ 16-12-201 *et seq.* (West 2003) (statutory scheme adopted in 1997 to create new "unitary" review scheme in death-penalty cases); *see also* Colo. R. Crim. Proc. 32.2(b)(3) (setting out deadline of 150 days from date defendant is advised of his right to new post-conviction counsel, which in turn must be held within five days after sentence is imposed).

212. *See* Tex. Code Crim. Proc. art. 11.071 § 4(a) (West 2003) (providing that habeas corpus application in capital case must be filed no later than 180 days after appointment of post-conviction or "not later than the 45th day after the date the state's original brief is filed on direct appeal, whichever date is later").

213. *See* Ohio Rev. Code § 2953.21(A)(2) (West 2003) (requiring post-conviction motion to be filed within 180 days of date transcript is filed during direct appeal).

214. *See* Idaho Code § 2719 (West 2003).

Supreme Court's rationales are. In these states, a death-sentenced inmate begins preparing his post-conviction and direct appeals simultaneously, shortly after the end of his trial.

To be sure, unitary systems are controversial, and generally unpopular with capital defenders. The supreme courts of Pennsylvania[215] and Florida[216] struck down their legislatures' post-AEDPA attempts to create unitary systems, albeit only on separation-of-powers grounds. But unitary systems bear closer examination for the light they shed on the persuasiveness of the rationales the Rehnquist Court has offered for declaring post-conviction proceedings second-class procedural citizens.

C. Jettisoning the Justifications

Let us assume a death-sentenced inmate in a unitary-review state asserts that he has a right to the effective assistance of post-conviction counsel similar to that announced in *Evitts v. Lucey*,[217] which guarantees him effective assistance during his first appeal as of right. An intellectually honest appellate court can no longer rely on the conditionality, temporal remoteness, or finality rationales. The inmate's post-conviction attack is routine (because his is a capital case), it is being filed no later than his direct appeal, and attacks a conviction that is not yet final, because it has not yet been affirmed on direct appeal.

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215. In 1999, the Pennsylvania Supreme Court struck down a unitary-review scheme passed by the Pennsylvania Legislature on separation-of-powers grounds. The court held that, because the supreme court was vouchsafed ultimate authority to promulgate court rules under the Pennsylvania Constitution, a legislative act which "directly conflict[ed] with existing procedural rules duly promulgated by this Court" could not be permitted. *In re Suspension of Capital Unitary Review Act*, 722 A.2d 676, 680 (Pa. 1999).

216. *Allen v. Butterworth*, 756 So. 2d 52, 55, 62 (Fla. 2000) (striking down the Death Penalty Reform Act of 2000, which changed existing post-conviction deadlines to create a "'dual-track' capital post-conviction process, in which a death- sentenced inmate files post-conviction claims almost contemporaneously with his or her direct appeal," on the ground that the Florida Constitution conferred on the Florida Supreme Court the exclusive authority to promulgate rules of procedure governing post-conviction appeals). The court later, on its own motion, adopted changes to its rules that provided that post-conviction counsel should be appointed within fifteen days after the defendant is sentenced to death, but that the post-conviction petition itself need not be filed until one year after the affirmance of the defendant's conviction and sentence on direct appeal. *See In re Amendments to Fla. R. Crim. P. 3.851, 3.852, & 3.993*, 772 So .2d 512, 513-14 (Fla. 2000).

217. 469 U.S. 387, 394-95 (1985) (holding that Fourteenth Amendment guarantees criminal appellants the right to effective assistance of counsel during their direct appeal).

What other potential distinctions remain? Two are apparent: a difference in the nature of the evidence upon which the appeal is based, and second, a remaining superficial difference in terminology and definition (post-conviction attacks are denominated civil proceedings and are referred to using a specialized vocabulary). Do these distinctions make a difference?

1. Extra-Record Evidence

Considered purely from a practical standpoint, effective assistance of counsel is surely needed *more* during post-conviction than in direct appeal proceedings. A particularly bright and disciplined inmate could gather the transcripts of his trial, spend several months in the law library, and turn out a reasonably well-crafted direct appeal on points of law. Our hypothetical gifted inmate will surely be assisted by the contemporaneous-objection rule, which will have required his lawyer to signal the most promising appellate claims by lodging timely and specific objections during the trial.

Post-conviction claims, however, are another matter entirely. No death-row inmate will ever be set free from his prison cell to perform the "thorough, independent investigation" of his case that is a fundamental component of competent habeas representation.[218] And post-conviction law is certainly every bit as technical and forbidding as the law governing direct appeals. Perhaps in years past, a post-conviction petitioner could hope to succeed by succinctly stating his claim, sticking mainly to the operative facts. But those days are long past. Now, post-conviction practice involves substantial investigation followed by the filing of an appeal every bit as complex as the direct appeal itself.

The above arguments all tend to support one principal

218. *ABA Guidelines*, *supra* n. 8, at 1085 (Commentary to Guideline 10.15.1B). In response to the Mississippi Supreme Court's implied holding that death row inmates were perfectly capable of representing themselves in capital post-conviction matters, two commentators noted that several Mississippi death-row inmates had applied for investigative furloughs from prison and other resources to perform the investigation necessary to represent themselves. Clive A. Stafford-Smith & Remy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 Loy. L. Rev. 55, 86 n. 146, 96 (1999).

thesis. If we assume that all death row inmates should, as a matter of course, be given the opportunity to raise all record-based and extra-record claims before being executed, *and* we were legislating on a clean slate, free of anachronistic rules and classifications, *and* we were able to guarantee an inmate effective performance only as to one type of claim, we would surely choose to guarantee that performance as to extra-record claims, not record claims!

2. Nomenclature and Classification

The only remaining distinction is one of nomenclature and classification, which I above described as "superficial." However, by calling it superficial, I do not mean to suggest courts will ignore it. As a sage once remarked, law's "traditional approach is in terms of words, it centers on words, [and has] the utmost difficulty getting beyond words."[219] The abstract categories into which history has sorted various sorts of procedures "tend to take on an appearance of solidarity, reality and inherent value which ha[ve] no foundation in experience."[220]

To bring along courts which will respect the distinction between direct appeal and post-conviction regardless of whether it has a "foundation in experience," I propose eliminating the distinction between direct appeal and post-conviction completely. The proposal may seem radical, in that it would involve a fairly fundamental restructuring of the review process in non-unitary states. I do not, however, see it as being radical in the sense of requiring a dramatic, pro-petitioner re-conception of the appellate process. Such a re-conception, it bears repeating, will spell death for any proposed reform in a conservative, law-and-order state.

Here is how such a combined-track appeal would work:

- First, a state alters its code of criminal procedure to allow inmates to raise both record-based and extra-record-based claims during direct appeal.

219. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431, 443 (1930).

220. *Id.* at 453.

- At the end of a capital murder trial, the defendant is assigned two (or perhaps three) new lawyers. These lawyers will have suitable time—at the very least two full years after preparation and delivery of the trial transcript—in which to raise all claims relevant to the inmate's conviction and sentence.

- The lawyers will have access to the traditional resources needed to develop extra-record claims: investigators, expert witnesses, access to documents, and the like.

- When the time for filing comes due, the lawyers simply file all claims with the relevant court of appeals.

- That court first evaluates the record-based claims. These come first because they may require reversal without additional factual development, thus obviating the need for any discovery or an evidentiary hearing.

- If the appeals court is satisfied that none of the record-based claims merits reversal, it proceeds to the non-record-based claims. At this point, it makes the traditional judgment call post-conviction courts make: Would the petitioner's factual allegations, if true, entitle him to relief?

- If the answer is "yes," the court remands the case to the trial court to conduct an evidentiary hearing on the specified claims. The trial court then conducts the hearing, and determines whether to recommend relief.

- If the answer is "no," the appeals court denies all relief, and the inmate's state court appeals are finished.

- If a hearing has been held and the trial court has recommended the granting or denial of relief, the appeals court decides whether to accept the trial court's recommendation. If it decides to deny relief, the inmate moves to federal court.

Obviously, the consolidation of the inmate's appeals should not serve as a pretext for starving him of the resources he needs to fully explore potential errors. This proposed reform is designed to replicate, as far as possible, the scope of review that would have been available under the separate-track system. The crucial difference is that under this scheme, litigation of all claims now occurs during the inmate's first appeal "as of right." This means, as a practical matter, that the Fourteenth Amendment-derived right of effective assistance of counsel attaches throughout the proceeding, even as to the aspects of the process that involve the development and litigation of extra-record claims.[221]

Now, of course, it is immediately apparent that the inmate does not have any state-court forum for the litigation of any appellate-ineffectiveness claims. This flaw has induced some unitary states, such as Ohio and Colorado, to enact special procedures to permit the exhaustion of such claims in state court proceedings.[222] If a state decides to combine its appeals without providing such a "safety valve," however, what will actually happen is that appellate-ineffectiveness issues will be litigated in federal court.

Let us assume that an unfortunate inmate receives poor legal assistance during his state-court combined-track appeal. He then acquires new counsel in federal habeas proceedings. That counsel determines that there are meritorious claims or issues that were not adequately developed in state court owing to poor performance by combined-track counsel. New counsel will plead these unexhausted claims in her federal habeas petition. The state will then surely respond that these claims are

221. Of course, it is possible that a skeptical federal court might decide to inspect each particular claim, determine whether it involves extra-record litigation, and selectively deny any constitutional guarantee of effective performance as to those aspects of the direct appeal that dealt with the litigation of extra-record claims. But this seems unlikely, as it (1) involves intense scrutiny of the direct appeal process and (2) does not find any support in existing Supreme Court jurisprudence, which declines to attach effectiveness guarantees to post-conviction representation for reasons unrelated to the extra-record nature of most post-conviction claims.

222. Colorado, which has a "function[ally]" unitary review scheme, avoids the deprivation of a state-court forum for appellate ineffectiveness claims by permitting such claims to be raised specially by petition to the Colorado Supreme Court. Kappler, *supra* n. 163, at 528. Ohio provides a separate forum for attacking appellate counsel's performance after the direct appeal has been resolved. *See* Ohio R. App. Proc. 26(B).

technically exhausted, but procedurally defaulted. That is, the defendant flouted the rules of the state court forum by failing to advance all claims during the combined-track appeal. Yet he cannot return to state court and exhaust the claims, because, in all likelihood, he is forbidden from filing a successive habeas corpus application by state-court successor bars.[223]

In this situation, the petitioner's new federal habeas counsel has an effective rejoinder. Ineffective assistance of counsel can provide "cause" to excuse the failure to adhere to the state's procedural rules.[224] Of course, as *Coleman v. Thompson*[225] teaches, ineffective assistance of counsel can only provide cause when it constitutes an independent violation of the inmate's federal constitutional right to effective counsel.[226] And, of course, it will only constitute such a violation when it occurs at a phase of the proceedings to which the effective assistance guarantee attaches.[227] Under the combined-track appeal, however, the effective assistance guarantee will indeed attach. Any deficient performance during the combined-track direct appeal will constitute an independent violation of the inmate's Fourteenth Amendment right to effective appellate counsel.[228] The federal court will be empowered to review the underlying claim and, assuming it finds prejudice, to grant the writ of habeas corpus as to meritorious claims overlooked by incompetent appellate counsel.

What about *Edwards v. Carpenter*?[229] In *Edwards*, the Supreme Court held that a federal court could enforce a federal procedural default against a claim of ineffective assistance of

223. *Gray v. Netherland*, 518 U.S. 152, 162 (1996) (noting existence of procedural default in such a situation).

224. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

225. 501 U.S. 722 (1991).

226. *Murray*, 501 U.S. at 754.

227. *Id.* (distinguishing between ineffective assistance of counsel that occurs during the direct-appeal phase of the proceedings, during which the State "must bear the cost" of attorney defaults that constitute violations of the defendant's right to counsel, and post-conviction proceedings, during which the "State has no responsibility to ensure that petitioner was represented by competent counsel").

228. *See e.g. Smith v. Robbins*, 528 U.S. 259, 276 (2000) (noting existence of right to effective assistance of counsel in inmate's first appeal "as of right" from his conviction, and tracing provenance of right to "the Equal Protection Clause of the Fourteenth Amendment and . . . the Due Process Clause of [the Fourteenth] Amendment")

229. 529 U.S. 446 (2000).

counsel that the inmate intended to use to excuse a preceding procedural default as to a particular substantive claim.[230] Translated into more approachable prose, *Edwards* deals with the following situation. In state court, your incompetent lawyer fails to properly present a meritorious constitutional challenge to your conviction or sentence (we will call it Claim A) to the state court. You wish to assert that your lawyer performed ineffectively when he failed to advance Claim A. This fresh argument, in turn, is your ineffective assistance of counsel claim (Claim B), which you intend to use in federal court to excuse the procedural default caused by your incompetent lawyer's failure to properly present Claim A. Must you, in turn, exhaust Claim B in the state courts? That is, must you, at some point in the state appellate process, raise Claim B—your incompetent lawyer's failure to properly raise Claim A—in order to preserve your ability to use Claim B to obtain a merits determination of Claim A in the federal courts?

Citing "comity and federalism," the *Edwards* Court answered, "Yes."[231] *Edwards*, of course, means that the combined-track scheme would deprive inmates of any chance to exhaust their appellate-ineffectiveness claims in state court. That is, there would be no "appeal after the appeal" of the type provided in most full-guarantee states, during which inmates would be able to raise claims that their previous appellate lawyers had performed ineffectively. This fact is a by-product of the procedural streamlining that, in fact, is one of the selling points of the combined-track scheme. Under *Edwards*, it would seem that federal review of any appellate-ineffectiveness complaints is barred, given that they cannot be exhausted in state court.

However, once again the petitioner has a response grounded in existing habeas jurisprudence. The federal habeas statute provides that exhaustion of a claim is excused if "circumstances exist that render [the state's corrective] process ineffective to protect the rights of the applicant."[232] As we have seen above, at least one federal circuit court has definitively rejected any reading of this provision that might serve as a

230. *Id.* at 452-53.

231. *Id.* at 453.

232. 28 U.S.C. § 2254(b)(1)(B)(ii) (2002) (available at http://uscode.house.gov).

pretext to regulate the quality of the work an appointed post-conviction lawyer did in an available state forum.[233] However, when there is no forum at all in which a lawyer or inmate may exhaust such a claim, the situation is different.

A Ninth Circuit capital habeas case, *Hoffman v. Arave*,[234] illustrates how a federal court will likely respond to this procedural conundrum. *Hoffman* is of special interest because it addresses a state, Idaho, which *already has* a combined-track system, albeit one with glaring procedural shortcomings that completely rule it out as any sort of model for reform.[235] Idaho's law requires those who have been convicted of capital offenses to file "any legal or factual challenge to the sentence or conviction that is known or reasonably should be known" within forty-two days of the "filing of the judgment imposing the sentence of death."[236] Hoffman, still represented by his trial attorneys, filed his appeal timely in 1989.[237] Unsurprisingly, his trial counsel did not file any claims attacking their own performance.[238] Later, with new counsel, Hoffman filed a second post-conviction attack raising ineffectiveness challenges. This second attack was dismissed by the Idaho courts as procedurally defaulted.[239]

When Hoffman reached federal court, the Ninth Circuit reversed the district court, which had respected the state court's procedural default of Hoffman's claims. The court first cited a sister circuit for the proposition that because the right to effective representation "'lies at the very foundation of the adversary system of criminal justice,' habeas courts must be 'particularly vigilant in scrutinizing the adequacy of state rules of procedural default which have the effect of barring federal habeas review of claims of ineffective assistance of counsel.'"[240]

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233. *See supra* Part III.B (discussing jurisprudence of the United States Court of Appeals for the Fifth Circuit).

234. 236 F.3d 523 (9th Cir. 2001).

235. For a detailed critique of Idaho's unitary system of review in operation, see Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. App. Prac. & Process 85 (2000).

236. Idaho Code § 19-2719(3) (West 2003).

237. *Hoffman*, 236 F.3d at 528.

238. *Id.*

239. *Id.*

240. *Id.* at 529-30 (quoting *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998)).

The *Hoffman* court found that the Idaho rule was "an unreasonable restriction on the exercise of the federally protected right to counsel" and was therefore "inadequate to bar federal review."[241]

The Ninth Circuit based its conclusion on three principal grounds. First, the statute did not provide for the automatic replacement of trial counsel by new counsel, leading to the unavoidable conflict of interest created by a defendant being represented by his own trial counsel in the only proceeding available to him in which to exhaust any claims of ineffective assistance of counsel.[242] "Not surprisingly," the court observed, "Hoffman's trial counsel failed to raise and argue the issue of their own ineffectiveness in post-conviction proceedings."[243] Second, the *Hoffman* court also suggested that the extreme brevity of the forty-two day deadline, which it labeled "uniquely harsh," might well have rendered the state appellate remedy inadequate even in the absence of the counsel conflict. Because Idaho made no provisions for expedited delivery of the trial transcript to the defendant's lawyers, an inmate's counsel might be required—as Hoffman's counsel on his initial appeal were—to prepare the appeal without access to the printed transcript of the case.[244] Finally, the court held, even if the transcript had been available, the forty-two day deadline would likely have rendered the remedy ineffective. Proper representation of a capital defendant during a post-conviction proceeding requires more than a mere review of the record—it requires "the opportunity to conduct an investigation beyond the court records to uncover possible omissions made by trial counsel in the investigation and presentation of the case."[245]

Hoffman suggests what a federal court would do in a combined-track state. Even assuming the federal court initially recognized the state-court procedural default (stemming from

241. *Id.* at 530 (citing *Michel v. La.*, 350 U.S. 91, 93-94 (1955)).

242. *Id.* at 532-34. The Ninth Circuit noted that following Hoffman's appeal the Idaho Supreme Court and Idaho Legislature had amended the rules governing capital appeals to advise the defendant of his right to have new counsel on appeal, and to require that at least one attorney other than trial counsel be appointed to represent a defendant during his appeal. *Id.* at 534.

243. *Id.*

244. *Id.* at 535.

245. *Id.*

the fact that the petitioner had not exhausted his appellate-ineffectiveness claims in state court), the court would surely excuse the default (or excuse the exhaustion requirement itself) by finding that the state had not provided any adequate forum for the resolution of the claim. After all, the *Hoffman* court excused a defendant from exhausting his ineffectiveness claims because his trial counsel could not be expected to challenge his own performance in a subsequent phase of the proceeding. In the combined-track scenario, a capital defendant's appellate lawyer's only chance to exhaust appellate counsel would be to file ineffectiveness claims against himself in the very same appellate proceeding. It is difficult indeed to imagine a federal court willing to recognize such a forum as adequate, although, unfortunately, the possibility cannot be ruled out. But the likelihood seems so remote that the potential problem posed by *Edwards*, I submit, can be viewed as less serious than anticipated.[246]

3. A Caveat and an Argument

Once again, it bears repeating that the combined-track proposal is an emergency triage solution designed for states that currently have grave problems with their post-conviction schemes and a political climate actively hostile to any reform that could be portrayed as prolonging death penalty appeals. That such states exist cannot be doubted. And that the problem is urgent also cannot be doubted: The states with the crudest and most problem-plagued capital post-conviction systems—such as Texas, Alabama, Georgia, and Florida—are precisely those

246. The federal courts would be justified in finding that a state which adopted a combined-track scheme with no safety valve to permit review of appellate ineffectiveness claims was knowingly waiving the right, conferred by *Edwards*, to initial review of such claims. The situation can be analogized to the state courts' reactions to *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). In *O'Sullivan*, the Supreme Court held that state inmates must present their constitutional claims to the state's highest court during discretionary review in order to exhaust them for federal habeas purposes. *Id.* at 845. To blunt criticism that *O'Sullivan*'s holding would undermine state supreme courts' discretionary review procedures, Justice Souter, in a separate opinion, "anticipated—indeed invited" the states to alter their appellate-procedure rules to provide that presentation of a claim during direct appeal to an intermediate court sufficed to exhaust the claim. *Abdur'Rahman v. Bell*, 537 U.S. 88, 90 n. 3 (2002) (citing *O'Sullivan*, 526 U.S. at 849-850) (Souter, J., dissenting from dismissal of certiorari).

states with the largest and most active death rows. Texas has carried out more executions than any other state, and Alabama sentences more defendants to death, per capita, than any other state.[247]

Obviously, the most effective remedy to this problem would be the recognition of a federal constitutional right to the effective assistance of counsel or, at least. a federal jurisprudence that makes possible some sort of meaningful control and oversight over the adequacy of state post-conviction forums. I have argued elsewhere that neither of these appears to be on the horizon[248] and that certainly neither will be forthcoming in time to ensure quality representation for recently sentenced inmates.

While federal courts have shown very little interest in systemic policing of the overall adequacy of state post-conviction forums, they have shown themselves willing to police the fairness of individual convictions. My approach accepts the current federal climate as a given and leverages existing precedent and the continued willingness of the federal judiciary to spot-check individual cases by (1) broadening the scope of individual review to include at least a meaningful *chance* of review of claims defaulted by the incompetence of state-court appellate counsel and (2) freeing the federal court of any obligation to articulate systemic critiques in order to remedy injustices in individual cases (as is generally necessary under more systemic arguments).

The other constraint my proposal takes into the account is the necessity of convincing skeptical or reluctant state legislators to reform their current post-conviction schemes. This is, in my view, a necessary part of any pragmatic solution. The federalist cat is out of the bag: State legislators, officials and courts know that, in the foreseeable future, there is almost no chance of successful federal challenges to the constitutionality of their state post-conviction schemes. They know, in short, that they have a completely free hand to structure their state capital post-conviction systems as they wish and to honor state-level policies

247. *See* Post, *supra* n. 156 (noting that Alabama's death row housed 194 people as of December 1, 2003, and that Alabama had, since 1998, sentenced more people to death per capita than any other state).

248. *See* Hammel, *supra* n. 95, at 55-61.

without fear of federal interference. My proposal is designed to accommodate one of the most prominent such policies: the desire to keep delays between imposition and execution of sentence under control.

The key selling point of the combined-track appeal is that state-level politicians will be able accurately to portray the plan as streamlining death-penalty appeals: "We are collapsing two redundant, time-consuming levels of appeals into one, but we will still allow prisoners a full opportunity to challenge the fairness of their trials." There can be little doubt that in states that currently have sequential direct appeal and post-conviction procedures, the combined-track approach will shorten the state appellate process. Even if the appointed combined-track counsel were given an appropriate amount of time in which to prepare and file their catch-all appeal (at least two years), that span of time would likely end up being no longer than the amount of time needed for two separate sequential appeals.

Further, a state court might well be able to make more efficient docket-management decisions with all the relevant facts—both record-based and extra-record—before it at once. For instance, a state court that was on the brink of granting relief on a record-based claim of prosecutorial misconduct (based, for instance, on a prosecutor's comment on the defendant's failure to testify or inflammatory closing argument) could allow the presence of a compelling *Brady* allegation to tip the scales in favor of relief. "Even though the record-based misconduct might not be enough on its own to merit a grant of relief," a court might reason, "a full picture of the case persuades us that there were serious problems with this case stemming from several independent sources. Better to reverse the case now and send it back for a new trial than spend several extra years in hearings and appeals needed to confirm the inevitable conclusion—that this trial was too flawed to uphold."

The extra-record factual development could also, conversely, clarify to the court that a claim lacks merit. A court that was concerned about a defense attorney's lackluster argument at the punishment phase of the trial would clearly gain insight in to the quality of the defense attorney's preparation by the extra-record portions of the petition. If they revealed substantial additional evidence never investigated by trial

counsel, a hearing would be in order. But if they revealed little or no additional evidence, the court might well be justified in concluding that the trial counsel in all likelihood performed a competent investigation and was simply not left with any defense theme more viable than the one he used.

As should be apparent from *Hoffman*, the combined-track appeal may, in some states, shift the burden of adjudication toward the federal courts. Federal courts will have to evaluate de novo all claims of appellate ineffectiveness that the defendant intends to use to excuse any procedural defaults caused by failure to properly litigate his claims in state court. And, to the extent that those cause arguments are successful, the federal court will have to develop and decide all claims overlooked in state court.

This will take time and resources. But the amount of adjudicatory responsibility thrust on the federal courts will be roughly proportionate to the quality of the representation in state courts. Appeals handled by qualified counsel with adequate time and resources should, in the ordinary course of events, generate more streamlined federal proceedings. The worse lawyers the state court appoints, and the fewer resources these lawyers are given, then the more time the federal court will have to expend making up for the state-court mistakes. This will build in a much-needed institutional incentive for federal courts to urge state courts to improve their post-conviction forums.

Currently, many federal courts display no discernible concern about the quality of the post-conviction process afforded death row prisoners. In a recent notorious case, the Fifth Circuit accorded AEDPA deference to the fact findings and legal conclusions of a Texas post-conviction judge who entered an order denying a Texas death-row inmate post-conviction relief—even though the judge had not presided over the defendant's trial, had never read the transcript of the trial, and in fact had even lost several of the extra-record exhibits that the petitioner had filed with his petition.[249] A dissenter commented that the majority's decision "ignores the delicate balance struck by the Supreme Court among competing concerns of federalism, due process, Article III jurisdiction,

249. *Valdez v. Cockrell*, 274 F.3d 941, 944-46, 954-57 (5th Cir. 2001).

faithfulness to Congressional enactments, and the importance of the Great Writ to our legal tradition."[250] Nevertheless, both the panel and the en banc court denied rehearing.[251]

Such a court is unlikely to display any interest in the quality of a state's post-conviction forum out of conscientiousness or statesmanship—but it might do so out of concern for its docket.

VI. CONCLUSION

The creation of a combined-track remedy is not suitable in every state. The states that are the real focus of the combined-track proposal are the states, mostly in the Deep South, that have large and active death rows and that have historically shown less than single-minded concern for the provision of adequate counsel to condemned inmates. These states are the focus of this proposal for two reasons. First, the political climate in these states will make them receptive only to reform proposals that can be sold as significantly streamlining the death-penalty appeals process. Second, only in these states will the benefits to be gained by a reform that extends the effective-counsel guarantee to the entire state appellate process outweigh any losses. That is, the proposal appears to be a lesser of two evils in states where (1) incompetent post-conviction representation is widespread; (2) no court, state or federal, will provide any remedy for it; and therefore, (3) significant numbers of condemned inmates are meeting their deaths without any meaningful review at all.

The combined track is also meant to be a temporary measure, designed to bring a well-deserved end to the disgraceful spectacle of federal courts allowing inexperienced or negligent lawyers to rob their clients of the careful and thorough post-conviction review which those very courts have frequently labeled an indispensable component of fair procedure. One can only hope that those who control the process will soon come to their collective senses and that legal minds will be freed from

250. *Id.* at 973 (Dennis, J., dissenting).

251. *See Valdez v. Cockrell*, 287 F.3d 392 (5th Cir. 2001) (denying panel rehearing); 288 F.3d 702 (5th Cir. 2001) (denying en banc rehearing).

the burden of conceiving remedies for this absurd and sorry state of affairs.