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Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel

Thomas M. Place[1]

INTRODUCTION

THE United States Supreme Court has long recognized a constitutional right to effective assistance of counsel at trial.[2] More recently, the Court has held that a defendant also has a right to effective assistance of counsel on direct appeal.[3] Neither the right to effective assistance of counsel at trial nor the right to effective assistance of counsel on direct appeal is dependent on the length of the defendant's imprisonment.[4] Rather, to assure fairness in each proceeding, the defendant has a right to counsel and the concomitant right that counsel provides effective assistance.[5] In some cases, a defendant can protect the right of effective assistance at trial on direct appeal;[6] but, as the Supreme Court has noted, in many cases "collateral review will frequently be the only means through

1 Professor of Law, The Dickinson School of Law of the Pennsylvania State University. A special thanks to Grace D'Alo and Harvey Feldman for their thoughtful comments on earlier drafts of this Article and to Erin Kawa and Ryan Lockman for excellent research assistance.

2 *See* Powell v. Alabama, 287 U.S. 45, 71–72 (1932) (stating that a state's duty to provide counsel to an indigent defendant is "not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

3 *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

4 *See* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) (holding that the right to effective counsel at trial attaches when there is a constitutional right to appointed and retained counsel, however, the proceeding is classified if it results in an "imprisonment even for a brief period").

5 Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

6 As a general rule, in order for the issue of trial counsel ineffectiveness to be raised on direct appeal, new counsel needs to be appointed or retained and must present the ineffectiveness claim to the trial court in a motion for new trial. *See* United States v. McGill, 952 F.2d 16, 19 (1st Cir. 1991). Even when new counsel is appointed, because many jurisdictions require a motion for new trial to be filed within a short time period following trial, new counsel may not have sufficient time to discover possible claims of ineffectiveness not apparent on the record. *See, e.g.*, MD. CODE ANN., MD. RULES 4-331(a) (ten days); KY. R .CRIM. P. 10.06(1) (five days); PA. R. CRIM. P. 720 (A)(1) (ten days); *see also infra* note 65 and accompanying text.

which an accused can effectuate the right to counsel . . . ."[7] This will be the case if trial counsel represents the defendant on direct appeal[8] because it is unlikely that counsel will identify his own ineffectiveness in challenging the conviction.[9] In such a case, a claim of ineffectiveness of trial counsel must be presented in a collateral proceeding,[10] or it may be found to have been waived.[11] When new counsel appointed or retained for direct appeal raises a claim of trial counsel ineffectiveness on direct appeal, and the record is incomplete or inadequate for purposes of deciding the claim, many states will defer the claim to the collateral review process instead of remanding the claim to the trial court.[12] In states that require the claim to be raised on direct appeal and new counsel fails to do so, the claim is waived unless asserted as a claim of appellate counsel ineffectiveness in a collateral proceeding.[13] Even record-based claims of trial counsel ineffectiveness

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7 Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

8 In numerous states, counsel appointed for trial also has the obligation to represent the defendant on direct appeal. *See* IDAHO CODE ANN. § 19-852(b)(1)-(3) (2004); KAN. STAT. ANN. § 22-4503(a) (2007); MINN. STAT. ANN. § 611.18 (West 2009); MISS. CODE ANN. § 99-15-15 (West 2006); MONT. CODE ANN. § 46-8-103 (2007); NEB. REV. STAT. § 29-3904 (2008); N.C. GEN STAT. § 7A-451(b) (2007); TENN. CODE ANN. § 40-14-203 (2006); ALA. R. CRIM. P. 6.2(b); ARIZ. R. CRIM. P. 6.3(b); DEL. R. CRIM. P. SUP. CT. 39(e); HAW. REV. STAT. §802-5(a) (Supp. 2007); IOWA R. CRIM. P. 2.28(1); MD. RULE 4-214(b);N. H. SUP. CT. R. 32(1); PA. R. CRIM. P. 122(B)(2); S.C. RULE 602(e)(1); WY. R. CRIM. P. 44(a)(1); *see also* Standards Relating to Criminal Appeals 2.2(a) (1978).

9 *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 620 n.5 (2005) ("A lawyer may not, however, perceive his own errors . . . ."); White v. Kelso, 401 S.E.2d 733, 734 (Ga. 1991) ("[A]n attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness . . . ."); People v. Moore, 797 N.E.2d 631, 638 (Ill. 2003) ("It would be inappropriate for trial counsel to argue a motion that is predicated on allegations of counsel's own incompetence."); Commonwealth v. Saranchak, 866 A.2d 292, 299 n.9 (Pa. 2005) ("[T]rial counsel cannot be expected to raise his own ineffectiveness on direct appeal . . . ."); Robinson v. State, 16 S.W.3d 808, 812 (Tex. Crim. App. 2000) ("[I]t is unrealistic to expect that the attorney charged with ineffectiveness will subsequently realize all of his mistakes and be able to adequately prosecute the claim."); Calene v. State, 846 P.2d 679, 684 (Wyo. 1993) ("It is recognized that trial counsel should [not] be . . . expected to contend ineffectiveness of performance by himself . . . .").

10 The terms "collateral proceeding," "collateral review," "post-conviction proceedings," or "post-conviction process," used interchangeably in this article, all describe a "class of judicial remedies" available to criminal defendants after conviction has been affirmed on direct appeal or after the "time for taking direct appeal has expired." 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES & RELIEF HANDBOOK § 1.2 (2008-09 ed.).

11 *See* Gregory G. Sarno, Annotation, *Waiver or Estoppel in Incompetent Legal Representation Cases*, 2 A.L.R.4th 807, 821-37 (1980) (discussing cases where the consideration of claims of ineffectiveness of counsel was found to be precluded - and cases where consideration of such issue was found not to be precluded - on waiver or estoppel grounds because the issue had not been raised on direct appeal or in post-conviction proceedings).

12 *See, e.g.*, Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003); People v. Alvarado, 683 N.Y.S.2d 501, 502 (N.Y. App. Div. 1998); State v. Stroud, 557 S.E.2d 544, 548 (N.C. Ct. App. 2001).

13 *See, e.g.*, State v. Smith, 573 S.E.2d 64, 65 (Ga. 2002); Taylor v. State, 156 P.3d 739, 746 (Utah 2007).

are being shunted to the post–conviction process as states are increasingly relieving newly appointed or retained counsel of the obligation to raise the claim on direct appeal.[14] In federal court prosecutions, the United States Supreme Court followed the lead of numerous states in concluding that a post–conviction proceeding[15] in the trial court is preferable to direct appeal for resolving ineffectiveness claims. In *Massaro v. United States*,[16] the Court held that new counsel's failure to raise an ineffective assistance of counsel claim on direct appeal did not bar the claim from being brought in a later collateral proceeding in the trial court, the court "best suited" to developing the facts necessary to resolve ineffectiveness claims.[17] Finally, state collateral review is the only means for a defendant to challenge the performance of direct appeal counsel.[18]

This article examines the consequences of states' increased reliance on post–conviction proceedings to review claims of trial counsel ineffectiveness. One result of deferring ineffectiveness claims to the post–conviction process is that it leaves a significant number of defendants who receive short prison sentences[19] without a remedy "to vindicate their right to effective trial counsel."[20] This occurs because many states limit access to post–conviction remedies to defendants who are in custody at the time.[21]

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14 *See, e.g.*, Commonwealth v. Davido, 868 A.2d 431, 441 n.16 (Pa. 2005); Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002).

15 *See* 28 U.S.C. § 2255 (2006) (describing a prisoner's remedies on motion attacking sentence).

16 Massaro v. United States, 538 U.S. 500 (2003).

17 *Id.* at 505.

18 *See, e.g.*, Tolbert v. State, 773 So. 2d 901, 903 (Ala. Crim. App. 1997); State v. Jackson, 747 N.W.2d 418, 430 (Neb. 2008); Commonwealth v. Lantzy, 736 A.2d 564, 569–70 (Pa. 1999).

19 Nationwide, more than 68,000 defendants were sentenced in 2006 to a year or less of imprisonment. *See* WILLIAM J. SABOL, ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, PRISONERS IN 2006 1, 6 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf. The median prison sentence for felonies in 2004 was about three years (thirty–seven months). MATTHEW DUROSE & PATRICK LANGAN, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004 3 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf. In Pennsylvania, more than fifteen percent of defendants received a sentence of one year or less in 2006 (the most recent for which such data is available). E–mail from Joan Lisle, Field Services Manager, Pennsylvania Commission on Sentencing, to Thomas M. Place, Professor of Law, Penn State University, Dickinson School of Law (June 29, 2007, 12:00 EST) (on file with author).

20 Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

21 In twenty–four states, the post–conviction remedy is limited to defendants who are imprisoned or on probation or parole. *See* CONN. GEN. STAT. ANN. § 52–466(a)(1)–(2) (West Supp. 2009); GA. CODE ANN. § 9–14–1 (2006); KAN. STAT. ANN. § 60–1507(a) (2006); LA. CODE CRIM. PROC. ANN. art. 924(1)–(2), 926(B)(1); ME. REV. STAT. ANN. tit. 15, § 2124(1)(A)–(E) (Supp. 2008); MD. CODE ANN., CRIM. PROC. § 7–101 (LexisNexis 2008); MASS ANN. LAWS. P. R. CRIM. 30(a); MISS. CODE ANN. § 99–39–5(1) (West 2008); MO. ANN. STAT. § 547.360(1) (West 2002); NEB. REV. STAT. § 29–3001 (2008); NEV. REV. STAT. §§ 34.360, 34.724 (2005); N.H. REV. STAT. ANN. § 534:1 (LexisNexis 2006); N.M. STAT. ANN. § 31–11–6 (LexisNexis 1984); 42 PA.

If the defendant's prison sentence is completed during the period while direct appeal is pending[22] or, in some jurisdictions, before the collateral process is completed,[23] the defendant is shut out of the only forum able to hear his claims. The custody requirement also deprives defendants who have already completed their sentence of access to post-conviction proceedings to challenge the ineffectiveness of direct appeal counsel.[24] Finally, in contrast to direct appeal, even if the state's collateral process is open to defendants who have completed their sentences, states do not have an obligation under the Fourteenth Amendment to appoint counsel for indigent defendants seeking state post-conviction relief.[25] In some states, appointment of counsel in a collateral proceeding is not mandated by statute or court rule.[26] When a state provides counsel, either by statute or court rule, because the right is not constitutionally based, counsel's performance is not subject to the federal standard governing ineffectiveness claims.[27] Moreover, in some states that provide counsel, the defendant does not have a state law right to effective post-conviction counsel.[28]

CONS. STAT. ANN. § 9543(a)(1) (West 2007); S.D. CODIFIED LAWS § 21-27-1 (1987); TENN. CODE ANN. § 40-30-102(a) (2006); VT. STAT. ANN. tit. 13, § 7131 (1998); W.VA. CODE ANN. § 53-4A-1(a) (LexisNexis 2008); WIS. STAT. ANN. § 974.06 (West 2007); WYO. STAT. ANN. § 7-14-101(b) (2009); ARK. R. CRIM. P. 37.1(a); DEL. SUPER. CT. CRIM. R. 61(a)(1) (Delaware also allows a defendants subject to future custody to seek relief in a post-conviction proceeding); KY. R. CRIM. P. 11.42(1); WASH. R. APP. P. 16.4(a)-(b). In Texas, confinement is broadly defined to include actual confinement and any collateral consequences resulting from the conviction that is the basis for the post-conviction petition. TEX. CODE CRIM. PROC. ANN. art. 11.07, §3(c) (Vernon 2008).

22 Depending on the jurisdiction, direct appeals may take several years or longer. *See, e.g.*, Commonwealth v. O'Berg, 880 A.2d 597, 602 (Pa. 2005) (noting "instances where a direct appeal took more than four years to be completed"); *see also Speedy Trial*, 35 GEO. L .J. ANN. REV. CRIM. PRO. 360 n.1210 (2006) (noting cases of appellate delay from two to thirteen years in length); Eve Bresnike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693 (2007) (noting that it takes four or five years in many jurisdictions for the appellate process to be completed).

23 In some states, to obtain collateral relief the defendant must be in custody at the time relief is granted. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9543(a)(1) (West 2007); ARK. R. CRIM. P. 37.1.

24 *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) (establishing the right to effective assistance of counsel on direct appeal).

25 *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.") (citation omitted); Murray v. Giarratano, 492 U.S. 1, 13 (1989) (plurality opinion) ("[T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases.").

26 *See* 1 WILKES, *supra* note 10, at § 1.5. In some states that authorize appointment of counsel, the appointment occurs only after the defendant has filed a pro se petition. *See, e.g.*, PA. R. CRIM. P. 904(C).

27 Coleman v. Thompson, 501 U.S. 722, 752 (1991); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam).

28 *See* 1 WILKES, *supra* note 10, at § 1.5; *see also* Celestine Richards McConville, *The Right*

The Article begins with a discussion of the right to effective assistance of counsel. Part I reviews Supreme Court decisions establishing that the right to counsel is the right to effective counsel, and that this right applies without regard to the defendant's length of imprisonment. This section also notes the Court's decisions extending the right to effective counsel to direct appeals. Part II explores the problems with presenting ineffectiveness claims on direct appeal, the development of state collateral proceedings, and the consequences of moving ineffectiveness claims from direct appeal to the collateral review process. Part III addresses the fact that a growing number of defendants are unable to assert challenges to the effectiveness of their counsel because many states make custody a condition for collateral review. The Article argues that when a state closes its appellate process to claims of ineffectiveness of trial counsel—either directly or indirectly by requiring appointed trial counsel to represent the defendant on direct appeal—it is a denial of due process and equal protection to deprive defendants who have already completed their sentences, while their direct appeal is pending, of access to the collateral review process in order to challenge the effectiveness of trial counsel. Part III further argues that it is similarly a denial of equal protection for states to prevent these defendants from challenging the effectiveness of direct–appeal counsel. Lastly, Part IV considers the issue of appointment of counsel and argues that when the collateral review process substitutes for direct appeal, an indigent defendant has a constitutional right to counsel in the collateral proceeding.

I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In *Powell v. Alabama*,[29] the first case in which the Supreme Court considered the issue of an indigent defendant's right to counsel, the Court recognized that the right to effective assistance of counsel was inseparable from the right to counsel.[30] In numerous post–*Powell* decisions, the Court explained that the right to effective counsel is rooted in the essential role counsel plays in assuring that the rights of the defendant are protected.[31]

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to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 WIS. L. REV. 31, 67–68 (arguing that when a state creates a statutory right to counsel in post–conviction proceedings, the Constitution compels counsel to provide effective assistance).

29 Powell v. Alabama, 287 U.S. 45 (1932).

30 *Id.* at 71. In *Powell*, the Court stated that when due process requires the state to provide counsel to an indigent, "that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id. See* Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that right to counsel violated when judicial action denied defendant's "right to have the effective assistance of counsel").

31 *See, e.g.*, United States v. Ash, 413 U.S. 300, 309 (1973); Argersinger v. Hamlin, 407 U.S.

Vigorous partisan advocacy is central to the proper functioning of the adversarial process in assuring a fair trial.[32] When counsel for the defendant fails to provide effective assistance, the prosecution's case is not subjected to "meaningful adversarial testing."[33] Because such a trial is not a "confrontation between adversaries,"[34] it "cannot be relied upon as having produced a just result."[35] For this reason, the Court has long recognized that the "right to counsel is the right to effective assistance of counsel."[36]

The right to effective assistance of counsel extends to the first appeal.[37] Like trial, direct appeal is an adversarial proceeding, and without a lawyer an appellant would not have a fair opportunity to establish that his conviction was unlawful.[38] A lawyer retained or appointed for appeal, like trial counsel,

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25, 31–32 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

32 United States v. Cronic, 466 U.S. 648, 656 (1984); Herring v. New York, 422 U.S. 853, 862 (1975).

33 *Cronic*, 466 U.S. at 656.

34 *Id.* at 657.

35 Strickland v. Washington, 466 U.S. 668, 686 (1984); *see also id.* at 685 ("[C]ounsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution.") (internal quotation omitted); *see also* Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (noting that if defendant does not receive effective assistance of counsel, "a serious risk of injustice infects the trial itself").

36 Kimmelman v. Morrison, 477 U.S. 365, 377 (1986); *see* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ."). In *Cronic*, the Court explained that the constitutional right to effective assistance of counsel is grounded in the language of the Sixth Amendment:

> The special value of the right to the assistance of counsel explains why "it has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence [sic]." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial . . . ." If no actual "Assistance" "for" the accused's "defence [sic]" is provided, then the constitutional guarantee has been violated.

Cronic, 466 U.S. at 654 (quoting first from *McMann*, 397 U.S. at 771 n.14, then from *Ash*, 413 U.S. at 309); *see Strickland*, 466 U.S. at 685 (stating that the fact "[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy" the Sixth Amendment).

37 Evitts v. Lucey, 469 U.S. 387, 396 (1985). In *Evitts*, privately retained counsel's failure to file a statement of appeal resulted in dismissal of direct appeal. In finding that the constitutional right to counsel and the concomitant right to effective counsel applied to retained counsel, the Court rejected the state's claim that the right to counsel on appeal was rooted exclusively in the Equal Protection Clause, concluding instead that due process had played a significant role in its prior appeal decisions. *Id.* at 404–05.

38 *Id.* at 396; *see* Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA.

must provide effective representation for the appellate proceeding to resolve appellant's claims fairly.[39] When counsel fails to provide effective representation, the appellant "is in no better position than one who has no counsel at all."[40]

The right to counsel at trial[41] and the concomitant right to effective counsel apply without regard to the length of the sentence of imprisonment imposed.[42] In every situation where a defendant enjoys a constitutional right to counsel at trial[43] and on appeal,[44] he or she is entitled to effective counsel[45]—regardless of whether counsel is retained by the defendant or appointed by the court.[46]

II. CHALLENGING THE EFFECTIVENESS OF TRIAL COUNSEL

A. *Direct Appeal*

Although there is no constitutional right to appeal a criminal conviction,[47]

L. REV. 1, 36 n.227.

39 *Evitts*, 469 U.S. at 396 (stating that a first appeal is "not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney").

40 *Id.*

41 A defendant has a Sixth Amendment right to counsel when charged with a felony, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), and, for a less serious charge, when a sentence of imprisonment is imposed. Scott v. Illinois, 440 U.S. 367, 374 (1979) (affirming Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) which held that "no indigent criminal defendant [can] be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense"); *see* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (noting that a suspended sentence may not be imposed unless the defendant was provided counsel).

42 *Argersinger*, 407 U.S. at 33 (deciding that defense counsel must be appointed in any criminal prosecution however classified "that actually leads to imprisonment even for a brief period").

43 *See supra* note 36; *see also* Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam) (linking right to effective counsel to underlying right to counsel).

44 Douglas v. California, 372 U.S. 353, 357–58 (1963).

45 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established a two-part performance and prejudice standard that governs claims of ineffectiveness of counsel. Under *Strickland*, a defendant is deprived of the right to effective assistance of counsel if counsel's representation is (1) deficient, meaning counsel's performance fell "below an objective standard of reasonableness", and (2) "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." The *Strickland* standard applies to claims of ineffectiveness of direct appeal counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000).

46 Cuyler v. Sullivan, 446 U.S. 335, 344–45 (1980).

47 *See, e.g.*, Goeke v. Branch, 514 U.S. 115, 120 (1995) (per curiam); Jones v. Barnes, 463 U.S. 745, 751 (1983); Ross v. Moffitt, 417 U.S. 600, 611 (1974); McKane v. Durston, 153 U.S. 684, 687 (1894); *see also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (acknowledging "that a State [sic] is not required by the Federal Constitution to provide appellate courts" but noting that "[a]ll of the States [sic] now provide some method of appeal from criminal convictions"). *But*

a first appeal as of right is guaranteed by statute or state constitutional provision in almost all jurisdictions.[48] Direct appeal provides a defendant an opportunity "to demonstrate that the conviction . . . is unlawful."[49] To insure that the appeal[50] is "adequate and effective,"[51] a defendant is entitled to certain "minimum safeguards,"[52] including the right to counsel.[53] Almost all jurisdictions permit an appeal to continue if the defendant completes his sentence during the pendency of the appeal if the defendant would suffer collateral consequences as a result of the conviction.[54] As a general rule, a defendant is required to raise on direct appeal all grounds for reversal,[55] and appellate review is limited to issues raised and considered by the trial

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see Jones v. Barnes, 463 U.S. 745, 757 n.1 (1983) (Brennan, J., dissenting) (questioning whether the Court would reaffirm prior holding that there is no constitutional right to appeal but noting "a case presenting this question is unlikely to arise . . . [because] a right of appeal is now universal for all significant criminal convictions"). For a discussion of a right to appeal, see David Rossman, *Were There No Appeal: The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 519–20 (1990); see also Daniel Givelber, *Gideon—A Generation Later: The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L .REV. 1393, 1396 n.22 (1999).

48 Thirty-five states and the District of Columbia provide for appeal as of right by statute. In eleven states, the right is guaranteed by constitution. *See* Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 946 n.12 (2002) (compiling appeal provisions in every jurisdiction); *see also* Appendix in Bundy v. Wilson, 815 F.2d 125, app. at 136–42 (1st Cir. 1987). In Virginia, West Virginia, and New Hampshire there is discretionary appellate review but no appeal as of right. *See* VA. CODE ANN. §17-1-405 (2003); W. VA. CODE ANN. §58-5-1(j) (LexisNexis 2005); N.H. SUP. CT. R. 7(1).

49 Evitts v. Lucey, 469 U.S. 387, 396 (1985); *see* SPECIAL COMM. ON STANDARDS FOR THE ADMIN. OF CRIMINAL JUSTICE, AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS § 1.2(a)(i) (1970) ("The structure of appellate courts should be consonant with the purposes of appellate review . . . [which is] [t]o protect defendants against prejudicial error in the proceedings leading to conviction . . . .").

50 In the majority of states, the appeal of right is available to all defendants without regard to the seriousness of the offense or the sentence imposed. *See e.g.*, ARIZ. CONST. art. II, § 24; IND. CONST. art. VII, § 6; KY. CONST. § 115; PA. CONST. art. V, § 9; FLA. STAT. ANN. §§ 924.05–06 (West 2001); MONT. CODE ANN. §46-20-104 (1979); VT. STAT. ANN. tit. 13, § 7401 (1998).

51 Griffin v. Illinois, 351 U.S. 12, 20 (1956).

52 *Evitts*, 469 U.S at 392.

53 Douglas v. California, 372 U.S. 353, 357 (1963).

54 *See, e.g.*, People v. Jordan, 608 N.E.2d 626, 628 (Ill. App. Ct. 1993); State v. Jones, 516 N.W.2d 545, 546 n.1 (Minn. 1994); State v. Patterson, 465 N.W.2d 743, 747 (Neb. 1991); Angle v. State, 942 P.2d 177, 180 n.1 (Nev. 1997); People v. DeLeo, 585 N.Y.S.2d 629, 630–31 (N.Y. App. Div. 1992); State v. Key, 388 N.W.2d 866, 868 (N.D. 1986); State v. Golston, 643 N.E.2d 109, 111 (Ohio 1994); State v. Raines, 922 P.2d 100, 101 (Wash. Ct. App. 1996). *But see* State v. Snowman, 698 A.2d 1057, 1058 (Me. 1997). In *Sibron v. New York*, the Supreme Court adopted a rule for federal courts that a criminal case is not mooted by completion of the sentence unless "it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57 (1968).

55 *See e.g.*, Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993), *abrogated by* Massaro v. United States, 538 U.S. 500 (2003).

court.[56] As a result, appellate courts generally decline to consider matters raised on appeal for the first time because the absence of a trial court opinion on the matter presents a "substantial impediment to meaningful and effective appellate review."[57]

Claims of ineffectiveness of trial counsel do not fit comfortably within the general model of appellate review without some restructuring.[58] Because it is unlikely that trial counsel will identify his own act or omission as ineffective assistance, the issue is rarely presented to the trial court.[59] When trial counsel represents the defendant on appeal,[60] it is equally unlikely that counsel will identify his own ineffectiveness as a basis for challenging the defendant's conviction on appeal.[61] The issue will often escape consideration by the trial and appellate court even when new counsel is appointed for the appellate process.[62] When the issue of trial counsel ineffectiveness is not record–based,[63] it is unlikely that new counsel will identify and present the issue to the trial court in a motion for new trial, which would provide a record of the claim that is reviewable on appeal.[64] In

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56 ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES §3.1 (2d ed. 1989).

57 Commonwealth v. Lord, 719 A.2d 306, 308 (Pa. 1998); *see Massaro*, 538 U.S. at 505–06.

58 States could structure direct appeal in a manner that allows for meaningful review of claims of ineffectiveness of trial counsel by requiring new post–trial counsel and allowing the trial record to be supplemented to support the claim of ineffectiveness. For an argument advocating such reform, see Primus *supra* note 22, at 706–21. *See also* Nancy J. King & Joseph L. Hoffmann, *Envisioning Post–Conviction Review for the Twenty–First Century*, 78 MISS. L.J. 433, 448 n.58 (2008). For proposed changes in one state's rules governing appointment of counsel and post–trial motion procedure to permit appellate review of claims of ineffectiveness of trial counsel, see Thomas M. Place, *Ineffectiveness of Counsel and Short–Term Sentences in Pennsylvania: A Claim in Search of a Remedy*, 17 TEMP. POL. & CIV. RTS. L. REV. 109 (2007); see also *infra* note 73 and accompanying text for discussion of remand by appellate courts to permit the trial court to make findings on claims of ineffectiveness of trial counsel.

59 *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 620 n.5 (2005).

60 *See, e.g.*, PA. R. CRIM. P. 122(b)(2) (appointment of trial counsel "effective until final judgment, including any proceedings upon direct appeal"); N.H. SUP. CT. R. 32(1) ("Whether retained by the defendant or appointed by a trial court, trial counsel in a criminal case shall be responsible for representing the defendant in the supreme court . . . .").

61 *See infra* note 9.

62 *See* Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on* Massaro v. United States, 42 BRANDEIS L.J. 793, 797 (2004).

63 In *Woods v. State*, the Indiana Supreme Court identified three kinds of ineffectiveness of trial counsel claims: (1) claims based on the trial record not requiring extrinsic proof; (2) claims involving counsel's performance "not visible at all on the trial record, or that require additional record development"; and (3) "hybrid" claims, namely claims that are based on the record "but whose evaluation requires a showing to rebut the presumption of counsel competence." Woods v. State, 701 N.E.2d 1208, 1211–12 (Ind. 1998); *see* Calene v. State, 846 P.2d 679, 684 (Wyo. 1993) (classifying ineffectiveness claims as either arising from events not controlled by counsel or involving decisions by counsel and noting that the basis for counsel's acts or omissions "will frequently not be documented in the trial record").

64 Some courts have held that appellate counsel is not ineffective in failing to uncover extra–record claims of trial counsel ineffectiveness. *See, e.g.*, Kitt v. Clarke, 931 F.2d 1246,

other cases, the appointment or retention of new counsel may occur after the time permitted to present an on-the-record claim of ineffectiveness to the trial court[65] in order to preserve the issue for appellate review has passed. Finally, the claim may be presented by new counsel for the first time on direct appeal "on a trial record not developed . . . for the object of litigating . . . the [ineffectiveness] claim . . . ."[66]

Because claims of "ineffective assistance of counsel elude[] once-and-for-all disposition,"[67] it is not surprising that courts have different approaches regarding when the claim should be raised and when failure to present the claim precludes its consideration in a later proceeding.[68] If the record is adequate to decide the matter, some states require new counsel to raise the claim on direct appeal or the claim is waived.[69] When ineffectiveness is raised for the first time on direct appeal and the record is incomplete, the appellate court in some states will remand the case to the

1249-50 (8th Cir. 1991); Wilson v. State, 565 N.E.2d 761, 764 (Ind. Ct. App. 1990); *see also* Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 38 (1994). Even if identified as an issue by new counsel, an appellate court may deny review of the ineffectiveness claim on the grounds that the issue was not raised and preserved at trial. *See* CHRISTOPHER H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 29.02(e) (5th ed. 2008); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 640 (4th ed. 2004) ("An ineffectiveness claim raised on appeal is limited to what the trial record reveals . . . ."). A claim not raised at trial may nonetheless be reviewed on appeal if it meets the jurisdiction's standard governing "plain error." *See, e.g.*, United States v. Dominguez-Benitez, 542 U.S. 74, 81-83 (2004); State v. Burns, 925 A.2d 1041, 1057-58 (N.J. 2007).

65 In most jurisdictions, a motion for a new trial must be filed within a brief time following imposition of sentence. *See e.g.*, FED. R.CRIM. P. 33(b)(2) (seven days); CONN. SUP. CT. R. § 42-54 (five days); FLA. R. CRIM P. 3.590(a)-(b) (ten days); KY. R. CRIM P. 10.06(1) (five days); MD. CODE ANN., MD. RULES § 4-331(a) (LexisNexis 2009) (ten days); N.M. R. CRIM. P. DIST CT. 5-614(C) (ten days); PA. R. CRIM. P. 720(A) (ten days).

66 Massaro v. United States, 538 U.S. 500, 506 (2003).

67 Guinan v. United States, 6 F.3d 468, 473 (7th Cir. 1993) (Easterbrook, J., concurring), *abrogated by* Massaro v. United States, 538 U.S. 500 (2003).

68 The collateral review process presents the first opportunity for the defendant to assert the ineffectiveness of appellate counsel. For a summary of the various approaches of when ineffectiveness of trial counsel claims should be raised, see LAFAVE, *supra* note 64, at 614-15.

69 *See, e.g.*, Garland v. State, 657 S.E.2d 842, 844 (Ga. 2008) (holding that new counsel must raise claim of ineffectiveness "at the earliest practicable moment to avoid it being deemed waived"); Leake v. State, 737 N.W.2d 531, 535 (Minn. 2007) ("When a claim of ineffectiveness of trial counsel can be adjudicated on the basis of the trial record, it must be brought on direct appeal or it is barred . . . if raised in a postconviction petition."); Torres v. State, 688 N.W.2d 569, 572 (Minn. 2004) (declining to adopt holding of *Massaro v. United States* and reaffirming prior case law that "all claims brought or known on direct appeal are barred from consideration in a collateral proceeding"); State v. Suggs, 613 N.W.2d 8, 11 (Neb. 2000) (barring post-conviction review "where different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record"); State v. Lawson, 583 S.E.2d 354, 361 (N.C. Ct. App. 2003) (finding that a post-conviction review of a claim of ineffectiveness is forfeited if the claim should have been brought on direct appeal).

trial court.[70] Other state appellate courts will defer such a case to a collateral proceeding.[71] In some states, the claim cannot be heard on appeal unless first presented to the trial court.[72] In a number of states, the defendant may elect whether to present the claim on direct appeal or in a post–conviction proceeding.[73] Increasingly, states have moved in the direction of deferring ineffectiveness claims to the post–conviction process,[74] following the

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70 *See, e.g.*, Rice v. State, 154 P.3d, 537, 541 (Kan. Ct. App. 2007) (finding that "to avoid the delay associated with a collateral proceeding" an ineffectiveness claim may be remanded to the trial court and the findings of the trial court are then utilized by the appellate court to review the claim on direct appeal); State v. Roybal, 54 P.3d 61, 67 (N.M. 2002) ("If facts necessary to a full determination [of the ineffectiveness claim] are not part of the record . . . an appellate court may remand a case for an evidentiary hearing . . . ."); State v. Litherland, 12 P.3d 92, 97–98 (Utah 2000) (citing UTAH R. APP. P. 23(B) which provides for remand to the trial court for a determination of the facts necessary for an appellate court determination of a claim of trial counsel ineffectiveness); *see also* Duncan v. Kerby, 851 P.2d 466, 468–69 (N.M. 1993) (acknowledging the option of remanding case to the trial court during appeal when the record is incomplete, but noting that the state's post–conviction procedure was procedure of choice in such a case).

71 *See, e.g.*, State v. Silva, 864 P.2d 583, 592–93 (Haw. 1993) (holding that "where record on appeal is insufficient to demonstrate ineffective assistance of counsel . . . appellate court may affirm defendant's conviction without prejudice" to a collateral proceeding); State v. Cook, 667 N.W.2d 201, 220 (Neb. 2003) (observing that if ineffectiveness claim "has not been raised or ruled on at the trial level and requires an evidentiary hearing," the issue will not be decided on direct appeal); State v. Stroud, 557 S.E.2d 544, 548 (N.C. Ct. App. 2001) (dismissing a claim of ineffectiveness without prejudice to collateral proceeding where appellate court is unable to decide claim on the face of the record); State v. Strutz, 606 N.W.2d 886, 894 (N.D. 2000) ("When the record on direct appeal is inadequate to determine whether the defendant received ineffective assistance, the defendant may pursue the ineffectiveness claim at a post–conviction proceeding . . . ."); Downs v. State, 244 S.W.3d 511, 515 (Tex. App. 2007) (holding that when the record is not sufficiently developed with respect to strategies of trial counsel, the appropriate remedy is a petition for collateral relief); *see also* State v. Dixon 593 A.2d 266, 285 (N.J. 1991).

72 *See* Robitaille v. State, 971 So. 2d 43, 69 (Ala. Crim. App. 2005) (observing that a defendant's failure to raise a claim of ineffectiveness in a motion for a new trial will preclude review of claim on direct appeal); Ratchford v. State, 159 S.W.3d 304, 309 (Ark. 2004) (noting the "well–settled rule" that an allegation of ineffectiveness must be raised in the trial court for the issue to be considered on direct appeal).

73 *See, e.g.*, State v. Yakovac, 180 P.3d 476, 482 (Idaho 2008) (observing that defendant has the choice of raising an ineffectiveness claim in a direct appeal or in a post–conviction proceeding "but once she has elected a remedy, she must bear the burden of that choice") (citation omitted); Jewell v. State, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post–conviction proceedings.").

74 *See* Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) (laying down general rule that claims of ineffectiveness of trial counsel will no longer be reviewed on direct appeal but instead deferred to the post–conviction process). Prior to *Grant*, a claim of ineffectiveness of prior counsel was waived unless raised "at the earliest stage of the proceedings at which counsel whose ineffectiveness is being challenged no longer represents the defendant." Commonwealth v. Hubbard, 372 A.2d 687, 695 n.6 (Pa. 1977), *overruled by* Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002). The *Hubbard* rule required new counsel on direct appeal

lead of a number of jurisdictions that generally preclude consideration of ineffectiveness claims on direct appeal.[75]

States have moved claims of ineffectiveness of trial counsel from direct appeal to the post-conviction process principally because the basis for the claim may not appear on the record even where new counsel is appointed or retained for direct appeal.[76] Claims of ineffectiveness based upon omissions by counsel frequently require fact-finding and, in many cases, an evidentiary hearing in which trial counsel has an opportunity to explain his strategy.[77] When the record reflects the act that the defendant alleges was the result of ineffectiveness, the record rarely contains the reasons for counsel's action.[78] Collateral review, it has been argued, provides an opportunity to develop a factual basis for a claim that counsel's performance at trial did not meet the standard for effective assistance of counsel.[79] Lastly, courts have deferred

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to raise a claim of ineffectiveness of trial counsel notwithstanding the fact that the claim had not been presented to the trial court. *Id.* *See also* Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003) ("In light of the considerations potentially involved in determining ineffective assistance [claims], defendants have regularly been discouraged from attempting to litigate their counsel's ineffectiveness on direct appeal."); People v. Kunze, 550 N.E.2d 284, 296 (Ill. App. Ct. 1990) (stating that resolution of claims of ineffectiveness are often better made in proceedings for post-conviction relief); State v. Vincent, 971 So. 2d 363, 374 (La. Ct. App. 2007) ("An ineffective assistance of counsel claim is most appropriately addressed through an application for post-conviction relief filed in the trial court. . . ."); Mosley v. State, 836 A.2d 678, 692 (Md. 2003) (concluding that the post-conviction proceeding is the most appropriate way to raise a claim of ineffectiveness); Commonwealth v. Zinser, 847 N.E.2d 1095, 1097 n.2 (Mass. 2006) ("[C]ase law strongly disfavors raising ineffectiveness claims on direct appeal."); *Duncan*, 851 P.2d at 469 (finding that habeas proceedings preferred to direct appeal for adjudicating ineffectiveness claims); *Stroud*, 557 S.E.2d at 548 (holding that the preferable forum for an ineffective assistance of counsel claim is collateral review); *Ex parte* White, 160 S.W.3d 46, 48 n.1 (Tex. Crim. App. 2004) (noting that ineffectiveness claims most effectively raised in habeas proceedings).

75 *See, e.g.*, State *ex rel.* Thomas v. Rayes, 153 P.3d 1040, 1044 (Ariz. 2007) (holding that ineffectiveness claim may be brought only in a post-conviction proceeding); State v. Spreitz, 39 P.3d 525, 526 (Ariz. 2002) (holding that ineffectiveness claims "will not be addressed by the appellate courts regardless of merit"); State v. Nichols, 698 A.2d 521, 522 (Me. 1997) ("Today we make clear that we will not consider a claim of the ineffective assistance of counsel on direct appeal . . . . "); Hall v. Commonwealth, 515 S.E.2d 343, 347 (Va. Ct. App. 1999) ("Claims of ineffective assistance of counsel may not be raised on direct appeal.").

76 *See e.g.*, Guinan v. United States, 6 F.3d 468, 471 (7th Cir. 1993).

77 *See e.g.*, State v. Preciose, 609 A.2d 1280, 1285 (N.J. 1992) (noting that ineffective assistance of counsel claims "involve allegations and evidence that lie outside the trial record"); *Duncan*, 851 P.2d at 468-69 ("[T]he record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel ineffectiveness [and] . . . [c]onsequently, an evidentiary hearing on the issue . . . may be necessary."); People v. Alvarado, 683 N.Y.S.2d 501, 502 (N.Y. App. Div. 1998) ("Defendant's ineffective assistance of counsel claim would require a [collateral] motion, since the claim is based upon facts *dehors* the record and counsel has had no opportunity to explain his strategy.").

78 *Guinan*, 6 F.3d at 473 (Easterbrook, J., concurring).

79 United States v. Cocivera, 104 F.3d 566, 570 (3d Cir. 1996).

ineffectiveness claims to collateral review to enable the trial court to make findings related to the performance of trial counsel and to assess the impact of counsel's acts or omissions on the trial.[80]

The United States Supreme Court found this reasoning persuasive in *Massaro v. United States*.[81] In *Massaro*, the Court resolved a dispute among the federal courts of appeals as to whether an ineffectiveness of trial counsel claim in a federal criminal case is waived if new counsel fails to raise the issue on direct appeal.[82] The Court held that a claim of ineffectiveness of trial counsel can be brought in a collateral proceeding "whether or not the petitioner could have raised the claim on direct appeal."[83] The Court concluded that a collateral proceeding is "preferable to direct appeal"[84] as the trial court is the "forum best suited"[85] "for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial."[86]

B. Collateral Review of Ineffectiveness Claims

States began adopting post–conviction procedures in the 1950s in response to the United States Supreme Court's decision in *Young v. Ragen*.[87] In *Young*, the Court held that because defendants must exhaust state court remedies prior to seeking federal *habeas corpus* relief, states must provide defendants "some clearly defined method by which they may raise claims of denial of federal rights."[88] In response to *Young*, some states broadened their writ of *habeas corpus* to permit defendants to present federal constitutional

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80 *See, e.g.*, United States v. Galloway, 56 F.3d 1239, 1240 (10th Cir. 1995); United States v. Mala, 7 F.3d 1058, 1063 (1st Cir. 1993); Commonwealth v. Grant, 813 A.2d 726, 736 (Pa. 2002).

81 Massaro v. United States, 538 U.S. 500 (2003).

82 In *Massaro*, new counsel on direct appeal failed to raise a claim of trial counsel ineffectiveness that was evident from the record. When the claim was later presented in a collateral proceeding, the district court concluded that the claim was procedurally defaulted. The Second Circuit affirmed the district court's holding that Massaro was procedurally barred from bringing the ineffectiveness claim on collateral review. *Id.* at 503.

83 *Id.* at 504. Noting that there may be cases in which an ineffectiveness claim can be resolved on direct appeal, the Court refused to adopt a rule that required ineffectiveness claims be deferred to the post–conviction process. *Id.* at 508.

84 *Id.* at 504. The Court stated that the problem with a procedural default rule is that it would require a defendant to raise the claim of ineffectiveness before "there has been an opportunity to fully develop the factual predicate for the claim." *Id.*

85 *Id.* at 505.

86 *Id.* at 506.

87 Young v. Ragen, 337 U.S. 235 (1949).

88 *Id.* at 239. The Court further noted that "[t]he doctrine of exhaustion of state remedies . . . presupposes that some adequate state remedy exists." *Id.* at 238–39.

challenges to their convictions.[89] Others expanded the writ of *coram nobis*.[90] A smaller number of states enacted post-conviction procedures that were influenced by the Uniform Post Conviction Act[91] and the ABA Standards Relating to Post-Conviction Remedies.[92]

In 1965, the Supreme Court returned to the issue of the absence of adequate state post-conviction remedies in *Case v. Nebraska*.[93] In *Case*, the Court granted certiorari to decide whether states had an obligation under the Fourteenth Amendment to establish an "adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."[94] The Court remanded the case following Nebraska's enactment of a statute providing a collateral procedure to hear and decide federal constitutional claims.[95] However, concurring opinions noted that the "great variations in the scope and availability of [state collateral proceedings remained] entirely inadequate,"[96] and urged states to adopt sufficiently broad procedures that were "swift... simple and easily invoked,"[97] and to eliminate "rigid and technical doctrines of forfeiture, waiver, or default."[98]

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89 *See, e.g.*, Sewell v. Lainson, 57 N.W.2d 556, 562–64 (Iowa 1953); Rice v. Davis, 366 S.W.2d 153, 156–57 (Ky. 1963); Huffman v. Alexander, 251 P.2d 87, 98, 107–08 (Or. 1952); *Ex Parte* Bush, 313 S.W.2d 287, 288–89 (Tex. Crim. App. 1958).

90 *See, e.g.*, State *ex rel.* McManamon v. Blackford Circuit Court, 95 N.E.2d 556, 559, 561 (Ind. 1950); People v. Monahan, 217 N.E.2d 664, 666 (N.Y. 1966); *see also* LARRY W. YACKLE, POST CONVICTION REMEDIES § 13 (1981); Richard B. Amandes, Coram Nobi-*Panacea or Carcinoma*, 7 HASTINGS L.J. 48 (1955); Edwin W. Briggs, "Coram Nobis"-*Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?*, 17 MONT. L. REV. 160, 165 (1956).

91 *See* UNIFORM POST-CONVICTION PROCEDURE ACT (1955) (superseded 1966, 1980); *see, e.g.*, MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301 (LexisNexis 2008); MINN. STAT. ANN. §§ 590.01 - .06 (West 2000); MONT. CODE. ANN. §§ 46-21-101 to -203 (2007); *see also* Daniel J. Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A. J. 928, 929–30 (1964) (noting increased federal habeas corpus review of state convictions and arguing that state post-conviction remedies should be broadened to allow for the collateral review of claimed violations of federal constitutional rights); Note, *The Uniform Post-Conviction Procedure Act*, 69 HARV. L. REV. 1289 (1956).

92 STANDARDS RELATING TO POST-CONVICTION REMEDIES (Approved Draft 1980 & Supp. 1986 2nd ed.); *see, e.g.*, Clark v. North Dakota, 593 N.W.2d 329, 332 n.10 (N.D. 1999) (observing that the North Dakota post-conviction statute was a codification of the 1980 Uniform Post-Conviction Procedure Act and noting the ABA Standards were "the impetus and the polestar" for the 1980 revisions to the Uniform Act) (citations omitted).

93 Case v. Nebraska, 381 U.S. 336, 336–37 (1965) (per curiam) (noting that prior to the enactment of a statute establishing a post-conviction procedure in Nebraska, habeas corpus petitions had been limited to questions of jurisdiction and judicial power).

94 *Id.* at 337.

95 *Id.*

96 *Id.* at 338 (Clark, J., concurring).

97 *Id.* at 346–47 (Brennan, J., concurring).

98 *Id.* at 347. For a discussion of one state's response to the Supreme Court's decisions

Although significant variations exist, by the 1970s most states had, by statute[99] or rule,[100] created post–conviction procedures to hear and decide federal constitutional challenges following direct appeal. Some states restrict the remedy to felonies.[101] Some strictly limit the time for filing a post–conviction petition,[102] while others impose no time limits.[103] Many states restrict successive petitions[104] and either limit the time for presenting claims of newly discovered evidence[105] or excuse such claims from filing periods.[106] While most states bar consideration of claims on collateral review that could have been raised on direct appeal,[107] as noted above, increasingly states are relaxing waiver for claims of ineffectiveness of trial counsel.[108] Of significance to this Article, twenty–four states

urging states to expand their post–conviction remedies, see Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968 (2005).

99 *See, e.g.*, CAL. PENAL CODE §§ 1473 – 1508 (West 2000); GA. CODE ANN. § 9–14–(c), §§ 9–14–40 to –53 (2006); IDAHO CODE ANN. §§ 19–4901 to –4911 (2004); MINN. STAT. ANN. §§ 590.01 –.05 (West 2000); NEB. REV. STAT. §§ 29–3001 to –3004 (2008); OHIO REV. CODE ANN. §§ 2953.21–.23 (LexisNexis 2002); 42 PA. CONS. STAT. ANN. §§ 9541–9546 (West 2007); TENN. CODE ANN. §§ 40–30–101 to –122 (2006); VA. CODE ANN. §§ 8.01–654 to –668 (2007); *see also* YACKLE, *supra* note 90, at 16–17, 41–44.

100 *See, e.g.*, ALA. R. CRIM. P. 32; ARK. R. CRIM. P. 37; DEL. SUPER. CT. R. CRIM. P. 61; FLA. R. CRIM. P. 3.850; KY. R. CRIM. P. 11.42; MICH. CT. R. 6.500; N.J. CT. R. 3.22; WASH. R. APP. P. 16.3–.15, 16.17, 16.22, 16.24–.27.

101 *See, e.g.*, WYO. STAT ANN. §7–14–101(b) (2009); MO. R. CRIM. P. 24.035, 29.15.

102 *See, e.g.*, ARIZ. R. CRIM. P. 32.4 (in non–capital cases, nintey days after entry of judgment and sentence or thirty days after issuance of final order by appellate court); ARK. R. CRIM. P. 37.2(c) (nintey days after entry of judgment or sixty days following decision of appellate court); OHIO REV. CODE ANN. § 2953.21(A)(2) (LexisNexis 2002 & Supp. 2009) (180 days after transcript filed in appellate court or 180 days after time for filing appeal); MO. R. CRIM. P. 24.035(b)(3) (ninety days after appellate court affirms judgment or sentence or 180 days if no appeal taken). In other states that have a statute of limitations, the periods range from one to ten years. *See* 1 WILKES, *supra* note 10, at § 1.6.

103 Thirteen states do not restrict the time in which a petition for relief may be filed. *See* 1 WILKES, *supra* note 10, at § 1.6.

104 *See, e.g.*, ALASKA STAT. § 12.72.020(a)(6) (2008); NEB. REV. STAT. § 29–3001 (2008); 42 PA. CON. STAT. ANN. § 9544(a)(3) (West 2007); COLO. R. CRIM. P. 35(c)(3)(VI); FLA. R. CRIM. P. 3.850(h).

105 *See, e.g.* 42 PA. CON. STAT. ANN. § 9545(b)(1)–(2) (West 2007) (requiring petition based upon newly discovered evidence to be filed within sixty days of the date the claim could have been presented).

106 *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/122–1(a)(2), (a–5) (West 2008); LA. CODE CRIM. PROC. ANN. art. 930.8(A) (2008); MISS. CODE. ANN. § 99–39–5(2) (West 2006); S.C. CODE ANN. § 17–27–45(C) (2003).

107 *See, e.g.*, IDAHO CODE ANN. § 19–4901(b) (2004); LA. CODE CRIM. PROC. ANN. art. 930.4(F) (2008); NEB. REV. STAT. § 29–3003 (2008); N.C. GEN. STAT. § 15A–2419(a) (2007); 42 PA. CON. STAT. ANN. § 9544(b) (West 2007); DEL. SUPER. CT. R. CRIM. PROC. 61(i)(3); FLA. R. CRIM. P. 3.850(h); *see also* State v. Upshaw, 153 P.3d 579, 587 (Mont. 2006) (noting that a record– based claim of ineffectiveness of trial counsel is waived if not raised on direct appeal).

108 *See supra* notes 70, 71.

require that a defendant be in custody at the time post-conviction relief is sought.[109] Some states further require that the petitioner be in custody at the time relief is granted.[110] Important differences also exist with respect to counsel. In contrast to direct appeal, states do not have an obligation under the Fourteenth Amendment to appoint counsel for post-conviction proceedings.[111] In twenty-two states and the District of Columbia, there is no right under state law to appointed counsel in non-capital post-conviction cases.[112] In a number of states that recognize a right to counsel, there is no right to effective assistance of post-conviction counsel.[113] In other states, the appointment of counsel is discretionary.[114]

III. A CONSTITUTIONAL RIGHT TO ACCESS TO COLLATERAL REVIEW TO CHALLENGE THE EFFECTIVENESS OF TRIAL AND APPELLATE COUNSEL

A. *Trial Counsel Ineffectiveness*

As noted, many states require a defendant to be in custody to be eligible for collateral review. Thus, when defendants serve their prison sentences while direct appeals are pending or before the collateral review process is final, deferring ineffectiveness claims to collateral review leaves these defendants without a remedy[115] to "vindicate their right to effective trial

109 *See supra* note 21.

110 *See, e.g.* 42 PA. CONS. STAT. ANN. § 9543(a) (West 2007); ARK. R. CRIM. P. 37.1(a); Bohanan II v. State, 985 S.W.2d 708, 710 (Ark. 1999) (holding that where petitioner is released from prison and placed on parole, post-conviction petition is moot); Commonwealth v. Ahlborn, 683 A.2d 632, 637 (Pa. Super. Ct. 1996) (en banc), *aff'd*, 687 A.2d 375 (Pa. 1997).

111 *See* YACKLE, *supra* note 90, at 519.

112 *See* 1 WILKES, *supra* note 10, at § 1.6.

113 *See, e.g.*, MONT. CODE ANN. § 46-21-105(2) (2007); Barnett v. State, 103 S.W.3d 765, 773 (Mo. 2003); Bejarano v. Warden, 929 P.2d 922, 925 (Nev. 1996); Miller v. Maass, 845 P.2d 933, 934 (Or. 1993); House v. State, 911 S.W.2d 705, 712 (Tenn. 1995); *see also* 1 WILKES, *supra* note 10, at § 1.6.

114 *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 1082 (West 2003); ALA. R. CRIM. P.32.7(c); State v. Peck, 865 P.2d 304, 306 (Mont. 1993); Johnson v. State, 705 N.W.2d 830, 836 (N.D. 2005); White v. Haines, 618 S.E.2d 423, 433 n.23 (W.Va. 2005).

115 The Superior Court of Pennsylvania sought to remedy this problem following the Pennsylvania Supreme Court's decision in *Commonwealth v. Grant* to generally defer claims of ineffectiveness of trial counsel to post-conviction review. *See* Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002). In a number of cases following *Grant*, the Superior Court recognized a "short sentence" exception to *Grant* based upon the requirement in Pennsylvania that the defendant be in custody to be eligible for post-conviction relief. Noting that "review delayed constitutes review denied," the exception allowed appellate review of a claim of trial counsel ineffectiveness when the defendant's short sentence would preclude collateral review of the claim. Commonwealth v. Salisbury, 823 A.2d 914, 916 n.1 (Pa. Super. Ct. 2003). The "short sentence" exception was rejected by the Pennsylvania Supreme Court in *Commonwealth v. O'Berg*. Commonwealth v. O'Berg, 880 A.2d 597, 598 (Pa. 2005). The court in *O'Berg* concluded that the exception would undermine the rationale of the rule to defer ineffectiveness

. . . counsel."[116] Even in states that review claims of ineffectiveness on direct appeal, if trial counsel's appointment requires the representation of the defendant on direct appeal,[117] a claim of ineffectiveness of trial counsel must be presented in a post–conviction proceeding, or it will be waived.[118] But again, in custody states, defendants who serve their prison sentences while appeal is pending are denied access to collateral review. When a post–conviction proceeding is the only procedure available to challenge the effectiveness of trial counsel, a requirement that a defendant be in custody to obtain first–tier merits review of the ineffectiveness claim violates due process and equal protection.

The argument that it is unconstitutional for a state to deprive a defendant who is no longer in custody of access to a post–conviction procedure to challenge the effectiveness of trial counsel when the claim cannot be reviewed on direct appeal rests primarily on the principles of fairness and equal treatment that govern direct appeal. As is true of direct appeal,[119] the Constitution does not require states to provide defendants with a collateral review process to correct convictions obtained in violation of federal law.[120] Nonetheless, when a state elects to establish a procedure to review convictions, it must "act in accord with the dictates of the Constitution . . . ."[121] Once a state creates appellate courts as part of a system for determining the guilt or innocence of the defendant, the procedures used by the state in deciding appeals "must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."[122] More specifically, due process requires the state "to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."[123] Equal protection prevents the state from denying a class of appellants "an

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claims to the post–conviction process and was too ambiguous to be administered fairly. *Id.* at 602.

116 Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

117 *See supra* note 8 and accompanying text.

118 *See* Place, *supra* note 58, at 113 (discussing how one state's courts have handled waiver of ineffectiveness of counsel claims).

119 *See supra* note 47 and accompanying text.

120 Pennsylvania v. Finley, 481 U.S. 551, 556–557 (1987) (noting that the Due Process Clause does not require states to appoint indigent defendants counsel in state post–conviction proceedings as "[s]tates have no obligation to provide this avenue of relief"). In *Finley*, the defendant's claims were reviewed on direct appeal. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (holding that *Finley* "should apply no differently in capital cases than in noncapital cases").

121 Evitts v. Lucey, 469 U.S. 387, 401 (1985). The Court further noted, "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." *Id.* at 400–01.

122 *Id.* at 393.

123 *Id.* at 405.

adequate opportunity"[124] to present their claims to the appellate court.

To ensure fairness and equality of treatment[125] in direct appeal, states must provide indigent appellants a transcript to make certain that the appeal is "adequate and effective."[126] Fair process and equality also obligate states to provide indigent appellants with counsel on direct appeal in order to ensure that "the one and only appeal"[127] as of right is more than a "meaningless ritual."[128] And recently, the Court noted the unfairness of denying counsel to indigent defendants seeking first-tier discretionary appellate review of guilty or *nolo contendere* pleas.[129] Finally, the constitutional protections that safeguard direct appeal also govern withdrawal procedures[130] by counsel mandated by *Douglas v. California* and guarantee the defendant the right to effective representation.[131]

The constitutional principles of fairness and equality that govern direct appeal also apply to collateral review when a state closes direct appeal to claims of ineffectiveness or when the state requires trial counsel to represent the defendant on direct appeal. In both situations, collateral review is a first-tier merits review and functions like a direct appeal in ensuring a defendant his due process right to an "adequate opportunity"[132]

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124 Ross v. Moffett, 417 U.S. 600, 616 (1974).

125 *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (observing that decisions concerning access to judicial processes "reflect both equal protection and due process concerns"); *see also Ross*, 417 U.S. at 608–09 (noting the role of both equal protection and due process in resolving issues of access to direct appeal).

126 Griffin v. Illinois, 351 U.S. 12, 20 (1956). In *Griffin*, the Court stated that "other methods of reporting trial proceedings could be used in some cases." *Id.*; *see also* Mayer v. City of Chicago, 404 U.S. 189, 193–95 (1971) (extending *Griffin* to an indigent appellant convicted of an ordinance violation punishable by a fine only); *M.L.B.*, 519 U.S. at 106 (finding unconstitutional a state requirement that conditioned appeal in termination of parental rights case on indigent parent's ability to pay record preparation fees).

127 Douglas v. California, 372 U.S. 353, 357 (1963). *But cf. Ross*, 417 U.S. at 618–19 (holding that there was no right to appointed counsel for discretionary appeal to a state's highest court or for certiorari petitions to the Court).

128 *Douglas*, 372 U.S. at 358.

129 Halbert v. Michigan, 545 U.S. 605, 619, 621 (2005) (noting the complicated issues often arising in guilty pleas and the fact that unrepresented defendants are ill–equipped "to navigat[e] the appellate process without a lawyer's assistance").

130 Anders v. California, 386 U.S. 738, 744 (1967) ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate . . . ."); Smith v. Robbins, 528 U.S. 259, 276, 279 (2000) (holding that *Anders* is "merely one method of satisfying the requirements of the Constitution for indigent criminal appeals" and finding that the California procedure "afford[s] indigents the adequate and effective appellate review that the Fourteenth Amendment requires"); McCoy v. Court of Appeals, 486 U.S. 429, 443 (1988) (stating that the Wisconsin withdrawal rule does not "burden[] an indigent defendant's right to effective representation on appeal or to due process on appeal").

131 Evitts v. Lucey, 469 U.S. 387, 396 (1985).

132 *Ross*, 417 U.S. at 616; *see* Murray v. Giarratano, 492 U.S. 1, 25–26 (Stevens, J., dissent-

to fairly present his ineffectiveness claims.[133] Simply put, closing collateral review to defendants who have completed their prison sentences denies defendants their right to obtain an adjudication of their ineffectiveness claims. Because claims of trial counsel ineffectiveness can be adjudicated on direct appeal,[134] it is fundamentally unfair to move the resolution of such claims to a collateral process and then close that process to defendants who complete their prison sentences while their direct appeal is pending. When collateral review constitutes the first and only opportunity to review claims of ineffectiveness of trial counsel, due process obligates states to provide "each defendant a fair opportunity to obtain an adjudication on the merits"[135] of his claims.[136]

Excluding defendants who have served their sentences from the only review process available to adjudicate ineffectiveness claims also violates the equal protection principle that a system of reviewing convictions be "free of unreasoned distinctions."[137] Once a state decides that the collateral review process, rather than direct appeal, is the forum to adjudicate claims of trial counsel ineffectiveness, it violates equal protection for that state to grant review to some defendants and to "entirely cut off"[138] others solely on the basis of the length of the prison sentence imposed. Because all

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ing) (noting that in Virginia the post-conviction proceedings "are key to meaningful appellate review" as they "may present the first opportunity" to raise the issue of prior counsel's ineffectiveness).

133 *See*, Dripps *supra* note 62, at 801. Professor Dripps argues that where, as in *Coleman v. Thompson*, 501 U.S. 722 (1991), an ineffectiveness claim cannot be reviewed on direct appeal, instead of seeing the post-conviction proceeding as serving the function of first appeal, "the post-conviction trial court should be analogized to the initial trial court" because most claims on appeal are first presented to the trial court. Dripps, *supra* note 62, at 801. It is the appeal from the denial of post-conviction relief "that constitutes, practically speaking, the first appeal from the rejection of an ineffectiveness claim." *Id.*

134 *See supra* notes 48–52 and accompanying text.

135 *Evitts*, 469 U.S. at 405.

136 In *Daniels v. United States*, the Court assumed the availability of a forum for a defendant to challenge the ineffectiveness of trial counsel. Daniels v. United States, 532 U.S. 374, 381–83 (2001). While the Court held that a defendant could not raise such a challenge in a motion pursuant to 28 U.S.C. §2255 when a state court conviction was used to enhance a federal sentence, the Court noted that "a defendant generally has ample opportunity to obtain constitutional review of a state conviction." *Id.* at 383. In a concurring opinion, Justice Scalia indicted that the "fundamental fairness inherent in 'due process'" suggests that states have an obligation to provide a forum for defendants to litigate ineffectiveness of trial counsel claims. *Id.* at 386–87 (Scalia, J., concurring); *see* Wright v. West, 505 U.S. 277, 298–99 (1992) (O'Connor, J., concurring) (explaining that due process requires that a defendant receive "a full and fair" review of federal constitutional claims on direct or collateral review); Boumediene v. Bush, 128 S. Ct. 2229, 2268 (2008) (noting the importance of a full and fair review to minimize the risk of an "erroneous deprivation of a liberty interest").

137 Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

138 Ross v. Moffitt, 417 U.S. 600, 612 ((1974) (citing Lane v. Brown, 372 U.S. 477, 481 (1963).

defendants sentenced to incarceration have a right to effective counsel at trial, it is an "unreasoned distinction[]"[139] for a state to deny collateral review to defendants who have completed their sentences.[140]

B. Appellate Counsel Ineffectiveness

Unlike claims of trial counsel ineffectiveness, a claim of ineffectiveness of direct appeal counsel must be presented in a state collateral proceeding.[141] While a state has no obligation to provide for collateral review,[142] once established, collateral review, like direct appeal, may not be structured in a manner that violates equal protection.[143] At a minimum, equal protection requires a state to afford defendants "an adequate opportunity to present [one's] claims fairly."[144] When a state closes collateral review to defendants who have completed their sentences of imprisonment, it deprives defendants of the only opportunity to present claims of ineffectiveness of direct appeal counsel. There is simply no basis for a state to distinguish between defendants claiming ineffectiveness of direct appeal counsel on the basis of the duration of imprisonment imposed. A defendant sentenced to a short term of imprisonment and a defendant with a longer sentence both have a right to an effective lawyer on direct appeal[145] because both will experience the multiple collateral consequences of a criminal conviction.[146] As such,

139 *Rinaldi*, 384 U.S. at 310.

140 Even if the defendant waives other asserted trial errors and immediately seeks collateral relief after his sentence is imposed, in some jurisdictions if the sentence is served before collateral review is completed, relief cannot be granted. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9543(a)(1)(i) (West 2007).

141 As a general rule, a defendant cannot seek federal habeas corpus review of a constitutional claim unless the claim is first presented to the state court. *See* 28 U.S.C. § 2254(b)(1) (2006); *see, e.g.*, Baldwin v. Reese, 541 U.S. 27, 29 (2004). Although exhaustion may be excused in the absence of a state remedy, a defendant must nonetheless be in custody to be eligible for habeas corpus relief. 28 U.S.C. § 2241(c)(1)-(3) (2006).

142 Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987).

143 Long v. District Court of Iowa, 385 U.S. 192, 194-95 (1966) (finding a violation of equal protection to deny transcript to an indigent in an appeal from denial of post-conviction relief); Lane v. Brown, 372 U.S. 477, 484 (1963) (stating that *Griffin* principle is not limited to "direct appeals . . . but extend[s] alike to state post conviction proceedings"); Smith v. Bennett, 365 U.S. 708, 713-14 (1961) (holding that requiring filing fee for indigents seeking state habeas corpus review violated the Equal Protection Clause).

144 United States v. MacCollom, 426 U.S. 317, 324 (1976) (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

145 Evitts v. Lucey, 469 U.S. 387, 409 (1985).

146 Daniels v. United States, 532 U.S. 374, 379-80 (2001) ("States impose a wide range of disabilities on those who have been convicted of crimes, even after their release.... Further, each of the 50 States has a statute authorizing enhanced sentences for recidivist offenders."); Baldwin v. New York, 399 U.S. 66, 73 (1970) ("[I]mprisonment for however short a time . . . may well result in quite serious repercussions affecting . . . [one's] career and . . . reputation."); Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) ("The practical effects of conviction of even

equal protection requires that collateral review be open to defendants without regard to the length of imprisonment imposed so that they may "vindicate their right to effective . . . counsel."[147]

IV. RIGHT TO COUNSEL IN COLLATERAL PROCEEDINGS

Without a right to appointed counsel, simply opening collateral review to defendants who have served their sentences will not provide indigent defendants an "adequate opportunity"[148] to challenge the effectiveness of prior counsel. Even if an unrepresented defendant is not incarcerated, it is unlikely he can effectively interview prior counsel and otherwise investigate decisions made by counsel, which constitute the minimum actions necessary to establish an ineffectiveness of counsel claim.[149] In several cases prior to *Massaro* and before the recent movement among states to defer ineffectiveness claims to the collateral process, the Court held that indigent defendants do not have a constitutional right to appointed counsel when challenging their conviction in a collateral proceeding. In *Pennsylvania v. Finley*,[150] the Court concluded that "fundamental fairness" does not require the appointment of counsel because "collateral attack . . . normally occurs only after the defendant has failed to secure relief through direct review of his conviction."[151] The equal protection guarantee of "meaningful access"[152] was not violated because by the time Finley sought collateral relief, she had been represented on direct appeal. The *Finley* Court held that its conclusion in *Ross v. Moffitt*, that a defendant's access to appellate briefs and opinions "provided sufficient tools"[153] for an unrepresented defendant to gain meaningful access to discretionary review, applied to post–conviction review.[154]

In holding that *Finley* applied no differently in capital cases than in non–capital cases, the plurality in *Murray v. Giarratano*[155] again noted the

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petty offenses . . . are not to be minimized.").

147 Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

148 Ross v. Moffitt, 417 U.S. 600, 616 (1974).

149 *See* Dripps *supra* note 62, at 799; *see also* Halbert v. Michigan, 545 U.S. 605, 621 (2005) (noting that navigating the legal process is "well beyond the competence" of many defendants who have "little education, learning disabilities, and mental impairments").

150 Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (holding that procedures governing withdrawal by direct appeal counsel do not apply to post–conviction counsel).

151 *Id.* at 557.

152 *Ross*, 417 U.S. at 611.

153 *Finley*, 481 U.S. at 557.

154 In supporting this position, the Court said, "[S]ince a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.* at 555.

155 Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion).

relationship between direct appeal and collateral review.[156] "State collateral proceedings . . . serve a different and more limited purpose than the trial or appeal."[157]

The Court returned to the issue of counsel in state collateral proceedings in *Coleman v. Thompson*.[158] In *Coleman*, under Virginia law, claims of ineffectiveness of trial and direct appeal counsel could be brought only in a state collateral proceeding.[159] When collateral relief was denied after an evidentiary hearing at which the defendant was represented by state-appointed counsel, counsel failed to file a timely appeal to the Virginia Supreme Court.[160] In a subsequent federal habeas corpus action, the district court and Fourth Circuit found that the claims raised in the state collateral proceeding were procedurally defaulted when Coleman failed to appeal the denial of state collateral relief.[161] In affirming the denial of habeas corpus relief, the Court held that the error committed by collateral review appellate counsel did not constitute cause to excuse the procedural default[162] because Coleman did not have a constitutional right to counsel on appeal from the denial of state collateral relief.[163] The Court left open whether "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."[164] The Court concluded that it was not required to answer the question because Coleman's federal constitutional claims were addressed in the trial court collateral proceeding, and the "effectiveness of Coleman's counsel before that court [was] not at issue."[165] Because the collateral proceeding in which Coleman was

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156 *Id.* at 9. The plurality referred to *Barefoot v. Estelle* in which the Court noted that "direct appeal is the primary avenue for a review of a conviction or sentence." Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

157 *Murray*, 492 U.S. at 10; *see* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089 (2006) (arguing that "*Giarratano* did not decide that there is no right to counsel in state [collateral] proceedings in capital cases," but only rejected the claim on the facts and record before the Court).

158 Coleman v. Thompson, 501 U.S. 722, 755 (1991).

159 *Id.* at 755.

160 *Id.* at 727.

161 *Id.* at 728.

162 In *Murray v. Carrier*, the Court held that lawyer error did not constitute cause for excusing a procedural default unless the lawyer was "constitutionally ineffective under the standard established in *Strickland v. Washington*." Murray v. Carrier, 477 U.S. 478, 488 (1986); *see* Strickland v. Washington, 466 U.S. 668, 687 (1984). The *Strickland* standard applies only in proceedings where there is a constitutional right to counsel. *See* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam).

163 *Coleman*, 501 U.S. at 757.

164 *Id.* at 755.

165 *Id.*

represented served as Coleman's "one and only appeal"[166] for claims of trial error and ineffectiveness of trial and appellate counsel, Coleman had not been denied "an adequate opportunity to present his claims."[167]

The Court's rationale for not finding a right to counsel in *Finley* and *Giarratano* and the *Coleman* Court's decision not to rule on whether there must be an exception to *Finley* and *Giarratano*, argue for a right to appointed counsel when state collateral review is the first opportunity for a defendant to challenge the effectiveness of prior counsel. The Court's case law on when an indigent defendant has a right to appointed counsel on appeal supports this argument. In a first appeal as of right, *Douglas v. California*[168] holds that the "equality demanded by the Fourteenth Amendment"[169] requires states to appoint counsel to represent indigent defendants.[170] In its ruling, the Court emphasized that at issue was the "merits of the *one and only appeal* an indigent has as of right."[171]

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166 *Id.* at 756.

167 *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974). Some decisions post-*Coleman* fail to acknowledge the question left open in that case. *See, e.g.*, *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425–26 (6th Cir. 2003); *Henderson v. Sargent*, 926 F.2d 706, 710 n.6 (8th Cir. 1991), *reh'g granted and amended by* 939 F.2d 586 (8th Cir. 1991), *reh'g denied by* 1991 U.S. App. LEXIS 19766 (8th Cir. 1991) (unpublished opinion), *stay denied by* 502 U.S. 977 (1991); *Johnson v. Singletary*, 938 F.2d 1166, 1175 (11th Cir. 1991). Other decisions reject the claim that collateral counsel's ineffectiveness can serve as cause under a *Coleman* exception. *See, e.g.*, *Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996); *Gibson v. Turpin*, 513 S.E.2d 186, 191 (Ga. 1999). Decisions also recognize the open issue but find that circuit precedent precludes consideration of the issue. *See, e.g.*, *Martinez v. Johnson*, 255 F.3d 229, 240 (5th Cir. 2001). Finally, other decisions conclude that *Coleman* bars a right to counsel until the Court determines otherwise. *See, e.g.*, *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) ("As an inferior appellate court, we are not at liberty to disregard [*Coleman* as] controlling authority.").

168 Douglas v. California, 372 U.S. 353 (1963).

169 *Id.* at 358.

170 *Id.* at 357. Under the California Rules of Criminal Procedure the intermediate appellate court appointed counsel for an indigent after the court investigated the record and determined that counsel would be useful to the defendant or the court. The reviewing court was "forced to prejudge the merits" of indigent defendant appeals, while it determined the merits of other defendant's appeals "only after having the full benefit of written briefs and oral argument by counsel." *Id.* at 356. The Court left open whether California would be required to provide counsel for an indigent seeking discretionary review. *Id.*

171 *Id.* at 357 (emphasis added). *Douglas* was preceded by *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion). *Griffin* addressed the requirement in Illinois that defendants needed a transcript of the trial in order obtain adequate appellate review of their conviction. Defendants claimed that they were too poor to purchase a transcript and that the state's refusal to make the transcript available violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 15. The Court held a state could not grant appellate review in such a manner that "discriminates against some convicted defendants on account of their poverty." *Id.* at 18. *See* Mayer v. City of Chicago, 404 U.S. 189, 198 (1971) (holding that *Griffin* prevented the state from denying an indigent appellant, convicted of ordinance violations punishable only by a fine, a record of the trial to permit consideration of his claims by the appellate court).

In *Ross v. Moffitt*,[172] the Court held that neither due process nor equal protection required the state to appoint counsel for indigent defendants seeking discretionary review before North Carolina's highest court.[173] In concluding that the defendant had not been denied "meaningful access"[174] to discretionary review, the Court noted that the defendant had counsel on direct appeal as of right and, consequently, would have access to the transcript of the trial, the brief his lawyer had submitted to the direct appeal court, and the opinion, if any, of that court.[175] These materials would provide the discretionary court an "adequate basis... to grant or deny review."[176] As a result, "the indigent defendant [had] an adequate opportunity to present his claims"[177] to the discretionary appellate court.

The state's obligation under the Fourteenth Amendment to appoint appellate counsel for indigents was recently considered by the Court in *Halbert v. Michigan*.[178] Following an amendment to the Michigan constitution making the first appeal by a defendant who pleads guilty discretionary,[179] Halbert challenged the subsequent decision by the Michigan courts not to appoint counsel for such a defendant.[180] In holding that due process and equal protection require the appointment of counsel for defendants convicted on guilty pleas who seek review in Michigan's intermediate appellate court, the Court concluded that two factors persuaded it that Halbert's case was controlled by *Douglas*[181] rather than *Ross v. Moffitt*.[182] First, in contrast to *Ross*, Michigan's intermediate appellate court examined the

172 *Ross*, 417 U.S. 600 (1974).

173 *Id.* at 616.

174 *Id.* at 611.

175 *Id.* at 614–15.

176 *Id.* at 615. In contrast to *Douglas*, the Court noted that discretionary review was governed by factors other than the correctness of the decision of the intermediate appellate court. *Id.* at 613. Cases could be selected for review if "[t]he subject matter of the appeal has significant public interest," or "involves legal principles of major significance," or if the decision below is "likely to be in conflict with a decision of the Supreme Court." *Id.* at 614.; *see* N.C. GEN. STAT. § 7A-31 (1969).

177 *Ross*, 417 U.S. at 616. *Ross* also considered whether the state was obligated to appoint counsel for defendants seeking review of their convictions in the United States Supreme Court. *Id.* at 616–17. The Court held that the reasons it concluded the defendant had not been denied an adequate opportunity to present his claims to the discretionary court were "equally relevant" as to why the state did not have a constitutional obligation to appoint counsel for a defendant petitioning the Court for review. *Id.* at 617–18.

178 Halbert v. Michigan, 545 U.S. 605 (2005).

179 *See id.* at 612 (showing that when a defendant was found guilty at trial, Michigan law provided for direct appeal as of right).

180 *Id.* at 609; *see also* People v. Harris, 681 N.W.2d 653, 653 (Mich. 2004), *abrogated by Halbert*, 545 U.S. 605; People v. Bulger, 614 N.W.2d 103, 108, 114–15 (Mich. 2000), *abrogated by Halbert*, 545 U.S. 605.

181 Douglas v. California, 372 U.S. 353 (1963).

182 *Halbert*, 545 U.S. at 606; Ross v. Moffitt, 417 U.S. 600 (1974).

merits of the claims presented in the application for discretionary review and not the general importance of the issues presented in the appeal.[183] Second, the intermediate court's ruling "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive."[184] Unlike a defendant who has counsel on direct appeal, an unrepresented, plea–convicted defendant seeking "first–tier"[185] review will not have the benefit of a brief prepared by a lawyer or an opinion by a reviewing court. Finally, the Court noted that appealing a case "without a lawyer's assistance is a perilous endeavor for a layperson"[186] and beyond the abilities of many defendants who have little education and who may be further limited by learning and mental impairments.[187]

The reasoning of the Court in *Douglas*, *Ross*, and *Halbert* supports a due process and equal protection right to counsel when a state collateral proceeding is the only opportunity to challenge the effectiveness of trial or appellate counsel. As in *Douglas*, the collateral proceeding is the "*one and only appeal*"[188] available to a defendant when direct appeal is closed to claims of ineffectiveness of trial counsel or when trial counsel is obligated to represent the defendant on direct appeal.[189] The collateral proceeding is also the only "appeal" for claims of ineffectiveness of direct appeal counsel. Without counsel in the collateral proceeding, indigent defendants are "denied meaningful access"[190] to the only forum available to challenge the ineffectiveness of prior counsel because of their poverty.[191] Unlike discretionary appeal, defendants seeking collateral review do not have access to a brief prepared by a lawyer or an opinion of a court that ruled on the claim. Like the discretionary review at issue in *Halbert*, collateral review of claims of ineffectiveness of trial or direct appeal counsel constitute "first–tier review."[192] When collateral review substitutes for appeal as of right and is the only opportunity to present ineffectiveness claims, the fairness and equality demanded by the Fourteenth Amendment require the state to appoint counsel for indigent defendants.

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183 *Halbert*, 545 U.S. at 606–07.

184 *Id.* at 607.

185 *Id.* at 606.

186 *Id.* at 621.

187 *Id.*

188 Douglas v. California, 372 U.S. 353, 357 (1963) (emphasis added).

189 *See* Freedman, *supra* note 157, at 1094 n.82; *see also* Mackall v. Angelone, 131 F.3d 442, 452 (4th Cir. 1997) (Butzner, J., dissenting) (stating that when a state declines to review ineffectiveness claims on direct appeal, the indigent defendant is entitled to counsel because the collateral proceeding is "the only forum available" to the defendant to challenge the effectiveness of prior counsel).

190 Ross v. Moffitt, 417 U.S. 600, 615 (1974).

191 *Halbert*, 545 U.S. at 624 n.8.

192 *Id.* at 606.

The Court's due process case law also entitles an indigent defendant to appointed counsel when a collateral proceeding is the only opportunity to challenge the effectiveness of prior counsel.[193] Like direct appeal, state post-conviction proceedings are subject to due process protections.[194] As the Court has noted, the "ordinary mechanism"[195] for determining what procedures are required to ensure that liberty is not deprived without due process of law is the balancing test set out in *Mathews v. Eldridge*.[196]

In determining whether a due process violation exists, a critical aspect of the *Mathews* inquiry is the "fairness and reliability of the existing . . . procedures"[197] balanced against the "probable value, if any, of additional procedural safeguards."[198] Under this test, the due process implications of denying indigents counsel is plain: without the assistance of counsel and without the "tools"[199] a *pro se* litigant has following direct appeal, an indigent defendant, even one not incarcerated, is denied meaningful access to the post-conviction process. Moreover, as the Court observed in *Halbert*, indigent defendants are "particularly handicapped"[200] by lack of education, learning disabilities and mental impairments to act as "self-representatives."[201] That the majority of states appoint counsel in collateral proceedings in non-capital cases[202] and thirty-three states provide counsel in capital cases[203] demonstrates that assistance of counsel is a necessary

193 *See id.*

194 Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (finding that the procedures followed by defendant's post-conviction counsel "fully comported with fundamental fairness ... mandated by the Due Process Clause").

195 Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004) (plurality opinion) (determining what process is due citizen-detainee seeking to challenge his classification as enemy combatant).

196 Mathews v. Elridge, 424 U.S. 319, 335 (1976); *see* Lassiter v. Dep't. of Soc. Serv., 452 U.S. 18, 26-27 (1981) (using *Mathews* balancing test and concluding that counsel need not be appointed in every parental termination case but recognizing that in a given case fundamental fairness may require the appointment of counsel).

197 *Mathews*, 424 U.S. at 343.

198 *Id.*

199 *Finley*, 481 U.S. at 557 (noting that because Finley had been represented on direct appeal, she would have "sufficient tools" in the form of the trial record, appellate briefs and opinions to gain meaningful access to post-conviction review).

200 Halbert v. Michigan, 545 U.S. 605, 607 (2005).

201 *Id.*

202 1 WILKES, *supra* note 10, at § 1.5.

203 *See* ARK. CODE ANN. § 16-19-202(a)(1)(A)(I) (2006); CAL. GOV'T CODE § 27706 (West 1998); FLA STAT. ANN. § 27.702 (West 2009); 725 ILL. COMP. STAT. ANN. 5/122-2.1 (West 2008); IND. CODE ANN. § 33-40-1-2(a) (LexisNexis 2004); KAN. STAT. ANN. § 22-4506(d)(1)(C)(2) (2007); KY. REV. STAT. ANN. § 31.110(2)(c) (West 2006); LA. REV. STAT. ANN, § 15:149.1 (2005); MD. CODE ANN., CRIM. PROC. § 7-108(a) (LexisNexis 2008); MISS. CODE ANN. § 99-39-23(9) (West 2006); MONT. CODE ANN. § 46-21-201(3)(b)(I) (2007); NEB. REV. STAT. ANN. § 23-3402(1) (2007); NEV. REV. STAT. § 3-34.820 (2005); N.J. STAT. ANN. § 2A:158A-5 (West Supp. 2009); N.M. STAT. ANN. § 31-16-3 (LexisNexis 1984); N.C. GEN. STAT. § 7A-451(c) (2007); OHIO REV. CODE. ANN. § 2953.21(I)(1) (LexisNexis 2009); OKLA. STAT. ANN. tit. 22, § 1355.6 (West 2003);

"additional . . . procedural safeguard"[204] to ensure that the one and only proceeding to challenge the effectiveness of prior counsel is fundamentally fair.

CONCLUSION

A defendant has a constitutional right to effective assistance of trial and direct appeal counsel without regard to the length of imprisonment imposed. If a state chooses to defer claims of ineffectiveness of trial counsel to the post-conviction process or, as a condition of appointment, requires trial counsel to represent the defendant on direct appeal, the state violates fairness and equality mandated by the Fourteenth Amendment if it closes the post-conviction process to defendants who complete their prison sentence while direct appeal is pending. Limiting the post-conviction remedy only to defendants who are in custody is also unconstitutional because it denies defendants who have completed their prison sentence access to the only forum in which they can challenge the effectiveness of direct appeal counsel. Simply put, the right to effective trial and direct appeal counsel is of "no value"[205] if a state denies access to the only procedure to enforce the right. When the post-conviction process serves as the "one and only appeal"[206] for claims of ineffectiveness of trial and direct appeal counsel, fairness and equality require the state to appoint counsel for indigent defendants.

OR. REV. STAT. § 138.590 (2007); S.C. CODE ANN. § 17-27-160(B) (2003); S.D. CODIFIED LAWS § 21-27-4 (1987); UTAH CODE ANN. § 78-35a-202(2)(a) (2002); VA. CODE ANN. § 19.2-163.7 (2004); TEX. CODE CRIM. PROC. CODE ANN. art. 11.071(2) (Vernon 2005); WYO. STAT. ANN. § 7-6-104(c)(ii) (2009); ARIZ. R. CRIM. P. 32.4; IDAHO CRIM. R. 44.2; MO. R. CRIM. P. 24.036(a); PA. R. CRIM P. 904(G)(1); TENN SUP. CT. R. 13(d)(1)(D); WASH. R. APP. P. 16.25.

204 Mathews v. Elridge, 424 U.S. 319, 335 (1976).

205 Weeks v. United States, 232 U.S. 383, 393 (1914).

206 Coleman v. Thompson, 501 U.S. 722, 756 (1991) (quoting Douglas v. California, 372, U.S. 353, 357 (1963)).