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## Toward a Right to Litigate Ineffective Assistance of Counsel

Ty Alper

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# Toward a Right to Litigate Ineffective Assistance of Counsel

Ty Alper\*

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## *I. Introduction*

The Supreme Court did not acknowledge the impending fiftieth anniversary of *Gideon v. Wainwright*<sup>1</sup> when it cited the case last Term in *Martinez v. Ryan*.<sup>2</sup> But the Court did speak glowingly of the right enshrined by the landmark case. The right to the effective assistance of counsel at trial “is a bedrock principle in our justice system,” the Court explained;<sup>3</sup> indeed, the

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\* Clinical Professor of Law, U.C. Berkeley School of Law. I am grateful for thoughtful feedback on earlier drafts from the editors of the *Washington and Lee Law Review*, Eric Freedman, Paula Harms, Chris Lasch, Andrea Roth, Bidish Sarma, Elisabeth Semel, Giovanna Shay, Tamar Todd, Amanda Tyler, and Chuck Weisselberg. Many thanks to Rebecca Popuch for outstanding research assistance. I am indebted to J.D. King for his insightful comments on this footnote.

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

3. *Id.* at 1312.

Court continued, “the right to counsel is the foundation for our adversary system.”<sup>4</sup>

What to do, then, when a defendant is afforded an attorney at trial but the attorney is not effective?<sup>5</sup> Specifically, what is the appropriate mechanism for vindicating the right to effective counsel, especially for the vast majority of criminal defendants convicted of noncapital crimes, whose ability to secure postconviction counsel is effectively nil? In other words, how does a criminal defendant remedy the deprivation of a right that he cannot raise procedurally until he is no longer constitutionally entitled to an attorney? The Court did not use *Martinez* as a vehicle to resolve this critical issue, but its surprising ruling in the case, coupled with its ruling during the same Term in *Maples v. Thomas*,<sup>6</sup> provides some indication of where this complicated area of law may be headed.

*Martinez* was a sleeper case that did not register so much as a blip in the popular press at the time it was decided.<sup>7</sup> Even in the legal media and academic circles, the decision did not initially stand out.<sup>8</sup> Justice Kennedy, who wrote the opinion for the Court,

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4. *Id.* at 1317.

5. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (noting that appointed counsel must provide “effective and substantial aid”).

6. *Maples v. Thomas*, 132 S. Ct. 912 (2012).

7. A Lexis-Nexis search for news articles referencing *Martinez* written in the month following the decision produced only one article in the mainstream press. The article, printed in the *Houston Chronicle*, mentions *Martinez* in conjunction with the case of Texas death row inmate Robert Gene Will II, who has thus far been denied the opportunity to pursue federal habeas corpus relief despite significant evidence suggesting his actual innocence. Mike Tolson, *Death Row—Bid to Spare Life Gains Traction*, HOUSTON CHRON., Apr. 2, 2012, at A1, available at <http://www.chron.com/news/houston-texas/article/Death-row-inmate-s-effort-to-spare-live-gains-3450225.php>.

8. A search of legal journals and blogs in the immediate wake of the *Martinez* ruling produced very few discussions of the opinion. See Douglas A. Berman, *Via Narrow 7–2 Ruling for Defendant, SCOTUS Dodges Sixth Amendment Issue in Martinez v. Ryan*, SENTENCING L. AND POL’Y (Mar. 20, 2012, 10:30 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2012/03/via-narrow-7-2-ruling-for-defendant-scotus-dodges-sixth-amendment-issue-in-martinez-v-ryan.html](http://sentencing.typepad.com/sentencing_law_and_policy/2012/03/via-narrow-7-2-ruling-for-defendant-scotus-dodges-sixth-amendment-issue-in-martinez-v-ryan.html) (last visited Apr. 2, 2013) (noting that, in narrowly tailoring its decision, the Court in *Martinez* avoids addressing larger issues regarding a prisoner’s Sixth Amendment right to counsel) (on file with the Washington and Lee Law Review); Nancy King, *Court Surprises in Martinez v. Ryan*, HABEASBOOK.COM, (Mar. 20, 2012), <http://www.habeasbook.com/2012/03/court->

could hardly have presented the issue in the case more dispassionately: “[W]hether a federal habeas court may excuse a procedural default of an ineffective assistance [of counsel] claim when the claim was not properly presented in state court due to an attorney’s error in an initial-review collateral proceeding.”<sup>9</sup> The matter-of-fact recitation of the procedural complexities, however, undersold what is perhaps one of the most enduringly challenging aspects of applying *Gideon*: how to actualize *Gideon*’s guarantee when most criminal defendants are stymied in their efforts to claim that their trial lawyers were ineffective.

Despite the initially muted reaction to the *Martinez* decision, there are at least two indications of its importance. First, the opinion has now spawned voluminous commentary<sup>10</sup> and

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drops-a-bombshell-in-martinez/ (last visited Apr. 2, 2013) (asserting that the *Martinez* Court introduced an unusual standard—that federal review of an ineffective assistance of counsel claim is warranted only when the claim is “substantial” and “has some merit”—without laying out how a prisoner could satisfy the standard) (on file with the Washington and Lee Law Review); Steve Vladeck, *Opinion Analysis: A New Remedy, But No Right*, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), <http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/> (last visited Apr. 2, 2013) (noting that, in *Martinez*, the Court did not directly address whether prisoners are constitutionally entitled to effective assistance of postconviction counsel) (on file with the Washington and Lee Law Review). Prior to the rulings in *Martinez* and *Maples*, Lee Kovarsky published a blog post suggesting the Court may use the cases to “deliver a watershed in criminal procedure” but one that would remain “largely unnoticed outside an enclave of highly-specialized habeas lawyers.” Lee Kovarsky, *Maples and Martinez: Gideon for State Post-Conviction Review*, PRAWFSBLAWG (Oct. 2, 2011, 1:16 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/10/maples-v-thomas-and-martinez-v-ryan-gideon-in-the-state-post-conviction-era.html> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review). The Court did not, as Kovarsky thought it might, choose to “constitutionalize a slice of state post-conviction review,” but he was prescient to highlight the importance of the cases. *Id.* He also noted that the potential importance of *Martinez* was not lost on government lawyers; twenty-four states and the federal government signed briefs urging the Court in *Martinez* not to create a constitutional right to postconviction counsel. *Id.*

9. *Martinez v. Ryan*, 132 S. Ct. 1309, 1313 (2012).

10. *E.g.*, Eric Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. (forthcoming 2013) [hereinafter Freedman, *Enforcing the ABA Guidelines*]; Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. (forthcoming 2013); Nancy King, *Preview: A Preliminary Survey of Issues Raised by Martinez v. Ryan*, in LAFAVE, ISRAEL, KING & KERR, CRIMINAL PROCEDURE (3d ed. Supp. 2012–2013) (2012), available at [http://ssrn.com/abstract\\_id=2147164](http://ssrn.com/abstract_id=2147164); Lawrence Kornreich & Alexander I. Platt, *The Temptation of Martinez v. Ryan: Legal*

extensive litigation.<sup>11</sup> Indeed, the Supreme Court will soon decide its first post-*Martinez* case.<sup>12</sup> Second, the sarcasm and bitterness that pervades Justice Scalia's dissent appears to reflect the significance that at least he attached to the lasting effect, or potential for future expansion, of the majority opinion. Here, the dissent's opening words are the giveaway: "Let me get this straight."<sup>13</sup>

To back up and provide some context, *Gideon* held that the Sixth Amendment requires states to provide counsel to indigent criminal defendants at trial.<sup>14</sup> The complete failure to provide counsel is an issue that can be raised on direct appeal in an individual case (as Clarence Earl Gideon did), or perhaps through a federal civil rights lawsuit.<sup>15</sup> With respect to classes of

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*Ethics for the Habeas Bar*, 8 CRIM. L. BRIEF (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2139506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139506); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1280 (2012); Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, YALE L.J. (forthcoming 2013) [hereinafter Primus, *Effective Trial Counsel*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2203391](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203391); David M. Barron, *Martinez Casts Doubt on State Postconviction and Federal Habeas Representation*, 27-FALL CRIM. JUST. 42, 42 (2012).

11. See, e.g., *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012) (holding that *Martinez* does not apply to the petitioner's ineffectiveness of trial counsel claim "because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal"); *Ibarra v. Thaler*, 687 F.3d 222, 226–27 (5th Cir. 2012) (holding that state habeas counsel's failure to raise ineffective assistance of trial counsel claims in collateral proceedings is not cause to excuse procedural default and that *Martinez* applies only to ineffectiveness claims); *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (holding that, because Oklahoma law permitted the petitioner to assert his claim of ineffective assistance of trial counsel on direct appeal, the failure of petitioner's postconviction counsel to present his claim is not cause for the default); *Cook v. Ryan*, 688 F.3d 598, 609–10 (9th Cir. 2012) (holding that *Martinez* does not apply to a petitioner who represented himself at trial). A review on Lexis-Nexis for cases citing *Martinez* in the ten months following the ruling reveals 494 cases.

12. See *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011), cert. granted, 133 S. Ct. 524 (Oct. 29, 2012) (No. 11-10189). For discussion of *Trevino*, see *infra* note 33.

13. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting).

14. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

15. In Colorado, for example, advocates recently filed a federal lawsuit

defendants to whom the courts have not yet applied *Gideon*, legislative and other policy advocacy can be fruitful.<sup>16</sup> When trial counsel has been appointed, however, it is only through a posttrial claim of ineffective assistance of counsel that an individual defendant can seek a new trial based on the failure of the state to provide constitutionally adequate counsel.<sup>17</sup>

Most ineffectiveness claims depend on discovery and investigation of facts that are outside of the trial record.<sup>18</sup> For

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challenging the constitutionality of a state law that “statutorily requires indigent defendants in misdemeanor cases to consult with prosecutors about plea deals before they can receive their constitutional right to counsel.” David Carroll, *Gideon Alert: Lawsuit Challenges Colorado Law Refusing Appointment of Counsel Until After Clients Meet with DA*, NLADA (Dec. 12, 2012, 12:31 PM), [http://www.nlada.net/jseri/gideon-blog/co\\_complaintfiledinmisdrsuit12-12-2010\\_gideonalert](http://www.nlada.net/jseri/gideon-blog/co_complaintfiledinmisdrsuit12-12-2010_gideonalert) (on file with the Washington and Lee Law Review).

16. See AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 11–76 (2010) (identifying failures in state indigent defense systems nationwide); J.D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 33–36 (Erik Luna & Marianne Wade eds., 2011) (positing that there is an egregious lack of competent criminal defense available for indigent misdemeanor criminal defendants because both prosecutors and public defenders focus their attention on more serious crimes); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 371–72 (2011) (arguing for the development of standards governing the representation of misdemeanor criminal defendants and for structural reform in the misdemeanor criminal system).

17. See *Strickland v. Washington*, 466 U.S. 668, 685–98 (1984) (articulating the components of and justifications for the ineffective assistance of counsel claim and the convicted defendant’s burden of proof).

18. See *Massaro v. United States*, 538 U.S. 500, 505 (2003) (explaining that most ineffective assistance of counsel claims require “additional factual development” beyond what is contained in the trial record); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 90 (1999)

[A]n ineffectiveness claim is classically an issue that requires additional evidentiary development. While there are various claims of ineffectiveness that focus on the trial record, “[a]t the heart of effective representation is the independent duty to investigate and prepare.” If trial counsel did not prepare, then the post-conviction advocate must not only prove this (by contacting trial counsel and securing his admission), but must also demonstrate prejudice—i.e., show the difference that the proper investigation would have made to the outcome of the completed trial. Obviously, the only way this can be done is to perform the investigation himself.

this reason, such claims are typically brought, if at all, in postconviction collateral proceedings.<sup>19</sup> As Lee Kovarsky put it, “The reasons why inmates must press trial-phase [ineffectiveness] claims collaterally are intuitive: a trial lawyer won’t litigate his/her own ineffectiveness on appeal, and even a substituted appellate lawyer is not equipped to litigate a trial-phase [ineffectiveness] claim without a reconstructed record.”<sup>20</sup>

The development of ineffectiveness claims almost always requires the aid of counsel.<sup>21</sup> This is a problematic requirement

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(quoting *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) (citations omitted)).

19. See Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1126–29 (1999) (explaining why ineffective assistance of counsel claims, in most circumstances, may only be practically raised in postconviction proceedings); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) (noting that defendants claiming ineffective assistance of counsel are typically given a very brief posttrial window in which to file a motion for relief from the judgment in the form of a new trial). It is possible in most jurisdictions to raise ineffective assistance of counsel claims in a motion for new trial proceeding, but this theoretical possibility is not practical when trial counsel is representing the defendant during this type of proceeding, and when time limits for bringing such claims are prohibitively short. See Primus, *Effective Trial Counsel*, *supra* note 10, at 11 (noting that because an attorney cannot be expected to raise the issue of her own ineffectiveness on appeal, initial collateral proceedings represent the first practical opportunity defendants have to raise an ineffective assistance of trial counsel claim); Kornreich & Platt, *supra* note 10, at 14–15 (positing that it is never ethically sound for an attorney to bring an ineffective assistance of counsel claim against herself, given that it is not in the lawyer’s own interest and, accordingly, will interfere with her ethical obligation to zealously advocate for her client).

20. Kovarsky, *supra* note 8; see also Christopher N. Lasch, *The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 45 (2009)

Because appellate courts cannot find facts, claims that depend on evidence outside the record on appeal cannot be raised; state postconviction proceedings are usually initiated in a trial-level court because the claims cognizable in postconviction proceedings are those that require evidence outside the record, and findings of fact by the court considering such evidence.

21. See Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 609 (2011) (noting that it is very difficult, if not impossible, for a prison inmate without counsel to gather extra-record evidence sufficient to establish prejudice under the ineffective assistance of counsel standard); Smith

given that the claims can usually only be brought in collateral proceedings.<sup>22</sup> Because states are only required to provide counsel through an initial direct appeal,<sup>23</sup> most defendants, and virtually all noncapital defendants, have no lawyer to file postconviction petitions in either state or federal court.<sup>24</sup>

As a practical matter, then, the current state of the law ensures that the vast majority of convicted noncapital defendants have no recourse to raise ineffective assistance of counsel claims, and thus no mechanism for vindicating the requirement that the counsel *Gideon* provides be “effective.”<sup>25</sup> It is different for most capital defendants, who typically are provided counsel for state and federal collateral proceedings.<sup>26</sup> For capital convicted defendants, although the lack of a right to counsel impacts their ability to challenge the effectiveness of postconviction counsel, it does not work to deprive them of counsel altogether. So long as noncapital defendants are not provided postconviction counsel,

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& Starns, *supra* note 18, at 88–100 (establishing the many ways in which indigent prisoners are ill-equipped to develop and raise claims of ineffective assistance of counsel).

22. See Voigts, *supra* note 19, at 1127–28 (explaining why ineffective assistance of counsel claims may generally not be brought on direct appeal); *Massaro*, 538 U.S. at 508–09 (acknowledging that claims raising trial counsel’s ineffectiveness in federal cases should typically be brought in postconviction proceedings and will not be barred if raised in those proceedings for the first time, even if they theoretically could have been raised on direct appeal).

23. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”); see also Primus, *supra* note 21, at 605–07 (noting that, while defendants have a constitutional right to effective counsel on initial direct appeal, that right does not extend to further appeals).

24. Arizona is an exception. The state provides postconviction counsel to all indigent defendants convicted at trial. See ARIZ. R. CRIM. P. 32.4(c).

25. *Murray v. Giarratano*, 492 U.S. 1, 18 n.3 (1989) (Stevens, J., dissenting) (“The Court consistently has adhered to Justice Sutherland’s observation in *Powell v. Alabama*, 287 U.S. 45, 53, 71 (1932), that when assistance of counsel is required, that assistance must be ‘effective’ rather than ‘pro forma.’”).

26. See *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012) (noting that Alabama is “[n]early alone among the States” in that it does not “guarantee representation to indigent capital defendants in postconviction proceedings”); see *infra* note 174 (citing statute providing for counsel in capital federal habeas proceedings).



however, most violations of the fundamental right to counsel at trial are likely to go unremedied.<sup>27</sup>

Although framed in limited terms, *Martinez* and *Maples* have opened the door to challenging the existing framework, making it appropriate to debate whether the right to effective assistance of counsel at trial includes, as well, the right to raise at least a claim of ineffective assistance of trial counsel. *Gideon*'s fiftieth anniversary provides an appropriate moment to reconsider a famous right, as well as the remedy that proves elusive for all but a handful of convicted defendants.

In this Article, I argue that, in *Martinez* and, to a lesser extent, *Maples*, the Court has taken a step closer to recognizing not necessarily a broad right to postconviction counsel but rather a narrower yet critical right to raise a *claim* of ineffective assistance of trial counsel in at least one forum. This is a right already afforded, de facto, to most capital defendants but to very few noncapital defendants. Framed as such, I suggest that *Martinez* and *Maples* portend a legal landscape in which it is possible to obtain a remedy for a Sixth Amendment violation without extending the right to counsel to postconviction cases in their entirety. While far from ideal, such a regime may be somewhat more palatable to the current Court, thus rendering visible—and actionable—violations of *Gideon*'s promise that are not brought to light under the existing regime.

In Part II, I trace efforts over the past several decades to establish a constitutional right to counsel in postconviction proceedings. These efforts have been unsuccessful, and the Court has rejected the entreaties.<sup>28</sup> The Court has done so, however, in a way that never quite foreclosed reconsideration. Such

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27. I am deliberately excluding here a discussion of pro se prisoners filing meritorious federal habeas petitions. While it is theoretically possible for uncounseled prisoners to file such petitions (perhaps with respect to truly record-based ineffectiveness claims), these cases are the rare exception. For reasons discussed more fully *infra*, the ability to raise an ineffectiveness claim pro se does not equate to a remedy in any meaningful way. See Primus, *supra* note 21, at 608 (“Collecting the extra-record evidence to show that your trial attorney was constitutionally ineffective is particularly difficult if you are in custody and do not have the assistance of a lawyer. How are you supposed to supplement the trial court record from inside a prison cell?” (citation omitted)).

28. See *infra* notes 72–92 and accompanying text (explaining the Supreme Court's refusal to recognize a constitutional right to postconviction counsel).

reconsideration looked possible, if unlikely, when the Court agreed to hear *Martinez*.

The Court decided *Martinez* just two months after it ruled in *Maples*. *Maples* had headline-grabbing facts—involving the colossal failure on the part of a major New York corporate law firm to represent competently its pro bono client on death row in Alabama—but was, at bottom, about when “cause” could be established to excuse the failures of state-provided, postconviction counsel to which a defendant is not constitutionally entitled.<sup>29</sup> In *Maples*, the Court held that, when postconviction counsel abandons their client, the agency relationship has been severed and the client can establish cause to excuse a procedural default.<sup>30</sup>

When the Court agreed to review *Martinez*, some commentators read the tea leaves to suggest a reconsideration of the precedent holding that there was no constitutional right to postconviction counsel.<sup>31</sup> But it was not to be. The Court explicitly avoided reaching a constitutional question about the right to postconviction counsel, ruling instead in the exercise of its equitable discretion that, as in *Maples*, under certain circumstances, inadequate postconviction representation can provide cause for the excusal of a procedural bar on federal habeas review.<sup>32</sup> Specifically, *Martinez* held that ineffective assistance of postconviction counsel, or the lack of such counsel altogether, can excuse the procedural default of an ineffective assistance of trial counsel claim in federal court, at least in those

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29. *Maples*, 132 S. Ct. at 927; see also *Wainwright v. Sykes*, 433 U.S. 72, 72 (1977) (establishing that the rule barring federal habeas review will be excused upon a showing of “cause” and “prejudice”).

30. *Maples*, 132 S. Ct. at 1315.

31. See Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in Maples and Martinez to Restore It*, 45 CREIGHTON L. REV. 185, 212–13 (2011) (urging the Court to expand the right to counsel to cover first postconviction proceedings to “increase the likelihood that important constitutional claims reach federal courts without falling by the procedural wayside”). But see Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 460 (2011) (expressing pessimism about the Court’s future ruling in *Martinez* given its previous efforts to curtail review for defaulted claims).

32. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318–19 (2012).

states where the law requires the claim to be raised postconviction.<sup>33</sup> And once the default is excused, the door is open to merits review of the ineffective assistance of trial counsel claim.

While *Martinez* may have disappointed those hoping the Court would establish a constitutional right to postconviction counsel, it did upend what commentators and litigators had assumed for years was settled law regarding the relevance of postconviction counsel's competence.<sup>34</sup> And when coupled with *Maples*, it opened up intriguing new possibilities for the future of ineffective assistance of counsel claims in noncapital cases, when defendants are typically without postconviction counsel.<sup>35</sup> Most notably, the Court's opinion in *Martinez* suggested that it is as important to allow defendants an opportunity to pursue ineffective assistance of trial counsel claims as it is to allow them to raise record-based trial errors typically brought by constitutionally required appellate counsel. In the Court's words, "[a] prisoner's inability to present a claim of trial error

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33. *Id.* at 1320. As noted above, the Supreme Court is now considering its first post-*Martinez* case. In this case, *Trevino*, the issue is whether, to put it as bluntly as the Texas Attorney General did in urging the Supreme Court not to grant review, *Martinez* "appl[ies] in Texas." See Respondent's Brief in Opposition at 11–14, *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011) (No. 11-10189), 2012 WL 3555164. In its review of *Trevino*, the Court will consider whether the Fifth Circuit was correct when it held that, because ineffectiveness claims can technically be brought prior to postconviction in Texas, *Martinez* does not apply in that state. See *Ibarra v. Thaler*, 687 F.3d 222, 225–27 (5th Cir. 2012) (refusing to apply *Martinez* in Texas). The Court's ruling in *Trevino* should have wide implications for the future scope of *Martinez* because the majority of states do, at least in theory, allow for ineffective assistance of counsel claims to be brought prior to postconviction review, even though such a practice is neither encouraged nor facilitated through the provision of time and resources. Eve Primus, who has exhaustively catalogued the state laws in this regard, has concluded that "in most states," the requirement that ineffectiveness claims be brought in postconviction is "*de facto* rather than *de jure*." Primus, *Effective Trial Counsel*, *supra* note 10, at 6 n.33 (cataloguing state laws). *Trevino* should shed light on whether the Court, in *Martinez*, intended to limit its application to only the handful of states, such as Arizona, that require, *de jure*, that ineffective assistance of trial counsel claims be raised postconviction.

34. King, *supra* note 8 ("Until today, it was no excuse that a prisoner had no attorney (or only an incompetent attorney) in state collateral proceedings to help him comply with state rules. After today's decision, it is.").

35. See *infra* notes 173–75 (discussing implications of *Martinez* and *Maples* for noncapital defendants).

is of *particular* concern when the claim is one of ineffective assistance of counsel.”<sup>36</sup>

In Part III, I discuss in some detail the Court’s decisions in both *Martinez* and *Maples*, and situate them within the ineffectiveness jurisprudence. In each case, an indigent prisoner found himself before the Supreme Court, arguing that his postconviction counsel (to which he was not constitutionally entitled) erred in a way that deprived the state and federal habeas courts of an opportunity to review his claim of ineffective assistance of trial counsel.<sup>37</sup> The Court could have used these cases as vehicles to announce a new constitutional right to counsel. Or it could have used them to further solidify the rule of *Coleman v. Thompson*,<sup>38</sup> which has long stood for the proposition that the failures of postconviction counsel cannot be the basis of relief when appointment of that counsel was not constitutionally required.<sup>39</sup>

Instead, in a pair of 7–2 decisions with Justices Scalia and Thomas dissenting in each, the Court declined to disturb the rule of *Coleman*<sup>40</sup> and reiterated the general rule that the failure of postconviction counsel does not excuse a procedural default in federal court<sup>41</sup>—but also, in each case, recognized an exception

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36. See *Martinez*, 132 S. Ct. at 1317 (emphasis added).

37. See *id.* 1314–15 (stating that Martinez believed his postconviction attorney was ineffective because she had failed to raise an ineffectiveness of trial counsel claim in his initial collateral proceeding); *Maples v. Thomas*, 132 S. Ct. 912, 916–17 (2012) (outlining Maples’s argument that he should be permitted to file his habeas petition after the filing deadline because he was abandoned without notice by his out-of-state attorneys).

38. *Coleman v. Thompson*, 501 U.S. 722 (1991).

39. See *id.* at 752–54 (“There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.”).

40. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (“The rule of *Coleman* governs in all but the limited circumstances recognized here.”); *Maples*, 132 S. Ct. at 922 (“[W]hen a petitioner’s postconviction attorney misses a filing deadline, the petitioner is bound by that oversight and cannot rely on it to establish cause. . . . We do not disturb that general rule.” (citing *Coleman*, 501 U.S. at 753–54)).

41. See *Martinez*, 132 S. Ct. at 1320 (stating that an error on the part of postconviction counsel generally does not excuse a procedural default); *Maples*, 132 S. Ct. at 922 (stating that postconviction counsel’s failure to meet a filing deadline does not generally constitute cause for circumventing a procedural

that excused the procedural default.<sup>42</sup> Justice Scalia's dissents took the Court to task for reiterating settled law while excusing the default in each case anyway with little regard, he contended, for the precedent set for future cases.<sup>43</sup>

In Part IV, I take issue with the prevailing view of commentators, which appears to be that *Martinez* erects a set of procedural rules all but mandating states to provide postconviction counsel, even in the absence of a constitutional requirement.<sup>44</sup> I have a somewhat different take. I am skeptical that the equitable ruling in *Martinez* provides sufficient incentive for states to provide postconviction counsel, and the current Court does not seem poised to announce a blanket constitutional right to postconviction counsel any time soon. I think, rather, that the more lasting effect of the decision may be the impact on the ability of noncapital defendants to argue that counsel is required in order to litigate the ineffectiveness of their trial counsel.

*Martinez* and *Maples* do not necessarily evidence the Court's concern that all defendants enjoy postconviction counsel; instead, they reflect the Court's unease with the inability of defendants to raise, at least once, in some forum, a claim that they were deprived of constitutionally effective trial counsel. If the Court continues to attempt to remedy this problem through equitable as opposed to constitutional rulings, it is unlikely to provide much in the way of meaningful relief to uncounseled, noncapital defendants. But the logic and underlying concern the Court expressed in both cases does

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bar).

42. See *Martinez*, 132 S. Ct. at 1320 (stating that the rule announced is an exception to *Coleman*); *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (justifying the holding based on the "extraordinary circumstances" of the case).

43. See *Martinez*, 132 S. Ct. at 1327 (Scalia, J., dissenting) ("Despite the Court's protestations to the contrary, the decision is a radical alteration of our habeas jurisprudence that will impose considerable economic costs on the States and further impair their ability to provide justice in a timely fashion."); *Maples*, 132 S. Ct. at 934 (Scalia, J., dissenting) ("[I]f the interest of fairness justifies our excusing *Maples*' procedural default here, it does so whenever a defendant's procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel.").

44. See *infra* note 146 and accompanying text.

portend the eventual recognition of a constitutional right, not necessarily to postconviction counsel generally, but to counsel who can raise ineffective assistance of trial counsel claims in at least one forum.<sup>45</sup>

I argue that *Martinez* and *Maples* are, then, less about the right to counsel in postconviction proceedings and more about the right to raise a claim of ineffective assistance of counsel.<sup>46</sup> This is a subtle distinction, but one that represents the triumph of Justice Kennedy's view—first expressed in his concurrence in *Murray v. Giarratano*,<sup>47</sup> that postconviction is a critical stage in the criminal process in most states because it is the first real opportunity to present an ineffective assistance of trial counsel claim—over Justice Rehnquist's view of postconviction as an insignificant appendage to the appellate process. *Martinez* and *Maples* are decisions that have been (cautiously) celebrated by the capital defense bar but may actually have a more lasting effect on noncapital defendants because it is noncapital defendants who are typically unable to raise ineffective assistance of trial counsel claims at any time.

While *Martinez* and *Maples* themselves admit only of narrow exceptions to the procedural default rule in federal court, they suggest a framing in future cases that focuses more on the right to bring an ineffectiveness claim derived directly from the *Gideon*

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45. See *infra* Part IV.B.

46. Much has been written about the right to counsel (or lack thereof) in postconviction proceedings, but the question is almost never framed in terms of a right to litigate an ineffective assistance of trial counsel claim. One exception is Kirk J. Henderson, *The Right to Argue that Trial Counsel Was Constitutionally Ineffective*, 45 DUQ. L. REV. 1 (2006). This Article is a detailed account of Pennsylvania law on the right to raise ineffectiveness claims, and it makes a number of policy proposals specifically related to defendants in Pennsylvania who receive short prison sentences. *Id.* at 32–45. In the course of making these proposals, Henderson argues that “the right to counsel is the keystone right enjoyed by a criminal defendant and . . . a defendant, thus, must be given an opportunity to vindicate the deprivation of that right.” *Id.* at 20.

47. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (“It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.”); see also *id.* at 25 (Stevens, J., dissenting) (“The postconviction procedure in Virginia may present the first opportunity for an attorney detached from past proceedings to examine the defense and to raise claims that were barred on direct review by prior counsel’s ineffective assistance.”).

right itself, as opposed to a right to secure postconviction counsel writ large.<sup>48</sup> Votes apparently did not exist on the currently constituted Court for such an expansion of the right to counsel in *Martinez*. As a result, the immediate impact of *Martinez* and *Maples*, especially for noncapital defendants who are unlikely to secure federal habeas counsel, is minimal. But the logic of the cases is inescapable: for the bedrock principle of *Gideon* to provide meaningful protection to the indigent-accused, counsel must be afforded to allow for the presentation of ineffective assistance of trial counsel claims.

## II. *The Elusive Right to Postconviction Counsel*

This year also marks the fiftieth anniversary of *Douglas v. California*,<sup>49</sup> which was decided the same day as *Gideon*. In *Douglas*, the Court held that states must provide counsel to indigent defendants for their “first appeal, granted as a matter of right.”<sup>50</sup> The decision, written by Justice Douglas, appears to be grounded in both due process and equal protection principles, with an emphasis on the latter: “[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”<sup>51</sup> *Douglas* did not create a right to appeal, but it does stand for the proposition that when states choose to grant criminal defendants a right to appeal, they must provide counsel as well.<sup>52</sup>

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48. See discussion *infra* Part IV.B (suggesting a right to pursue an ineffective assistance of trial counsel claim).

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

50. *Id.* at 366.

51. *Id.* at 357; see *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974) (noting that it is not clear whether *Douglas* was grounded in equal protection or due process principles); *id.* at 621 (Douglas, J., dissenting) (“*Douglas v. California* was grounded on concepts of fairness and equality.”). In *Halbert v. Michigan*, the Court observed that its cases on “appeal barriers encountered by persons unable to pay their own way” were grounded generally in both equal protection and due process concerns. 545 U.S. 605, 610 (2005).

52. See *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not

*Douglas* represented the high-water mark with respect to the Court's extension of the right to counsel in criminal proceedings. A series of cases, beginning with *Ross v. Moffitt*<sup>53</sup> in 1974 and concluding with *Coleman v. Thompson* in 1991, held that the Constitution generally does not require states to provide counsel beyond the first appeal as of right.<sup>54</sup>

*Ross* considered whether *Douglas* should be extended to discretionary state appeals and to applications for review in the Supreme Court.<sup>55</sup> In an opinion written by then-Justice Rehnquist, the Court held that neither the Due Process Clause nor the Equal Protection Clause requires states to provide counsel beyond the first appeal as of right.<sup>56</sup> With respect to due process, the Court emphasized the differences between the trial and appellate stages of a criminal proceeding. Regarding appeal, the Court noted:

[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.<sup>57</sup>

Because the right to an appeal is not constitutionally guaranteed, the Court held, there can be no violation of due process when the state refuses to provide counsel "at every stage" of the appellate

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now, a necessary element of due process of law."); *see also* *Murray v. Giarratano*, 492 U.S. 1, 17–18 (1989) (Stevens, J., dissenting) (citing *McKane* and describing the holding of *Douglas*); *Ross*, 417 U.S. at 606 (citing *McKane* and noting the "traditional principle that a State is not obliged to provide any appeal at all for criminal defendants").

53. *Ross*, 417 U.S. at 600.

54. *See id.* at 612 ("[W]e do not believe that the Equal Protection Clause . . . requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court."); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings.")

55. *Ross*, 417 U.S. at 600.

56. *Id.* at 609–16.

57. *Id.* at 610.



process.<sup>58</sup> The Court, implicitly recognizing that this reasoning could just as easily govern the question presented in *Douglas*, then moved on to analyze the claim under an equal protection analysis.<sup>59</sup>

With respect to equal protection, the Court concluded that an uncounseled, indigent defendant seeking discretionary review in a state's highest court, when he has received counsel for his first appeal as of right (to the state's intermediate appellate court), is not so much worse off than a defendant with the resources to hire appellate counsel.<sup>60</sup> After all, the Court noted, the indigent defendant might not have a lawyer, but he will have at his disposal "a transcript or other record of the trial proceedings, a brief on his behalf filed in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."<sup>61</sup> This material, along with whatever the indigent defendant can come up with on his own, provides the state supreme court "with an adequate basis for its decision to grant or deny review."<sup>62</sup>

Justice Rehnquist had become Chief Justice by the time the Court decided *Pennsylvania v. Finley*<sup>63</sup> in 1987, and he wrote the opinion for the Court in that case as well. At its most narrow reading, *Finley*, a noncapital case, was about whether the procedures dictated in *Anders v. California*<sup>64</sup> had to be followed in state postconviction proceedings.<sup>65</sup> To answer that question,

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58. *Id.* at 611.

59. *Id.*

60. *See id.* at 616

This is not to say that a skilled lawyer . . . would not prove helpful to any litigant able to employ him. . . . But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the [state supreme court] make this relative handicap far less.

61. *Id.* at 615.

62. *Id.* The Court did not discuss the possibility that an indigent defendant's need for counsel would be significantly greater if the state supreme court decided to grant review.

63. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

64. *Anders v. California*, 386 U.S. 738 (1967).

65. *See Finley*, 481 U.S. at 554 ("We think that the court below improperly . . . extend[ed] the *Anders* procedures to postconviction proceedings.").

however, the Court felt obligated to first discuss whether indigent defendants had a constitutional right to counsel in state postconviction proceedings.<sup>66</sup> If not, then the *Anders* procedures would not apply.<sup>67</sup> The Court made quick work of the suggestion that there is a constitutional right to postconviction counsel, noting that because *Ross* foreclosed the possibility of a constitutional right to counsel for discretionary appeals, there could be no such right “when attacking a conviction that has long since become final upon exhaustion of the appellate process.”<sup>68</sup> Indeed, the Court held, “Postconviction relief is even further removed from the criminal trial than is discretionary direct review.”<sup>69</sup> Thus, the Court concluded, while Pennsylvania had made the “valid choice” to provide postconviction counsel, it was not constitutionally required to have done so.<sup>70</sup> And because it was not constitutionally required to provide counsel, it could not be required to follow the *Anders* procedures when it elected to provide counsel: “[T]he Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines enunciated in *Anders*.”<sup>71</sup>

Two years after *Finley*, Chief Justice Rehnquist wrote for a four-Justice plurality in *Murray v. Giarratano*,<sup>72</sup> a federal civil rights action alleging a constitutional right to postconviction counsel in capital cases. Chief Justice Rehnquist cited *Finley* for the proposition that the Constitution does not require “the State to appoint counsel for indigent prisoners seeking state postconviction relief.”<sup>73</sup> The question for the Court in *Giarratano*, however, was whether the fact that a case was capital dictated a different result.<sup>74</sup> “No,” said the plurality, holding that “the rule

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*Anders* announced procedures for appointed appellate counsel to follow if counsel believes no colorable appellate claims exist. *Anders*, 386 U.S. at 744.

66. *Finley*, 481 U.S. at 555.

67. *Id.*

68. *Id.*

69. *Id.* at 556–57.

70. *Id.* at 559.

71. *Id.*

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

73. *Id.* at 7.

74. *Id.* at 4–6.

of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases.<sup>75</sup> Noting again the belief that postconviction proceedings “serve a different and more limited purpose than either the trial or appeal,” the Rehnquist plurality was satisfied that the Eighth Amendment protections afforded to capital defendants at trial were sufficient to “assure the reliability of the process by which the death penalty is imposed.”<sup>76</sup>

Justice Kennedy did not join the plurality opinion in *Giarratano*, but he provided the fifth vote against the petitioner class of Virginia death row inmates.<sup>77</sup> And though his vote sealed the fate of the petitioners in *Giarratano*, his concurring opinion in the case struck a remarkably different tone with respect to the role of postconviction in our system. It did so in a way that foreshadowed Justice Kennedy’s opinion for the Court in *Martinez* more than two decades later.

Justice Kennedy began his concurring opinion, which Justice O’Connor joined, by stating, “It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.”<sup>78</sup> He noted the substantial success rate of collateral attacks in capital cases,<sup>79</sup> and also commented that, at least in death penalty cases, defendants required the assistance of counsel to meaningfully litigate in collateral proceedings: “The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”<sup>80</sup> Justice Kennedy was operating from a very different premise than that of Chief Justice Rehnquist, who, as noted above, relegated the postconviction process to insignificant status in the context of the overall proceedings in a criminal case.<sup>81</sup>

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75. *Id.* at 10.

76. *Id.*; see also *id.* at 13 (O’Connor, J., concurring) (“[T]here is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings.”).

77. *Id.* at 14 (Kennedy, J., concurring).

78. *Id.*

79. *Id.*

80. *Id.*

81. See *id.* at 9 (“[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.” (quoting

Justice Kennedy concluded that, because the record revealed that “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings,” he was “not prepared” to say that Virginia’s postconviction scheme violated the Constitution.<sup>82</sup> His concurrence was explicitly based “[o]n the facts and record of this case.”<sup>83</sup> But his deciding fifth vote implies that he believed that the Constitution *does* provide some meaningful access to postconviction counsel, at least in capital cases.<sup>84</sup> As Eric Freedman has argued, “Contrary to much loose talk, *Giarratano* did not decide that there is no right to counsel in state postconviction proceedings in capital cases.”<sup>85</sup> Rather, Freedman points out, “*Giarratano* only rejected the claim of constitutional entitlement in that particular instance.”<sup>86</sup>

At issue two years after *Giarratano*, in *Coleman v. Thompson*, was counsel’s failure, on appeal from the trial court’s denial of the state postconviction petition, to file a timely notice of appeal.<sup>87</sup> Coleman alleged that his postconviction counsel’s ineffective assistance—the failure of his pro bono law firm to file the notice of appeal on time—was sufficient “cause” for the procedural default in state court and he should be permitted to

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

82. *Id.*

83. *Id.*

84. See Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006) (arguing that “five, and perhaps six Justices [in *Giarratano*] plainly believed that states” had a constitutional obligation to provide postconviction counsel to death row inmates).

85. *Id.* at 1089; see also Smith & Starns, *supra* note 18, at 57–58 (“[I]n *Murray v. Giarratano*, four members of the Supreme Court opined that there was no constitutional right to the assistance of counsel in post-conviction proceedings, even in a capital case. The key to the case, however, was in the concurrences . . . .” (citations omitted)).

86. Freedman, *supra* note 84, at 1089; see also Smith & Starns, *supra* note 18, at 57–58 (noting that Justice Kennedy’s concurrence in *Giarratano* was limited only to the specific facts of the case). Freedman suggests that *Giarratano* “implicitly held that other facts would lead to other results.” Freedman, *supra* note 84, at 1089. At the very least, Justice Kennedy’s concurrence does not foreclose the possibility of a different result on different facts.

87. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (outlining Coleman’s claim that his attorney’s error should excuse the procedural default).

pursue federal habeas relief.<sup>88</sup> Thus, the Court was called to determine whether Coleman, a death row inmate, had a right to counsel at that stage. If so, ineffective assistance could be grounds for “cause” to excuse the default; if not, it could not.<sup>89</sup>

In *Coleman*, the Court announced that “[t]here is no constitutional right to an attorney in state post-conviction proceedings.”<sup>90</sup> Justice O’Connor’s opinion for the Court cited both *Finley* and *Giarratano* summarily for this proposition<sup>91</sup> and concluded that, “[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman’s claims in state court cannot constitute cause to excuse his default in federal habeas.”<sup>92</sup>

The Court in *Coleman* explicitly left open the question whether there should 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.”<sup>93</sup> The Court did not need to reach the question because Coleman did have one court review his state habeas claims—the state trial court.<sup>94</sup>

In sum, before last Term, the Supreme Court had never assigned any relevance to the quality of postconviction counsel, even in capital cases.<sup>95</sup> It was something of a surprise, then, when

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*; see also *id.* at 755 (“*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings.”).

92. *Id.* at 757.

93. *Id.* at 755.

94. *Id.*

95. See Freedman, *supra* note 84, at 1080 n.11 (referring to *Coleman* as “‘intellectually and practically’ untenable . . . [as well as] ‘morally indefensible’” (quoting Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 553, 568 (James R. Acker et al. eds., 2d ed. 2003))); see also Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Post-Conviction Counsel: The Scope of Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521, 524–25 (2005) (describing how the Court has consistently declined to establish a right to postconviction counsel or even extend constitutional ineffective assistance of counsel to statutory grants of postconviction counsel). In *Halbert v. Michigan*, the Court did hold that defendants were entitled to counsel

the Court chose to address, in *Martinez* and *Maples*, the implications in those cases of postconviction counsel's inadequate performance.

### III. *Martinez and Maples*

Cory Maples, an indigent Alabama death row inmate, may have thought he had “won the lottery.”<sup>96</sup> Like Roger Coleman years before him,<sup>97</sup> a high-powered corporate law firm had agreed to represent him in his postconviction proceedings.<sup>98</sup> As

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for a discretionary postconviction appeal from a plea bargain under Michigan's unique direct appeals process. 545 U.S. 605, 609 (2005). Indeed, that 6–3 opinion, which Justice Kennedy joined, may have further contributed to the foundation of the *Martinez* ruling because it appeared grounded in a concern that plea-convicted defendants have at least one counseled opportunity to present their claims. *Id.* at 619; *see also* Steve Vladeck, *Martinez v. Ryan Argument Preview: Direct Vs. Collateral Review and the Theory Behind the Right to Counsel*, SCOTUSBLOG (Sept. 29, 2011, 12:16 PM), <http://www.scotusblog.com/2011/09/martinez-v-ryan-argument-preview-direct-vs-collateral-review-and-the-theory-behind-the-right-to-counsel/> (last visited Apr. 2, 2013) (noting, in a pre-*Martinez* blog post, that *Halbert* stands for the proposition that “the purpose of the right to counsel is to allow defendants fully to litigate the merits of viable claims at least once, particularly when a pro se defendant would be ill-equipped to do so on his own”) (on file with the Washington and Lee Law Review).

96. *See* *Maples v. Thomas*, 132 S. Ct. 912, 928 (2012) (Alito, J., concurring) (“I have little doubt that the vast majority of criminal defendants would think that they had won the lottery if they were given the opportunity to be represented by attorneys from such a firm.”).

97. Roger Coleman was represented by the prominent D.C. law firm of Arnold and Porter. Lawyers at the firm misunderstood the filing deadlines for the notice of appeal and missed the deadline to file an appeal from the trial court's denial of postconviction relief. JOHN C. TUCKER, *MAY GOD HAVE MERCY* 115 (W.W. Norton & Co. 1997) (“On December 4, 1986, Arnold & Porter filed Coleman's brief on appeal with the Virginia Supreme Court. On December 9 the state moved to dismiss the appeal on the ground that the notice of appeal had been filed a day late.”).

98. *See* Adam Liptak, *A Mailroom Mix-up That Could Cost a Life*, N.Y. TIMES, Aug. 2, 2010, at A10 (“Cory R. Maples, a death row inmate in Alabama, must have been grateful when lawyers from the firm agreed to represent him without charge.”); Adam Liptak, *An Appeal Gone Astray Catches the Supreme Court's Attention*, N.Y. TIMES, Oct. 4, 2011 (“Cory R. Maples, a death row inmate in Alabama, had what turned out to be the bad fortune to be represented by one

the Supreme Court would go on to observe in its opinion in his case, Alabama, unlike almost all other states, does not guarantee counsel to death row inmates seeking to challenge their convictions and death sentences in collateral proceedings.<sup>99</sup> Instead, indigent death row inmates must petition non-profit organizations, law school clinics, or law firms to take their cases pro bono.<sup>100</sup> Some are unable to find lawyers and remain without counsel as their time limits for filing habeas petitions wind down.<sup>101</sup> So Maples was presumably fortunate to have secured postconviction counsel.

Maples's pro bono postconviction attorneys, however, failed him. After filing a state postconviction petition raising claims of ineffective assistance of trial counsel, the two Sullivan & Cromwell attorneys, Jaasi Munanka and Clara Ingen-Housz, left the firm without notifying either their client or the circuit court in which the petition was pending.<sup>102</sup> When the circuit court denied relief in the case and sent the final order to the law firm, the order was returned to the court clerk, who did

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of the most prominent law firms in the nation.”).

99. See Freedman, *supra* note 84, at 1081 (“Notably, every active death penalty state today, with the exception of Alabama, provides for the pre-filing appointment of counsel to assist with indigent death row inmates in the preparation of postconviction petitions challenging their convictions and sentences.”).

100. See *id.* at 1090 (“Alabama prisoners are at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts.”). Full disclosure: I teach in a law school clinic that represents clients on death row, including several in Alabama.

101. See *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012) (“[A]s of April 2006, approximately fifteen of Alabama’s death row inmates in the final rounds of state appeals had no lawyer to represent them.” (quoting AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT 112 (2006))).

102. *Id.* at 916. An attorney for Mr. Munanka has disputed the accuracy of the facts that have been repeated in multiple media accounts and the Supreme Court opinion in *Maples*. See John Steele, *Lawyer in Maples v. Thomas Case Asks Ethics Professors and Practitioners To Correct Their Claims*, LEGAL ETHICS FORUM (Jan. 22, 2013, 10:12 AM), <http://www.legaethicsforum.com/blog/2013/01/lawyer-in-maples-v-thomas-case-asks-ethics-professors-and-practitioners-to-correct-their-.html> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review). However, neither Munanka nor Ingen-Housz has provided a public account of the facts that differs from that presented in the Court’s ruling.

nothing further to track down Maples's attorneys.<sup>103</sup> As a result, the forty-two days that Maples had to file a notice of appeal in the Alabama Court of Criminal Appeals lapsed before Maples even learned the circuit court had denied his postconviction petition.<sup>104</sup>

When Maples was finally alerted to what had happened (via a letter from the Assistant Attorney General on the case), he called his mother, who placed what must have been a frantic call to the New York firm.<sup>105</sup> New counsel at the firm tried to rectify the mistake first by seeking an out-of-time appeal, which was denied, and then by filing a federal habeas petition raising the same ineffective assistance of trial counsel claims that the Alabama circuit court had denied.<sup>106</sup>

The lower federal courts held that Maples's ineffectiveness claims were procedurally barred because he had missed the state deadline for filing a notice of appeal.<sup>107</sup> The fact that it was postconviction counsel who were entirely at fault did not move these courts, which read *Coleman v. Thompson* to preclude any excuse based on the actions of counsel to which the defendant was not constitutionally entitled.<sup>108</sup>

The Supreme Court granted review "to decide whether the uncommon facts presented here establish cause adequate to excuse Maples's procedural default."<sup>109</sup> Although it ultimately

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103. *Maples*, 132 S. Ct. at 917.

104. *See id.* at 918–20 (providing the factual and procedural history).

105. Jon Hayden, the assistant attorney general who wrote to Maples, informed Maples that he had only a few weeks to file a federal habeas corpus petition before his statute of limitations for doing so expired. *Id.* at 920. Although Hayden sent Maples the letter prior to the expiration of the federal habeas statute, he sent it *after* the forty-two days to file a notice of appeal in state court had come and gone. *Id.*

106. *Id.*

107. *Id.* at 917.

108. *See Maples v. Allen*, 586 F.3d 879, 891 (11th Cir. 2009) ("Here, the factor that resulted in Maples' default—namely, counsel's failure to file a timely notice of appeal of the Rule 32 Order—cannot establish cause for his default because there is no right to post-conviction counsel." (citing *Coleman v. Thompson*, 501 U.S. 722 (1991))).

109. *Maples v. Thomas*, 132 S. Ct. at 922. While the facts of *Maples* were egregious, they are not shocking to those familiar with postconviction practice in Alabama death penalty cases. *See, e.g.*, Adam Liptak, *Lawyers Stumble, and Clients Take Fall*, N.Y. TIMES, Jan. 8, 2013, at A12 (describing the case of Alabama death row inmate Ronald B. Smith, whose postconviction attorney was



granted relief to Maples, the Court took pains to note that it was doing nothing to “disturb [the] general rule” of *Coleman* that “[n]egligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’”<sup>110</sup> Instead, the facts of *Maples* represented a “markedly different situation” in which “an attorney abandon[ed] his client without notice.”<sup>111</sup> Under those circumstances, the attorney has severed the attorney–client relationship, and the agency principles that typically work to impute the attorney’s negligence to the client are not applicable.<sup>112</sup> When the prisoner has been “disarmed by extraordinary circumstances quite beyond his control,” he has demonstrated sufficient cause, the Court held, to excuse the procedural default.<sup>113</sup>

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“battling a crippling drug addiction” at the time he missed a filing deadline that threatened to foreclose all federal review of Smith’s constitutional claims); *Smith v. Comm’r, Ala. Dep’t of Corr.*, 703 F.3d 1266, 1267–68 (11th Cir. 2012) (rejecting Smith’s request for equitable tolling in light of the failures of his postconviction counsel); *id.* at 1276 (Barkett, J., dissenting) (“These allegations are sufficient to show an egregious breach of [postconviction counsel’s] professional ethical obligations to Smith, which, I believe, constitute the sort of extraordinary circumstances that merit equitable relief . . .”).

110. *Maples*, 132 S. Ct. at 122.

111. *Id.*

112. *See id.* at 922–23 (“Having severed the principal–agent relationship, an attorney no longer acts, or fails to act, as the client’s representative.”). Judge Barkett on the Eleventh Circuit has written a thorough refutation of the applicability, generally, of the agency analogy in the context of death row inmates and their attorneys. *See Hutchinson v. Florida*, 677 F.3d 1097, 1103–11 (11th Cir. 2012) (Barkett, J., concurring) (explaining why “none of the key assumptions underlying the application of an agency relationship to a death-sentenced client and his lawyer are valid in the post-conviction context”).

113. *Maples*, 132 S. Ct. at 927. The Court remanded for a consideration of whether Maples had met the “prejudice” requirement to lift the bar to federal review of his ineffectiveness claims. *See id.* at 927–28 (“Having found no cause to excuse the failure to file a timely notice of appeal in state court, the District Court and the Eleventh Circuit did not reach the question of prejudice. That issue, therefore, remains open for decision on remand.” (citations omitted)). As a practical matter, this inquiry entails a review of the merits of his ineffectiveness claims; if they have merit, Maples should overcome the procedural bar and then win relief in the form of a new trial, upon federal review of his claims.

Justice Scalia, in dissent, dismissed the majority's opinion as merely "word games" that had now established a template for habeas petitioners to use to get around the settled rule of *Coleman*.<sup>114</sup> The rhetoric of Justice Scalia's dissent was tempered somewhat by his recognition that the "interest of fairness," at first blush, would seem to justify the result in this case, given the egregious facts and the State's refusal to waive the procedural default.<sup>115</sup> But, he pointed out, the precedent established in the postconviction context simply does not allow for an excusal of procedural default "whenever a defendant's procedural default is caused by his attorney."<sup>116</sup> *Maples*, he contended, "invites future evisceration of the principle that defendants are responsible for the mistakes of their attorneys."<sup>117</sup>

In *Maples*, Justice Scalia was concerned that habeas petitioners facing procedural default would simply allege that their ineffective postconviction counsel were not acting as "genuinely representative agents" in order to position themselves within the *Maples* exception.<sup>118</sup> Given the extreme facts in *Maples* and the narrow definition of "abandonment" the Court employed,<sup>119</sup> it is doubtful that the "template" Justice Scalia feared will aid a significant number of habeas petitioners. In *Martinez v. Ryan*,<sup>120</sup> however, decided two months later, the

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114. *Id.* at 933 (Scalia, J., dissenting).

115. *Id.* at 934.

116. *Id.*

117. *Id.* Of course, this principle only holds in the postconviction context. Defendants are not responsible for the mistakes of their attorneys in proceedings during which they have a constitutional right to counsel. *See, e.g.,* *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 . . .").

118. *Maples v. Thomas*, 132 S. Ct. 912, 933 (2012) (Scalia, J., dissenting).

119. *See id.* at 917 (majority opinion) (describing the abandonment as "without leave of court, without informing *Maples* [that the attorneys] could no longer represent him, and without securing substitution of counsel"); *see also id.* at 923 (Scalia, J., dissenting) (likening *Maples*'s situation to a previous case involving abandoning counsel when there was a "near-total failure to communicate . . . or to respond to . . . inquiries and requests" (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring))).

120. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Court created another exception to the procedural default rule, one that may not be as easily cabined.

Luis Martinez was serving two consecutive life sentences in Arizona as a result of his convictions for sexual conduct with a minor following a jury trial.<sup>121</sup> His state-appointed appellate attorney filed a brief on direct appeal, which was denied.<sup>122</sup> The attorney did not raise any claim of ineffective assistance of trial counsel because Arizona law does not allow such claims to be raised on direct appeal.<sup>123</sup> The appointed appellate counsel also filed a petition for postconviction review in the state trial court.<sup>124</sup> She did not raise an ineffective assistance of trial counsel claim in that petition either, and the petition was eventually dismissed on the merits.<sup>125</sup>

Martinez was not entitled under either state or federal law to new postconviction counsel, but he was able to secure new, pro bono counsel anyway.<sup>126</sup> New counsel filed a second petition for postconviction relief, this time raising a number of claims alleging that his trial counsel had performed ineffectively.<sup>127</sup> The Arizona courts, however, held these claims procedurally barred because they could have been, but were not, raised in the first postconviction petition.<sup>128</sup>

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121. *Id.* at 1313.

122. *Id.* at 1314.

123. *See id.* (“Arizona law, however, did not permit her to argue on direct appeal that trial counsel was ineffective.” (citing *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002))).

124. *Id.*

125. *See id.* (“Despite initiating this proceeding, counsel made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all.”).

126. *See id.* (“About a year and a half later, Martinez, now represented by new counsel, filed a second notice of postconviction relief in the Arizona trial court.”). Martinez was able to secure new postconviction counsel when the Arizona Justice Project, a nonprofit organization that investigates claims of manifest injustice, became interested in whether Martinez was factually innocent or had received ineffective assistance of counsel at trial. E-mail from Professor Robert Bartels to Professor Ty Alper (Mar. 14, 2013, 10:42 PDT) (on file with the Washington and Lee Law Review).

127. *Martinez v. Ryan*, 132 S. Ct. 1309, 1314 (2012).

128. *See id.* (“Martinez’s petition was dismissed, in part in reliance on an Arizona Rule barring relief on a claim that could have been raised in a previous

When Martinez sought review of his ineffective assistance of trial counsel claims in federal court, he was met with longstanding case law that precludes federal review of claims that have been procedurally barred pursuant to independent and adequate state rules.<sup>129</sup> He attempted to argue that his initial appellate counsel's ineffectiveness (the failure to raise trial counsel's ineffectiveness in the first postconviction petition) constituted "cause" to excuse the procedural default.<sup>130</sup> But there he ran square into *Coleman v. Thompson*, or at least the lower federal courts thought so. His claim was rejected first by the District Court,<sup>131</sup> and then by the Ninth Circuit, which noted that Martinez had no constitutional right to postconviction counsel.<sup>132</sup> Thus, per *Coleman*, "[w]ithout a right to the appointment of counsel, there can be no right to the effective assistance of counsel."<sup>133</sup>

On petition for review in the Supreme Court, the case presented the Court an opportunity to address the constitutional question of whether "a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."<sup>134</sup> The Court dubbed these

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collateral proceeding. Martinez, the theory went, should have asserted the claims of ineffective assistance of trial counsel in his first notice for postconviction relief.").

129. *Id.*

130. *Id.* at 1314–15.

131. *Martinez v. Schriro*, No. CV 08-785-PHX-JAT, 2008 WL 5220909, at \*4–5 (D. Ariz. 2008), *aff'd*, 623 F.3d 731 (9th Cir. 2010), *rev'd sub nom.*, *Martinez*, 132 S. Ct. 1309.

132. *See* *Martinez v. Schriro*, 623 F.3d 731, 743 (9th Cir. 2010), *rev'd sub nom.*, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) ("We have already concluded that there is no right to the assistance of post-conviction counsel in connection with a state petition for post-conviction relief, such as Martinez asserts in this case.").

133. *Id.*

134. *Martinez*, 132 S. Ct. at 1315. The actual question presented in the petition for certiorari was as follows:

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction

proceedings “initial-review collateral proceedings.”<sup>135</sup> Whether a prisoner has a constitutional right to counsel in initial-review collateral proceedings was the question explicitly left open in *Coleman* more than two decades earlier,<sup>136</sup> and it suggested that the Court might at least mandate appointment of counsel in some postconviction circumstances.

The Court, however, punted on this issue: “This is not the case,” the Court said, to resolve the constitutional question left unresolved in *Coleman*.<sup>137</sup> The Court did not explain why *Martinez* would not have been an appropriate vehicle for answering the question; instead, it simply reframed the question as whether ineffective assistance of postconviction counsel may provide cause to excuse a procedural default in federal habeas review, which is an equitable, as opposed to constitutional, determination.<sup>138</sup>

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counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

Petition for Writ of Certiorari at \*i, *Martinez v. Schriro*, *cert granted sub nom.*, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 398287.

135. *Martinez*, 132 S. Ct. at 1315.

136. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (“For *Coleman* to prevail, therefore, 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. We need not answer this question broadly . . .”).

137. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012).

138. *Id.* at 1315 (“The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.”). In so doing, the Court made no mention of a provision in the federal habeas statute that purports to rule out the adequacy of postconviction counsel as a ground for relief. *See* 28 U.S.C. § 2254(i) (2012) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”). To be sure, *Martinez* was arguing that the ineffectiveness of postconviction counsel should excuse the default in federal court, not create an independent ground for relief. *See* Reply Brief at 13, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 4500686. But Arizona had argued that such a result would provide “an end run around Section 2254(i).” *See* Respondent’s Brief on the Merits at 8, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 3947554. In any event, the Court did not address this concern in its opinion.

The Court's 7–2 ruling in *Martinez*, written by Justice Kennedy, created an equitable exception to the rule of *Coleman*. It did so explicitly to “protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel.”<sup>139</sup> Specifically, the Court held that, when counsel performs ineffectively in initial-review collateral proceedings or a state fails to provide postconviction counsel in initial-review collateral proceedings, the petitioner might be able to establish cause for any procedural default in federal court.<sup>140</sup> If he can do so and can also demonstrate that the ineffective assistance of counsel claim has “some merit,” the default will be excused and the federal court will be permitted to review the ineffective assistance of counsel claims fully on the merits.<sup>141</sup>

The ruling in *Martinez* raises a host of questions about future application.<sup>142</sup> In his dissent, which was joined only by Justice Thomas, Justice Scalia mocked the Court both for creating an exception to the rule of *Coleman* that had, he argued, precisely the same effect as if the Court had overturned *Coleman*,<sup>143</sup> and for

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139. *Martinez*, 132 S. Ct. at 1315.

140. *Id.* at 1320–21

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

141. *Id.* at 1318–19. What the Court meant by “some merit” is an open question. See King, *supra* note 10, at 11 (arguing that it “remains to be seen how often the analysis of whether an ineffectiveness claim has ‘some merit’ or the analysis of whether post-conviction counsel was ineffective will force a court to conduct the very same merits review the default defense is supposed to preclude”).

142. See, e.g., Freedman, *Enforcing the ABA Guidelines*, *supra* note 10 (arguing that “the equitable rationale of *Martinez* should apply to a number of claims other than ineffective assistance of counsel”); see also King, *supra* note 10, at 3–5 (arguing that the question of whether a proceeding constituted an “initial review proceeding” was not defined by the Court, and under “*Martinez* might require a case- and even fact-specific analysis”); *id.* at 12 (arguing that “[i]t is not clear how *Martinez* would be applied in cases involving petitioners who do not want the legal representation that a state may offer for initial review collateral proceedings”).

143. *Id.* at 1321 (Scalia, J., dissenting) (“Instead of [holding that there is a constitutional right to counsel in initial-review state habeas], the Court holds

suggesting that its ruling was merely a narrow advancement in the law.<sup>144</sup> Where Justice Scalia decried the Court's "word games" in *Maples*, here he was less constrained: "[T]he Court creates a monstrosity."<sup>145</sup>

#### IV. Toward a Right to Litigate Ineffectiveness

##### A. Evolution from *Rehnquist* to *Kennedy*

Some scholars have read *Martinez* and *Maples* as establishing a strong incentive for states to provide postconviction counsel.<sup>146</sup> My view is that the opinions portend a different advancement in the law, one that, if realized, would also be of significant benefit to tens of thousands of prisoners serving noncapital sentences. With respect to the blanket provision of postconviction counsel, however, I am less sanguine; my reading is that neither case provides much incentive for states to provide postconviction counsel.

Indeed, Justice Scalia's concern that *Martinez* "as a practical matter requires States to appoint counsel in initial-review collateral proceedings" seems wildly exaggerated.<sup>147</sup> Because

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that, *for equitable reasons*, . . . failing to provide assistance of counsel . . . constitutes cause for excusing procedural default. The result, of course, is precisely the same.").

144. *Id.* at 1321–22 (Scalia, J., dissenting) ("The Court's soothing assertion that its holding addresses only the constitutional claims presented in this case insults the reader's intelligence." (internal citations and quotation marks omitted)).

145. *Id.* at 1327 (Scalia, J., dissenting).

146. See Shay, *supra* note 10, at 3 ("*Maples* and *Martinez* provide incentive for states to provide effective assistance of counsel in state postconviction at a moment when these proceedings are being forced to assume a new role in the development of federal constitutional procedure."); *id.* at 12 ("*Martinez* creates powerful incentives for states to ensure competent counsel in state postconviction."); Primus, *Effective Trial Counsel*, *supra* note 10, at 8–9 (describing the suggestion that Justice Scalia's predictions are overstated as potentially "misguided"). Eric Freedman has predicted that, in the wake of *Martinez*, "states will decide that their only reasonable choice is to provide effective counsel," but he acknowledges the incentive may only exist in capital cases. Freedman, *Enforcing the ABA Guidelines*, *supra* note 10, at 102, 104. I am grateful to Giovanna Shay and Eric Freedman for providing me with unpublished drafts of their essays.

147. *Martinez v. Ryan*, 132 S. Ct. 1309, 1327 (2012) (Scalia, J., dissenting).

*Martinez* provides cause to avoid a default, it only “requires” appointment of postconviction counsel to the extent that states want to use procedural default to avoid merits review in federal court.<sup>148</sup> *Martinez* comes into play only when a state prisoner files a federal habeas petition alleging an ineffectiveness claim that appears to contain “some merit.”<sup>149</sup> For that to happen, the prisoner, in almost all cases, needs a lawyer in federal court. For noncapital defendants who typically have no habeas counsel in federal court, there will be no federal habeas claims to default in the first place.

*Martinez* thus is only of use to pro se petitioners who manage to raise meritorious ineffectiveness claims in federal court, when state postconviction counsel was either ineffective or, more likely, not appointed at all. Most pro se prisoners are unlikely to be able to investigate and then present, in federal court, a claim of ineffective assistance of trial counsel that survives the initial merits review *Martinez* prescribes; as noted above, ineffectiveness claims almost always require the kind of extra-record investigation and development that can only be accomplished by collateral counsel and resources for investigation.<sup>150</sup> In short, states are no more encouraged to provide postconviction counsel

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148. *Id.* at 1320 (majority opinion).

149. *Id.* at 1318.

150. Primus, *Effective Trial Counsel*, *supra* note 10, at 3 (“Because ineffective-assistance-of-trial-counsel claims are often predicated on what trial attorneys failed to do, they frequently require extra-record development.”). That is not to say that pro se prisoners will not file habeas petitions in federal court. They likely will, and it is possible some may be successful, especially if they raise purely record-based ineffectiveness claims. As Giovanna Shay and Chris Lasch found when researching petitions for certiorari in the Supreme Court, pro se petitioners in criminal cases file thousands of such petitions each year. See Giovanna Shay & Christopher Lasch, *Inflating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 247 n.178 (2008). But that phenomenon would only affect state practice if pro se federal habeas petitions were likely to be successful often enough that states found themselves having to defend true merits inquiries. That is highly unlikely. See Uhrig, *supra* note 10, at 1222 (quoting *United States v. Cronin*, 466 U.S. 648, 657 (1984))

In the trial context, the Supreme Court has recognized that “[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.” What I witnessed in federal habeas practice for non-capital, pro se litigants is precisely such a slaughter.



after *Martinez* than Congress is to provide counsel to all would-be federal habeas petitioners.<sup>151</sup>

That said, there is an unmistakable cast to the Court's decisions in *Martinez* and *Maples* that recognizes the value of postconviction proceedings, in that—unlike appellate review—such proceedings allow for the development and presentation of claims of ineffective assistance of trial counsel. As Justice Kagan noted during oral argument in *Trevino*, the Court's first post-*Martinez* case, *Martinez* “was an equitable rule about giving people an opportunity to raise a trial ineffectiveness claim.”<sup>152</sup> Much like the Court's ruling fifty years ago in *Douglas* appreciated the value of an initial appeal as of right, these decisions reflect an appreciation for the value of an ineffectiveness claim that was absent in the Court's Rehnquist-era opinions.

Justice Ginsburg's opinion in *Maples*, for example, began by calling out Alabama for its “low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial”;<sup>153</sup> for the lack of training it provides to, or requires of, these lawyers;<sup>154</sup> and for the fact that “[a]ppointed counsel in death

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151. Steve Vladeck has also suggested that Justice Scalia's concerns may be overblown. He notes that *Martinez* “may in fact have the salutary effect of putting a greater onus on state courts seriously to consider ineffective assistance claims in state post-conviction proceedings,” and that, in any event, because the Court's rule was merely equitable, states may choose to forgo the procedural default in federal court and raise a merits defense instead of choosing to provide post-conviction counsel. Steve Vladeck, *Opinion Analysis: A New Remedy, but No Right*, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), <http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review). I differ with Vladeck as well; without any right to a lawyer in federal court, there is really no incentive for a state to provide post-conviction counsel. States will only face the Hobson's choice Justice Scalia decries if an indigent prisoner manages to secure federal counsel or files a pro se petition that survives initial review. Those cases are going to be so infrequent that few states, if any, are going to conclude that the rule of *Martinez* compels the blanket provision of state postconviction counsel.

152. Transcript of Oral Argument at 45, *Trevino v. Thaler*, 133 S. Ct. 524 (2012) (No. 11-10189), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-10189.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-10189.pdf).

153. *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012).

154. *Id.* (“Experience with capital cases is not required. Nor does the State provide, or require appointed counsel to gain, any capital-case-specific professional education or training.” (internal citations and quotation marks omitted)).

penalty cases are also undercompensated.”<sup>155</sup> With respect to Cory Maples’s two trial attorneys, the Court noted that only one of them had ever served in a capital case, neither had ever tried the penalty phase of a capital case, and their compensation for work on Mr. Maples’s behalf was “capped at \$1,000 for time spent out-of-court preparing Maples’s case, and at \$40 per hour for in-court services.”<sup>156</sup>

*Maples*’s discussion of the state of indigent trial-level defense in capital cases in Alabama and of the representation Maples received at trial was irrelevant to the Court’s holding. As Justice Alito noted in his concurrence, “The quality of petitioner’s representation at trial obviously played no role in the failure to meet the deadline for filing his notice of appeal from the denial of his state postconviction petition.”<sup>157</sup>

Yet the Court included the discussion anyway.<sup>158</sup> Was it simply to take the opportunity to knock Alabama for its insufficient system of providing counsel to indigent capital defendants? Perhaps. But more likely, it was included in the ruling because the Court recognized that the failure of postconviction counsel resulted in Maples’s inability to raise (except in his initial postconviction petition to the Alabama trial court) his facially legitimate claim that “his inexperienced and underfunded attorneys failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of the trial.”<sup>159</sup> The *claim* of ineffective assistance of trial counsel in this capital case was placed in jeopardy by postconviction counsel’s abandonment of their client.

Following *Maples*, the Court in *Martinez* much more explicitly placed a spotlight on the value of an ineffective assistance of trial counsel claim, in a sharp departure from the Court’s Rehnquist-era rhetoric. The *Martinez* Court was particularly concerned not with whether prisoners had postconviction counsel, but with whether criminal defendants had

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155. *Id.*

156. *Id.* at 918.

157. *Id.* at 928 (Alito, J., concurring).

158. *Id.* at 917–18 (majority opinion).

159. *Id.* at 919.

a fair opportunity—indeed, any opportunity—to raise a claim of ineffective assistance of trial counsel: “When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.”<sup>160</sup> And if state procedural rules operate to preclude federal review of claims not raised in state postconviction, *no* court will hear a petitioner’s claims. Thus, the Court noted, when the ineffectiveness claim cannot be raised earlier, “the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective assistance claim.”<sup>161</sup> The Court engaged in a somewhat extended discussion of the nature of ineffective assistance of trial counsel claims, noting that such claims often turn on the development of evidence outside of the trial record, which, as noted above, is all but impossible to accomplish without the assistance of counsel.<sup>162</sup>

The Court then made a striking statement: “A prisoner’s inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.”<sup>163</sup> This assertion places ineffectiveness claims on par with, if not more important than, other trial errors that would typically be raised by appellate counsel (to which all indigent defendants are constitutionally entitled). The Court noted that it made sense to require ineffectiveness claims to be raised postconviction, as Arizona did, but that “[b]y deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims.”<sup>164</sup> As noted above, the Court concluded by deciding that, as an equitable matter, a prisoner may establish cause for the default of an ineffectiveness claim either when counsel is not appointed in an initial-review collateral proceeding or when appointed counsel in the initial-review collateral proceeding was ineffective under

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160. *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012).

161. *Id.* at 1317.

162. *See id.* (“While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.”).

163. *Id.*

164. *Id.* at 1318.

*Strickland* standards (and either way, only when the claim has some merit).<sup>165</sup>

The Court's assertion in *Martinez* that a prisoner's inability to present a claim of trial error is "of particular concern"<sup>166</sup> when the claim is one of ineffective assistance of trial counsel echoed not only the "bedrock" principles enshrined in *Gideon* but also Justice Kennedy's own concurrence in *Giarratano*, in which he described collateral proceedings as "a central part of the review process for prisoners sentenced to death."<sup>167</sup> If anything, his opinion in *Martinez* represents an extension of that view, for it comes in a noncapital case.

Both *Maples* and *Martinez*, in the way they privilege the claim of ineffective assistance of counsel, represent a marked evolution from Justice Rehnquist's opinions in *Ross*, *Finley*, and *Giarratano*. No longer does the Court consider postconviction an afterthought to the criminal process. Instead, at least with respect to claims of ineffective assistance of trial counsel, the Court appears to be moving toward recognition that the right to raise such claims is as important as the right to raise record-based claims typically brought by constitutionally required appellate counsel. My view is that this development is far more significant than any signals the Court sent in *Martinez* with respect to the provision of postconviction counsel generally.

### B. What the Evolution Portends

This evolution in the jurisprudence may cautiously be described as the triumph of Justice Kennedy's more expansive view of the role of postconviction over Justice Rehnquist's

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165. *See id.*

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused the procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

166. *Id.* at 1312.

167. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring).

parsimonious approach. To date, it has amounted only to a willingness on the part of the Court to provide an equitable remedy (excusal of procedural default), as opposed to the provision of constitutionally required postconviction counsel. The limited nature of the remedy in *Martinez* and *Maples* is undoubtedly a reflection, to some extent, of the lack of votes on the Court for an expanded right to postconviction counsel. But it can also be traced to an important distinction between capital cases and most noncapital cases: States typically do not provide postconviction counsel for noncapital defendants.<sup>168</sup> They typically *do* provide postconviction counsel for capital defendants.<sup>169</sup> Because of this reality, the existence, or lack, of a constitutional right to postconviction counsel has radically different implications in each context.

Commentators and many members of the capital postconviction bar have long advocated for a constitutional right to postconviction counsel,<sup>170</sup> but not generally because such a rule would provide counsel to death row inmates who would otherwise go uncounseled. The relevance of a constitutional right to counsel in the *capital* context is that, when appointed postconviction counsel performs ineffectively and contributes to the finding of a procedural bar, that ineffectiveness can be grounds for excusing the procedural default in federal court (or perhaps even an

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168. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1322 (2012) (Scalia, J., dissenting) (referring to the “common state practice of not appointing counsel in all first collateral proceedings”).

169. See *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012) (noting that Alabama is “nearly alone among the States” in not guaranteeing representation to indigent capital defendants in postconviction).

170. See, e.g., Alice McGill, Comment, *Murray v. Giarratano: Right to Counsel in Postconviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 211, 212 (1990) (arguing that “the availability of postconviction relief is meaningless without the assistance of counsel”); Smith & Starns, *supra* note 18, at 56 (“It is the thesis of this article that the Eighth Amendment is violated by any state that refuses [to appoint postconviction counsel in capital cases.]”); Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA’s Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 665–66 (1999) (arguing that fairness demands either a congressional or constitutional requirement that states provide counsel in state postconviction for capitally convicted defendants); Freedman, *supra* note 84, at 1103 (“Intelligent lawyers, judges, and legislators should not allow *Giarratano* to divert them from doing what justice requires, and the Supreme Court should abandon it.”).

independent ground for some type of relief). Such a rule would have led to a different result in *Coleman*, as well as many post-*Coleman* cases in which postconviction counsel fails to perform effectively. Had postconviction counsel been constitutionally required, the ineffectiveness of postconviction counsel would have excused the default in those cases and allowed the federal court to review the underlying constitutional claims on their merits. (*Martinez* now provides this relief to some capital clients who can establish the factual predicates for the *Martinez* exception.<sup>171</sup>)

By contrast, a constitutional right to postconviction counsel in the *noncapital* context would mean the provision of counsel when none has previously existed.

In short, a constitutional right to counsel for capital defendants means ensuring the competence of the lawyers they already have and protecting those defendants from their lawyers' mistakes; for noncapital defendants, it means providing them with a mechanism to raise postconviction claims in the first instance. For capital defendants, the *Maples–Martinez* equitable remedy of default excusal provides meaningful relief in the form of a vehicle to allow federal court review of potentially meritorious federal constitutional claims. For noncapital defendants who have no counsel in state postconviction proceedings, *Maples* and *Martinez* provide no actual immediate benefit because the ability to excuse a default in federal court means little to defendants who have no lawyer to file a federal habeas petition.<sup>172</sup>

The distinction between capital and noncapital defendants is important in terms of the legacy of *Maples* and *Martinez* because most capital defendants already have a mechanism for bringing ineffectiveness claims, even if they do not currently enjoy a right to have those claims brought by constitutionally effective counsel.<sup>173</sup> For these defendants, *Maples* and *Martinez* provide a

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171. See *Martinez*, 132 S. Ct. at 1318 (establishing the circumstances in which a prisoner may establish cause for a default).

172. Again, as noted above, this is why Justice Scalia's concern that *Martinez* effectively requires states to provide postconviction counsel is unfounded. *Supra* note 147 and accompanying text.

173. While some state statutes require that postconviction counsel in capital cases be effective, the violation of these state standards does not excuse a procedural default in federal court, so long as *Coleman* generally remains good

vehicle to have their trial counsel ineffectiveness claims heard when their postconviction counsel fails them. For noncapital cases, the relevance of *Maples* and *Martinez* is more elusive because federal habeas counsel is so rarely provided.

The irony of what may be the legacy of *Maples* and *Martinez* is that the Supreme Court appears more interested in a remedy that allows ineffectiveness claims to be raised than it does in the provision of postconviction counsel generally. Thus, while the decisions provide cold comfort today for noncapital defendants who are typically without federal habeas counsel to help them take advantage of the Court's equitable rulings, they presage a postconviction landscape in which *all* prisoners are entitled to the litigation of an ineffectiveness claim in at least one forum.

Put another way, the Supreme Court does not appear to be on the verge of finding a broad constitutional right to postconviction counsel, for anyone. But the Court seems clearly concerned—much more so than during the Rehnquist era—with convicted defendants' ability to “get their day in court” with respect to ineffective assistance of trial counsel claims, even if that day in court is only one day, in one state court. In the capital context, in which counsel is typically provided in both state postconviction and federal habeas proceedings,<sup>174</sup> the Court can cobble together procedural work-arounds—what Justice Scalia called “word games” in *Maples*<sup>175</sup>—to ensure that day in court without finding a constitutional right to counsel.

I suggest, however, that because the defendants in *Maples* and *Martinez* had postconviction counsel, and in particular because they had attorneys to raise facially meritorious ineffectiveness claims in federal habeas petitions, the Court was able to fashion a remedy to excuse the federal court default without having to consider seriously a constitutional right to state postconviction counsel. Indeed, the fact that virtually all capital defendants have federal habeas counsel enables the

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law.

174. By statute, counsel is provided to all indigent capital defendants in federal habeas proceedings. 18 U.S.C. § 3599 (2008).

175. *Maples*, 132 S. Ct. at 933 (Scalia, J., dissenting) (“No precedent should be so easily circumvented by word games . . .”). And it was able to do so in *Martinez* as well, when the noncapital defendant in that case happened to have secured pro bono state postconviction counsel.

equitable approach the Court took in these two cases.<sup>176</sup> But the cases provide procedural protections that—when not coupled with a constitutional right to counsel—are of little use to noncapital defendants. In other words, the provision of postconviction counsel in capital cases has led to decisions, such as *Martinez* and *Maples*, that almost, but do not quite, vindicate the Court’s concerns regarding the ability to raise a claim that trial counsel was ineffective.

Recall Justice Kennedy’s statement for the Court in *Martinez*, implying that it is as important to provide a mechanism to raise an ineffectiveness claim as it is to raise a record-based trial error claim.<sup>177</sup> If that is the case, then the right to counsel to raise an ineffectiveness claim must be as grounded in constitutional guarantees as the right to counsel to raise a claim on direct appeal was in *Douglas*.<sup>178</sup> That is why *Martinez* and *Maples* in fact portend greater protections for the rights of noncapital defendants to litigate claims of ineffective assistance of counsel. They implicitly envision an expansion of *Douglas* that provides not just constitutionally mandated appellate counsel but some form of constitutionally mandated counsel to raise ineffective assistance of trial counsel.

The Court needs to go further than it did in *Martinez* or *Maples*, however, in order to effectuate any meaningful ability on the part of noncapital defendants to raise a claim of ineffective assistance of counsel. An equitable remedy that provides an

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176. See 18 U.S.C. § 3599(2) (2012)

In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . . .

See also *McFarland v. Scott*, 512 U.S. 849, 854–55 (1994) (construing 21 U.S.C. § 848(q)(4)(B) as granting “indigent capital defendants a mandatory right to qualified legal counsel and related services ‘[i]n any [federal] post conviction proceeding’” (footnote omitted)).

177. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

178. See *Douglas v. California*, 372 U.S. 353, 357 (1963) (“But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”).



excuse for default is of little use to a pro se federal habeas petitioner attempting to raise a meritorious ineffectiveness claim. While a blanket constitutional right to postconviction counsel seems out of reach with the Court as it is currently constituted, there seems no other way to provide for a day in court other than to hold that the Sixth Amendment requires the provision of counsel for defendants to raise, at the least, trial level ineffectiveness claims in one forum.

Admittedly, it is hard to avoid the conclusion that a constitutional requirement to some form of “ineffectiveness counsel” (or perhaps, as well, counsel to raise other, extra-record claims that can only be brought in initial-review collateral proceedings) would not impose a significant burden on the states. Unlike the equitable ruling in *Martinez* that permits states to gamble on the occasionally successful pro se federal habeas petitioner, such a constitutional ruling would require states to either amend their procedures to provide for meaningful opportunity (i.e., time, resources, and independent counsel) to raise trial ineffectiveness claims prior to collateral review,<sup>179</sup> or they will have to fund counsel to investigate and, when appropriate raise, postconviction, trial ineffectiveness claims. Because ineffectiveness claims comprise the majority of the claims raised postconviction, the cost of providing counsel to raise ineffectiveness claims may be similar to the cost of providing postconviction counsel generally.

It is beyond the scope of this Article to address the resource implications of an expanded right to postconviction counsel of some vintage. But I will observe that if the states devoted appropriate resources toward improving representation at the trial level, the postconviction process would not be as critical as it

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179. For the reasons explained above, *supra* note 19, and as the Court acknowledged in *Martinez*, it is likely impractical to force ineffectiveness claims into motion for new trial or appellate proceedings. *See Martinez*, 132 S. Ct. at 1318 (“Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim.”). The Court has already made clear that it does not view direct appeal as an appropriate forum in which to raise most claims of ineffective assistance of counsel. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003) (stating that “in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance”).

is now to rooting out trial-level error.<sup>180</sup> Particularly given the fact that the vast majority of noncapital cases result in negotiated settlements,<sup>181</sup> and given that the Court has now clarified that defendants have a right to effective counsel at the plea-bargaining stage,<sup>182</sup> one could argue that, now more than ever, the entire system would benefit from increased devotion of resources at the front end.

It may also be possible to envision some constitutional right to “ineffectiveness counsel” in state court to raise the ineffectiveness of trial counsel only when the petitioner can show some colorable claim to trial counsel’s ineffectiveness.<sup>183</sup> But

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180. In the capital context, Eric Freedman has argued that

[t]he single most meaningful reform of the capital punishment system, short of its abolition, would be the provision of effective trial counsel, through a system that provided adequate compensation, expert resources, and the training and support needed to practice in this esoteric field. If that happened—and nowhere has it to date—there would be far fewer convictions and death sentences, but those few would be much more likely to stick. That is an outcome that would be in the best interests of all concerned. When the government attempts to evade costs at the front end, they emerge at the back end . . . .

Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1106–07 (2001) (citations omitted); see also Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 15 (1990)

[T]he provision of knowledgeable counsel at trial would restore the trial as the “main event” in the criminal process because constitutional issues would be first recognized, aired, and resolved at that level, rather than later. As a result, there would be fewer colorable claims of ineffective assistance of counsel and fewer of the reversals and retrials that now so frequently and substantially prolong the process.

181. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

182. See *Frye*, 132 S. Ct. at 1408 (holding that “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused”); *Lafler*, 132 S. Ct. at 1388 (holding that a defendant who receives ineffective advice that results in rejection of a plea offer and conviction at trial may be entitled to relief).

183. For example, one could look to the provision of counsel in federal habeas proceedings. Noncapital pro se petitioners receive appointed counsel in

because indigent prisoners are so limited in their ability to research or investigate their cases, such a standard would have to be extremely liberal in order to have any meaning at all.<sup>184</sup> More likely, the Court's concern that defendants have their day in court with respect to an ineffectiveness claim could only be vindicated through the provision of counsel who would be tasked with investigating and raising, when colorable, a claim of ineffective assistance of counsel.

In any event, despite the burdens, the conclusion is inescapable. If, in *Douglas*, which, to be sure, was written by a very different Court in a very different era, the Court held that an unconstitutional line has been drawn between rich and poor when the former is entitled to a lawyer on appeal but the latter is not,<sup>185</sup> the Court's recognition of the importance of ineffectiveness claims demands the same result.

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federal habeas cases only when they can establish that an evidentiary hearing is required or when it is "in the interest of justice," with a wide range of interpretation across courts and circuits. *See, e.g.*, PRISON LAW OFFICE, FEDERAL HABEAS MANUAL § 4:25 ("There is a statutory right to appointed counsel in a § 2254 proceeding under Rule 8(c) if an evidentiary hearing is required." (citations omitted)). Federal courts have substantial discretion in deciding when to appoint counsel to noncapital habeas petitioners, and consider additional factors, including the complexity of the record; whether a petitioner can competently represent himself in a habeas proceeding; likelihood of success on merits; and the ability of an indigent petitioner to investigate and present his case. *See, e.g.*, *Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983) ("Counsel must be appointed for an indigent federal habeas petitioner only when the interests of justice or due process so require."); *Shaird v. Scully*, 610 F. Supp. 442, 444 (S.D.N.Y. 1985) (stating that a determination of whether counsel should be appointed "requires a close examination and evaluation of certain factors," including the likelihood of success, complexity of the issues, and the ability of the indigent to investigate and present the case).

184. *See, e.g.*, *Primus, supra* note 21, at 603 (noting that it is very difficult, if not impossible, for a prison inmate without counsel to gather extra-record evidence sufficient to establish prejudice under the ineffective assistance of counsel standard); *Smith & Starns, supra* note 18, at 88–100 (establishing the many ways in which indigent prisoners are ill-equipped to develop and raise claims of ineffective assistance of counsel). *Martinez* itself acknowledges this. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.").

185. *See Douglas v. California*, 372 U.S. 353, 357 (1963) ("But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

### V. Conclusion

*Martinez* and *Maples* offer hope for capital and noncapital defendants, but in very different ways. The equitable nature of the Court's rulings means that, for capitally convicted prisoners, there is now some hope that, when postconviction counsel fails them, there may still be an opportunity to have their ineffective assistance of trial counsel claims heard in federal court. As several commentators have suggested, these equitable exceptions should be expanded to cover an even greater number of cases.<sup>186</sup>

So long as the remedy remains equitable, however, prisoners without counsel to file federal habeas petitions will enjoy little benefit. Thus, for noncapital defendants, *Maples* and *Martinez* are far less helpful in the near term than they are for capital defendants.

That said, the Court's renewed emphasis on the importance of postconviction, because of its role in the facilitation of ineffectiveness claims, is a welcome evolution in the Court's jurisprudence. The logic of *Maples* and *Martinez* provides hope for the provision of constitutionally mandated postconviction counsel, even if in a limited role, to enable at least one day in court on an ineffectiveness claim. If I am right about that, and the Court eventually adopts a rule that actually ensures states provide counsel to investigate and raise ineffectiveness claims (as

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186. Although grounded in specific, articulated concerns about the ability of convicted defendants to raise ineffective assistance of trial counsel claims, it is certainly true that the essential logic of *Martinez* would apply to other claims that could not have been raised until initial-review collateral proceedings, such as claims alleging government suppression of exculpatory evidence. See King, *supra* note 8 (wondering whether the Court will “withstand the inevitable pressure to expand [*Martinez*] to *Brady*, jury misconduct, and other late-discovered claims”); Michael O’Hear, *A Good Week for the Right to Counsel*, LIFE SENTENCES BLOG (Mar. 23, 2012, 2:24 PM), <http://www.lifesentencesblog.com/?p=4582> (last visited Apr. 2, 2013) (“[T]here may be an argument that *Martinez* should apply whenever the legal or factual basis of any type of claim is not reasonably available during the direct review process.”) (on file with the Washington and Lee Law Review). As Chris Lasch points out in a pre-*Martinez* article, there are a number of claims other than ineffective assistance of trial counsel claims that are typically “not susceptible to presentation before collateral review.” Lasch, *supra* note 20, at 45–46 (listing claims). Whether the courts are willing to apply the equitable principles of *Martinez* to such claims is an open question, but one that will likely be answered sooner rather than later.

opposed to merely creating tentative incentives for them to do so), capital defendants will benefit from the increased ability to establish cause for procedural default in federal court. But the real sea change will be with respect to the many more noncapital defendants who will be able to surface violations of *Gideon* in a way that has never before been possible. This aspect of *Maples* and *Martinez* holds the greatest promise for the vindication of *Gideon*'s "bedrock principle."<sup>187</sup>

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187. *Martinez*, 132 S. Ct. at 1317.