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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 (2011)

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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

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I. INTRODUCTION

The United States Constitution provides that "[t]he [p]rivilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[1] Under federal law, habeas corpus relief extends to state prisoners convicted in violation of the Constitution.[2] Despite the broad promise of access to habeas corpus relief, restrictive state procedural rules often rob habeas petitioners of the right to federal review of valid constitutional claims.[3] Indeed, in order to advance a constitutional claim in a federal habeas petition, the same claim must be timely raised and fully litigated during state trial, appellate, or post-conviction proceedings.[4] The consequences of failing to comply with state procedural rules are severe. With rare exception, a claim raised for the first time in a federal habeas petition is rejected without review on the merits.[5]

Frequently, a habeas petitioner's failure to raise a constitutional claim during state proceedings is the result of ineffective assistance of trial or appellate counsel.[6] While a petitioner may be blameless for failing to comply with a state procedural rule, the odds of mounting a successful challenge to the effectiveness of counsel are slim.[7] A petitioner must first demonstrate that her counsel's representation did not meet the constitutional minimum guaranteed under the Sixth Amendment—a vague and often arbitrary standard. In cases in which counsel's performance does not meet the constitutional threshold, the petitioner must then convince a court that her counsel's mishandling of the case adversely impacted its outcome. To further hamper a petitioner's plight, the Constitution does not guarantee the right to counsel to wage a post-conviction attack on the effectiveness of a trial or appellate lawyer. Thus, habeas petitioners, many of whom are indigent prisoners without access to counsel or adequate legal resources, must typically attempt to meet their high legal burdens alone. Even when a petitioner has counsel to help navigate the post-conviction labyrinth, the right-to-counsel limitation prevents chal-

1. U.S. CONST. art. I, § 9, cl. 2; *see also* Johnson v. Avery, 393 U.S. 483, 485 (1969) ("[T]he basic purpose of the Writ is to enable those unlawfully incarcerated to obtain their freedom[.]").

2. 28 U.S.C. § 2241(c) (2006).

3. Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1113-14 (1999).

4. *Id.* at 1113.

5. *Id.*

6. Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 682-83 (1990).

7. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) ("Surmounting [the] high bar [to show ineffective assistance of counsel] is never an easy task.").

lenges to the effectiveness of post-conviction counsel on federal habeas review.

In its upcoming term, the United States Supreme Court will revisit questions regarding state procedural barriers, ineffective assistance of counsel, and the right to counsel on post-conviction appeal in two habeas cases: *Maples v. Thomas*[8] and *Martinez v. Ryan*.[9] The decisions in both cases promise to have a lasting effect on access to habeas relief, either by providing new avenues to challenge the dismissal of petitions on procedural grounds or by further restricting access to federal review of constitutional claims. This Article will look at the impact of state procedural rules on access to habeas review by examining the case of convicted murderer, Emma Jean Bilbrey. In addition, this Article will outline the origins of habeas corpus law and the evolution of rules limiting access to federal review for state prisoners. Finally, in anticipation of *Maples* and *Martinez*, this Article will propose that extending the right to counsel to "first-tier" post-conviction review is necessary to ensure continued meaningful access to the Writ of Habeas Corpus.

II. THE CASE OF EMMA JEAN BILBREY

The case of Emma Jean Bilbrey offers a striking example of how a procedural default resulting from the ineffective assistance of counsel can thwart federal review of a fundamental constitutional issue. In January 1994, Bilbrey was convicted of the murder of U.J. Bryant and sentenced to life imprisonment.[10] In many ways, Bilbrey's conviction proved the culmination of a lifetime of trauma, illness, and instability. Bilbrey was born into poverty in rural Crossville, Tennessee.[11] From childhood, she struggled with serious learning disabilities.[12] Her elementary school records reveal an IQ of 66.[13] Bilbrey "completed only 38 days of third-grade before receiving a 'social promotion' to fourth grade at age twelve 'due to size and age.'"[14] She "dropped out of school after [the] fourth grade, and did not return."[15] Upon her incarceration, she read at a second grade level and was unable to add or subtract single digits.[16]

8. 131 S. Ct. 1718 (2011).
9. 131 S. Ct. 2960 (2011).
10. State v. Bilbrey, 912 S.W.2d 187 (Tenn. Crim. App. 1995).
11. Amended Petition for Writ of Habeas Corpus at 8-9, Bilbrey v. Douglas, No. 00-CV-00310 (M.D. Tenn. Feb. 10, 2003).
12. *Id.* at 9.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

Bilbrey also suffered from depression, post-traumatic stress disorder, and bipolar disorder.[17] In her early teen years, she married an older man who moved her to Dayton, Ohio.[18] She had her first child a year later and two more before her eighteenth birthday.[19] In Dayton, she worked as a "bar maid" and a "go-go girl" to earn money for her family.[20] After her husband abandoned the family, Bilbrey returned to Tennessee.[21]

During the late-1980s, Bilbrey began a romantic relationship with David Harvey, a petty thief and drug dealer.[22] Harvey moved into Bilbrey's home.[23] Once there, he drank and used cocaine heavily.[24] In 1987, a serious car accident left Bilbrey with severe leg injuries, largely homebound, and in constant pain.[25] Over the next two-and-a-half years, she suffered through multiple surgeries resulting from the accident.[26] On March 29, 1990, a final procedure removed plates and screws in her leg.[27]

On April 14, 1990, Bilbrey was still recovering from her latest operation and walking with crutches.[28] That evening, she rode in Harvey's car to a small grocery story in nearby Mayland, Tennessee.[29] Once there, Harvey made a call from a pay telephone.[30] The couple then drove less than a mile to a rural two-lane road that snaked around a small creek.[31] Harvey pulled the car onto the shoulder of the road, activated the hazard lights, and opened the hood.[32] When Bilbrey questioned Harvey's actions, he replied that he was "waiting on [a] guy to bring him some cocaine."[33]

Minutes later, another car approached and stopped.[34] Harvey got out of the couple's car while Bilbrey remained inside.[35] Within mo-

17. Bilbrey v. Douglas, 124 F. App'x 971, 973 (6th Cir. 2005).
18. Transcript of Record at 526-27, State v. Bilbrey, No. 2676 (Tenn. Crim. Ct. Jan. 10, 1994) [hereinafter Second Trial Transcript].
19. *Id.* at 527.
20. *Id.* at 528-29.
21. *Id.* at 529.
22. *Id.* at 533.
23. *Id.*
24. Amended Petition for Writ of Habeas Corpus, *supra* note 11, add. 1, at 77-78.
25. Second Trial Transcript, *supra* note 18, at 531-32.
26. *Id.*
27. *Id.*
28. *Id.* at 558.
29. *Id.* at 552.
30. *Id.* at 553.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 554-56. According to Bilbrey's trial testimony, Harvey ordered Bilbrey to "get out of sight," prompting her to "[get] out of the front seat and [get] in the back in the floor board." *Id.* at 554.

ments, shots were fired and Harvey hastily returned to the car.[36] The couple went to drink at the Red Dog Saloon, a local bar, and then fled to Dayton, Ohio.[37] The following morning, a sheriff's deputy discovered the body of U.J. Bryant—Bilbrey's brother-in-law.[38] Bryant had been shot multiple times.[39] His wallet was missing.[40]

An investigation led police to Harvey and Bilbrey. The bartender at the Red Dog Saloon said that Bilbrey appeared shaken when the couple arrived.[41] Bryant's daughter reported that on the night of the murder, Bryant told her that Harvey's car had broken down and he was going to assist the couple.[42] The police also learned Bryant was known by friends and family to carry significant amounts of cash on his person.[43]

For two weeks, the couple hop-scotched through Ohio and Kentucky, staying in roadside motels and squandering Harvey's take from the robbery.[44] During the trip, Harvey made several threats that he would harm Bilbrey if she discussed the crime with anyone.[45] After two weeks, they returned to Crossville.[46] On April 30, 1990, the couple was arrested and charged with the robbery and murder of Bryant.[47]

Initially, Harvey denied killing Bryant.[48] At a post-arrest interview, Bilbrey also denied any involvement in the murder.[49] In subsequent months, however, Harvey made several sworn statements, all of which gave conflicting accounts of the crime.[50] Harvey first stated to the police that neither he nor Bilbrey killed Bryant.[51] Approximately one month later, he stated that he killed Bryant at Bilbrey's request but that Bilbrey did not leave the car.[52] Six weeks later, Harvey stated that he killed Bryant in self-defense but that Bilbrey was not

36. *Id.* at 555.
37. *Id.* at 557-59.
38. *Id.* at 221.
39. *Id.*
40. *Id.* at 217.
41. *Id.* at 285.
42. *Id.* at 336.
43. *Id.*
44. *Id.* at 559-61.
45. *Id.* at 564.
46. *Id.* at 613.
47. *Bilbrey*, 912 S.W.2d at 187.
48. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 19.
49. Second Trial Transcript, *supra* note 18, at 606-07.
50. *Id.*
51. *Id.*
52. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 19.

involved.[53] Harvey also admitted that he had given the police "two [prior] false statements about the crime."[54]

Two months later, Harvey again changed his statement, swearing that he shot Bryant without prompting from Bilbrey—though she assisted with the ensuing robbery.[55] Then, in the days leading up to his trial, Harvey entered into an agreement with prosecutors to plead guilty to a reduced charge of second degree murder in exchange for his testimony against Bilbrey.[56] As the agreement hinged on the prosecution's satisfaction with Harvey's testimony, his plea hearing was postponed until the conclusion of Bilbrey's trial.[57]

At trial, Harvey again altered his story.[58] For the first time, he identified Bilbrey as both the shooter *and* the robber.[59] He testified that he shot Bryant and then Bilbrey "got out [of the car] and shot him, too."[60] He then testified that after the shooting, "she took [Bryant's] wallet" and he "didn't see no more of that wallet."[61] Contrary to Harvey's trial testimony, Bilbrey steadfastly denied shooting or robbing Bryant or planning the crime.[62] Rather, she maintained that she hid in the backseat of the car while Harvey shot and robbed Bryant.[63]

Bilbrey's counsel, James Jones, cross-examined Harvey at trial.[64] His questioning meandered for several hours, often doubling back to correct chronological errors or stalling on seemingly mundane issues.[65] Despite the length of the cross-examination, Jones failed to meaningfully challenge Harvey about the wild inconsistencies in Harvey's prior statements or ask questions about Harvey's agreement for

53. *Id.*

54. *Id.* (alteration in original) (internal quotation marks omitted).

55. *Id.*

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 20. The fallibility of co-defendant testimony is effectively documented by Brandon L. Garrett in *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*. Garrett cites 52 cases involving defendants who were convicted based, in part, on informant testimony but later exonerated due to exculpatory DNA testing. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). Of the 52 informant cases, 23 involved co-defendant testimony. *Id.*

59. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 20.

60. *Id.* at 19 (alteration in original).

61. *Id.*

62. Second Trial Transcript, *supra* note 18, at 551.

63. *Id.* at 555.

64. Transcript of Record at 98, State v. Bilbrey, No. 1536 (Tenn. Crim. Ct. May 28, 1991) [hereinafter First Trial Transcript].

65. *Id.* at 98-224. At Bilbrey's post-conviction hearing, Joe Finley, a longtime public defender who represented Harvey, agreed that Jones's cross-examination was "rambling and disoriented and not effective." Transcript of Post-Conviction Record at 93-95, State v. Bilbrey, No. 2676 (Tenn. Crim. Ct. Oct. 13, 1997). For his part, Jones admitted to "having some difficulty with [his] thought processes," "experiencing difficulty with maintaining [his] balance," and "not feeling well" during the cross-examination. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 16.

leniency.[66] Worse still, the cross-examination brought out new allegations by Harvey that further damaged Bilbrey's defense, including claims that she encouraged him to lie about her involvement in the murder.[67]

After completing the cross-examination, Jones went to the emergency room at a nearby hospital and reported chest pains and dizziness.[68] Hospital records revealed that Jones admitted to heavy alcohol consumption prior to the trial.[69] Following a two-day hospitalization, doctors diagnosed Jones with congestive heart failure, and his co-counsel, John Appman, replaced him for the remainder of the trial.[70] Two days later, a jury convicted Bilbrey of first degree murder.[71] She was sentenced to life in prison for the murder plus an additional eight years for the robbery.[72] After Bilbrey's conviction, the prosecution allowed Harvey to plead to second degree murder.[73] He received two consecutive twenty-five-year sentences with eligibility for parole after serving thirty percent of the time.[74] Bilbrey's case took another bizarre turn when her conviction was vacated on appeal due to the trial judge's failure to follow a technical rule of procedure.[75] In January 1994, Bilbrey was retried for the murder of Bryant.[76] Weeks before the trial, Harvey gave a final sworn statement to detectives that he killed Bryant.[77] Harvey stated that "Jean [Bilbrey] didn't plan nothing" and "had nothing to do with [the crime]."[78] He also told the detectives that he threatened to "kill [Bilbrey], [her] children, [and][her] grandchildren" if she reported Bryant's murder.[79] Finally, Harvey admitted that when Bilbrey begged him to turn himself in to the police, he "grabbed her by the hair [on her] head, put a pillow case around her neck . . . [and] choked [her] real bad."[80]

66. *Id.*

67. *Id.* at 190-91. On cross-examination, Harvey for the first time testified, "[Bilbrey] told me to write this statement to where it looked like she had nothing to do with [the murder]." *Id.*

68. Amended Petition for Writ of Habeas Corpus, *supra* note 11, add. 4, at 15.

69. *Id.* at 16.

70. *Id.* at 16-17.

71. State v. Bilbrey, 858 S.W.2d 911, 912 (Tenn. Crim. App. 1993).

72. *Bilbrey*, 858 S.W.2d at 912.

73. Amended Petition for Writ of Habeas Corpus, *supra* note 11, add. 8.

74. *Id.*

75. *Bilbrey*, 858 S.W.2d at 912-14. Under TENN. R. CRIM. P. 25(a), the trial judge must "certify that he has familiarized himself with the record of the trial." The judge presiding over Bilbrey's trial failed to do so. *Id.*

76. Second Trial Transcript, *supra* note 18, at 1.

77. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 19.

78. *Id.* at 20.

79. Transcript of Pre-Trial Motions Hearing at 18, State v. Bilbrey, No. 2676 (Tenn. Crim. Ct., Jan. 7, 1994).

80. *Id.*

After providing the statement, Harvey refused to testify against Bilbrey a second time.[81] In light of Harvey's recalcitrance, the trial judge ruled that his prior trial testimony was admissible at the second proceeding.[82] As Harvey—the prosecution's star witness—sat in a prison cell miles away from the courtroom, a court reporter read aloud to the jury his inculpation of Bilbrey.[83]

Appman, Jones's co-counsel at the first trial, represented Bilbrey at the second trial.[84] In a surprising move, Appman declined to introduce the transcript of Jones's cross-examination of Harvey.[85] As a result, the new jury only heard Harvey's direct testimony from the first trial.[86] Appman later defended his decision, stating that Jones's cross-examination "rambled" and was "very lengthy."[87] A jury again convicted Bilbrey of first-degree murder, resulting in a sentence of life imprisonment.[88]

Appman appealed Bilbrey's conviction on the basis that the trial court erred in admitting Harvey's prior testimony.[89] Despite his clear disdain for Jones's cross-examination, Appman never argued that his friend and former trial partner's woeful questioning effectively deprived Bilbrey of her right to confront Harvey on the witness stand.[90] Rather, Appman merely claimed that the court reporter's reading of Harvey's prior testimony did not give the jury the opportunity to gauge Harvey's credibility on the witness stand.[91] Unmoved, the appellate court affirmed Bilbrey's conviction.[92]

With the assistance of appointed counsel, Bilbrey then filed a post-conviction petition in Tennessee state court.[93] The petition alleged Appman was constitutionally ineffective for failing to introduce Jones's cross-examination of Harvey at Bilbrey's second trial.[94] The petition, however, did not challenge Appman's failure to directly attack Jones's initial cross-examination in the appeal.[95] The court refused to find fault with Appman's trial tactics, opining that his

81. *Id.* at 5.
82. *Id.* at 62.
83. Second Trial Transcript, *supra* note 18, at 251-79.
84. *Id.* at 1.
85. *Id.* at 227.
86. *Id.* at 249-79.
87. Transcript of Post-Conviction Record, *supra* note 65, at 40.
88. Second Trial Transcript, *supra* note 18, at 649.
89. *Bilbrey*, 912 S.W.2d at 187.
90. *Id.* at 187-88.
91. *Id.*
92. *Id.* at 188.
93. Bilbrey v. State, No. 03C01-9711-CR-00498, 1998 WL 827080, at *6 (Tenn. Crim. App. Dec. 1, 1998).
94. *Bilbrey*, 1998 WL 827080, at *6-7.
95. *Id.* at *4-7.

decision to withhold the cross-examination was not ineffective.[96] On April 19, 1999, over nine years after Bilbrey was first jailed for Bryant's murder, the Tennessee Supreme Court denied any further appeals.[97]

In April 2000, Bilbrey filed a pro se petition for a Writ of Habeas Corpus in federal district court.[98] After the appointment of counsel, Bilbrey argued for the first time that the admission of Harvey's testimony at the retrial violated her rights under the Sixth Amendment Confrontation Clause.[99] The argument contained two essential components: Bilbrey first contended that Jones's cross-examination of Harvey was constitutionally ineffective as a result of his emergent health problems and alcohol consumption during the trial.[100] In turn, she argued that, as a result of Jones's ineffectiveness, she was denied an opportunity to cross-examine Harvey.[101] Put simply, Bilbrey contended that requiring her to choose between Jones's woeful cross-examination of Harvey or none at all ran afoul of the Confrontation Clause.[102]

Prior to reaching the merits of Bilbrey's Confrontation Clause claim, the district court held that Bilbrey's failure to raise the same claims during her state appeals—or to show good cause for such failure—precluded federal review of the argument.[103] The court stated:

> Apparently, petitioner's trial and appellate counsel at the retrial[,] on appeal[,] and in the post-conviction petition proceeding either did not recognize this specific claim or made a strategic decision not to pursue it. In either instance, petitioner has not shown cause for her failure to present this denial of her Sixth Amendment right to confrontation to the state courts.[104]

The decision provided Bilbrey with little recourse for relief. Bilbrey challenged the ruling, but the appellate court declined to address the issue because the statute of limitations had already expired.[105] Bilbrey remains in prison.[106]

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96. *Id.*

97. *Id.* at *1.

98. *Bilbrey*, 124 F. App'x at 971.

99. Amended Petition for Writ of Habeas Corpus, *supra* note 11, at 12-21.

100. *Id.* at 15-17.

101. *Id.*

102. *Id.*

103. Memorandum and Order at 21-22, Bilbrey v. Douglas, No. 00-CV-00310 (M.D. Tenn. Apr. 10, 2000).

104. *Id.* at 22.

105. *Bilbrey*, 124 F. App'x at 971-72.

106. *Tennessee Felony Offender Information Lookup*, TENN. GOV'T, https://apps.tn.gov/foil/search.jsp (last visited Aug. 10, 2011).

At every stage, Bilbrey's case was derailed by the ineffective assistance of counsel. Though her first conviction was vacated based on the court's technical error, the specter of Jones's disastrous cross-examination haunted her throughout her retrial and appeal. First, Appman declined to attack Jones's cross-examination as a violation of the Confrontation Clause. Instead, he sidestepped Jones's failings and contested the admission of Harvey's direct examination on credibility grounds alone. Without question, Appman recognized the worthlessness of Jones's cross-examination as evidenced by his decision to forego its admission at the retrial altogether. Still, he never argued at retrial or on appeal that Jones's feeble challenge to Harvey's suspect testimony ran afoul of a basic constitutional tenet, the right to confront an adverse witness at trial.

Bilbrey's state post-conviction appeal was her first chance to consult with an attorney *other* than Appman. Still, her post-conviction counsel did not allege that Appman's failure to raise the Confrontation Clause claim at trial *or* on appeal was ineffective. Rather, the petition took issue with Appman's trial tactics. Without question, several of Appman's decisions at Bilbrey's retrial evinced questionable judgment. Nevertheless, most of Bilbrey's post-conviction petition focused on the kinds of strategic choices to which courts typically give broad deference.[107]

Due to the ineffectiveness of counsel at trial, on appeal, and in her state post-conviction petition, Bilbrey was procedurally barred from asserting her Confrontation Clause rights in her habeas petition. Further, the federal court refused to find "cause" for Appman's failure to raise the Confrontation Clause claim, attributing its absence to either strategy or oversight.[108] As Bilbrey was not entitled to counsel in her post-conviction appeal, a cause-based challenge to her post-conviction counsel's ineffectiveness at that stage would have been fruitless. Additionally, in light of her low IQ and mental illness, Bilbrey was ill equipped to pursue post-conviction relief on her own. In essence, Bilbrey was forever robbed of the chance to effectively cross-examine Harvey, the prosecution's star witness, or challenge the failure of her counsel to protect her right to confrontation.

Bilbrey's case typifies the procedural barriers encountered by petitioners pursuing habeas corpus relief. Often, the ineffective assistance of counsel that deprives a defendant of a fair trial or appeal also results in procedural default of federal claims. Further, as the right to counsel ends on direct appeal, a habeas petitioner has no avenue to

107. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 486-88 (1986) (opining trial strategy decisions cannot establish the "cause" element for ineffective assistance of counsel).

108. Memorandum and Order, *supra* note 103, at 22.

challenge the failings of post-conviction counsel. A historical discussion of habeas corpus law provides some insight into the progressive narrowing of the "Great Writ"[109] from its ambitious origins to its diminished present-day form.

III. A BRIEF HISTORY OF HABEAS CORPUS LAW

A. The Origins of Habeas Corpus Review for State Prisoners

The power to grant habeas corpus relief is codified under 28 U.S.C. § 2241.[110] Such relief may be granted to state prisoners in custody for violating the Constitution, laws, or treaties of the United States.[111] Initially, habeas corpus relief offered protection only to federal prisoners.[112] In *Frank v. Magnum*,[113] the United States Supreme Court provided the first in a series of habeas interpretations that included prisoners in state custody. In that case, Frank, who was Jewish, was sentenced to death for the rape and murder of an Atlanta woman.[114] Frank petitioned for habeas corpus relief, claiming that he was convicted without due process by an anti-Semitic jury.[115] The United States Supreme Court denied Frank's petition, ruling that the Georgia appellate courts had considered and denied the due process claim.[116] The Court opined, however, that if the state did not offer an effective process to adjudicate federal constitutional rights, federal courts could entertain habeas corpus petitions.[117]

In *Brown v. Allen*,[118] the Supreme Court further widened access to habeas corpus review for state prisoners. In *Brown*, the petitioner alleged that his constitutional right to due process was denied due to discrimination against African-Americans in the selection of grand jurors.[119] The Court agreed, holding that jury pools, which were selected from county taxpayer lists, included a disproportionate number of whites.[120] Through its ruling, the Court opened the Writ to state

109. *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) ("[T]he Great Writ, the only writ expressly protected by the Constitution . . . .").

110. "Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2006).

111. 28 U.S.C. § 2254(a).

112. *Ex Parte* Dorr, 44 U.S. (3 How.) 103 (1845).

113. 237 U.S. 309 (1915).

114. Frank v. Magnum, 237 U.S. 309, 311-12 (1915).

115. *Frank*, 237 U.S. at 317.

116. *Id.* at 338.

117. *See id.* at 335.

118. 344 U.S. 443 (1953).

119. Brown v. Allen, 344 U.S. 443, 466 (1953).

120. *Brown*, 344 U.S. at 473.

prisoners who possessed federal constitutional claims, notwithstanding state adjudication of those claims.[121]

Although the expansive habeas corpus review afforded by *Brown* survives, subsequent court rulings show increased deference to state courts in resolving constitutional conflicts in criminal cases.[122] Federal legislation has further curtailed habeas relief for prisoners. As discussed in detail below, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") stiffened already restrictive laws limiting federal claims to those first raised during state proceedings.[123] AEDPA strictures are crafted to "strongly discourage" the presentation of new evidence in habeas corpus proceedings and "to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."[124]

B. State Limitations on Access to Habeas Review: Exhaustion and Procedural Default

1. *State Procedural Rules and the Exhaustion Requirement*

While habeas corpus review is theoretically available to state prisoners with federal claims, such prisoners must meet gate-keeping requirements at the state level before seeking relief in federal district court. First, a state prisoner must generally exhaust all state court avenues of relief prior to petitioning for a Writ of Habeas Corpus.[125] In so doing, a petitioner must also provide the state court an opportunity to fully review her constitutional claim prior to filing a habeas corpus petition.[126]

The exhaustion of remedies requirement also bars federal review of so-called "mixed petitions," i.e., those in which only a portion of the petitioner's claims are exhausted.[127] A petitioner's failure to exhaust

121. *Id.* at 474.

122. *See, e.g.*, Wright v. West, 505 U.S. 277 (1992) (upholding a state-court conviction despite mixed constitutional questions subject to plenary or deferential federal review); Keeney v. Tamayo-Reeves, 504 U.S. 1 (1992).

123. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].

124. Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011); Harrington v. Richter, 131 S. Ct. 770, 778 (2011).

125. A federal court may exercise some discretion in determining whether exhaustion of state remedies is required. *See, e.g.*, Granberry v. Greer, 481 U.S. 129, 131 (1987) (holding that a district court should decide on a case-by-case basis if the interests of comity and federalism will be best served by requiring additional state proceedings or by "reaching the merits of the petition forthwith").

126. *See, e.g.*, Anderson v. Harless, 459 U.S. 4, 12 (1982) (holding that the exhaustion of state remedies requires a petitioner to set forth with particularity the substance of his federal claim and explicitly request relief on constitutional grounds).

127. In Rose v. Lundy, 455 U.S. 509, 510 (1982), the petitioner sought habeas relief, alleging four grounds for relief. The Court dismissed the petition, citing a need for the

state appellate remedies as to some claims will result in dismissal of her entire habeas petition.[128] Moreover, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") strengthened the exhaustion requirement by imposing a one-year period of limitation on the time during which a petitioner may seek habeas review following the denial of her state appeals.[129] This strict temporal limitation, in conjunction with the exhaustion requirement, can preclude a petitioner from returning to federal court once her unexhausted claims have been fully litigated in state court.[130]

The exhaustion of remedies requirement poses unique challenges for pro se prisoner-litigants. In many cases, prisoners—often toiling without counsel and easily swayed by the misguided advice of "jailhouse lawyers"—unwittingly jeopardize an otherwise-sound habeas petition by including new claims for relief.[131] While a federal district court may hold a petition in abeyance pending the exhaustion of new claims, a petitioner must first demonstrate "good cause" for her failure to exhaust state remedies.[132] Further, even in cases involving "good cause," the district court will be found to have abused its discretion by granting a stay if the petitioner's unexhausted claims are "plainly meritless."[133] Finally, a federal court is under no obligation to inform a pro se petitioner about her right to request a stay of a habeas petition.[134] In concert, the strict AEDPA time barriers and inadequate legal counsel can conspire to preclude judicial review of meritorious claims.

2. *State Procedural Rules and Procedural Default*

Conjoined with the exhaustion requirement are state procedural rules that compel a petitioner to raise constitutional claims in state court prior to pursuing federal relief.[135] A petitioner's failure to do so

exhaustion of individual claims to promote judicial efficiency and consistency. *Rose*, 455 U.S. at 510-11.

128. *Id.* at 510.

129. 28 U.S.C. § 2244(d)(1) (2006).

130. *See* Pliler v. Ford, 542 U.S. 225, 225-26 (2004) ("The combined effect of *Rose* and the AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims—including those already exhausted—because the limitations period could expire during the time [a petitioner] returns to state court to exhaust his unexhausted claims.").

131. *Pliler*, 542 U.S. at 226.

132. Rhines v. Webber, 544 U.S. 269, 277 (2005).

133. *Rhines*, 544 U.S. at 277.

134. *Pliler*, 542 U.S. at 231 ("District judges have no obligation to act as counsel or paralegal to pro se litigants.").

135. Coleman v. Thompson, 501 U.S. 722, 731 (1991).

results in "procedural default" of the claim.[136] Generally, dismissal on state procedural grounds precludes a federal court from reviewing the petitioner's habeas claim.[137] The basis for this preclusion stems from federal law prohibiting review of any state decision resting upon "adequate and independent state grounds."[138]

Prior to rejecting a claim under the procedural default doctrine, a federal court must determine the adequacy of the state procedural bar at issue.[139] A state ground is adequate only if the state court acts in a consistent and principled manner concerning the rule.[140] A state ground is independent only if the state court actually relied on a state rule sufficient to justify its decision.[141] Factors a federal court may consider to determine the adequacy of a state rule include whether the state has put litigants on notice of the rule and whether the state has a legitimate interest in enforcing the rule.[142]

In reviewing challenges to the adequacy of state procedural rules, the United States Supreme Court affords considerable deference to states as to both the substance and application of rules. Even a rule applied with "seeming inconsistencies" by state court can serve as an adequate and independent state ground.[143] As a result of such broad judicial discretion, a state procedural rule may be both "firmly established" and "regularly followed" even if its application permits consideration of a federal claim "in some but not other[ ]" cases.[144] Further, the language of a state rule need not be exacting to be deemed "adequate."[145]

In 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") limited access to federal review by tailoring 28 U.S.C.

136. *Coleman*, 501 U.S. at 731.

137. *Id.* at 731-32.

138. Cone v. Bell, 129 S. Ct. 1769, 1780 (2009) ("[W]hen a petitioner fails to raise his federal claims in compliance with state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review.").

139. Douglas v. Alabama, 380 U.S. 415, 422 (1965) ("[The adequacy of state grounds] is itself a federal question.").

140. *Coleman*, 501 U.S. at 727 (holding that dismissal of the petitioner's claim due to his counsel's failure to submit a timely appeal arose from independent and adequate state procedural grounds, namely, a state rule requiring filing of a direct appeal within 30 days of entry of judgment of conviction).

141. *Id.* at 729 (defining an "independent" state decision as one "rest[ing] on a state law ground . . . independent of the federal question and adequate to support the judgment").

142. Lee v. Kemna, 534 U.S. 362, 389 (2002) (Kennedy, J., dissenting).

143. Walker v. Martin, 131 S. Ct. 1120, 1130-31 (2011) (holding that California rule requiring that a post-conviction petition must be filed "without substantial delay" is an adequate state ground to bar federal habeas review).

144. Beard v. Kindler, 130 S. Ct. 612, 618 (2009).

145. *See Walker*, 131 S. Ct. at 1130-31 ("Uncertainty is not enough to disqualify a state's procedural ground as one adequate under federal law.").

§ 2254(d), the statute outlining independent and adequate state grounds.[146] Under AEDPA, the statute precludes habeas relief on a claim that was adjudicated on the merits in state proceedings,

> unless the adjudication of that claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[147]

Prior to the amendment, federal courts were not required to "pay any special heed to the underlying state court decision."[148] AEDPA, however, firmly established the state court decision as the starting point in habeas review.[149]

To demonstrate that a state court decision was "contrary to" clearly established federal law, a petitioner may not merely show that his interpretation of Supreme Court precedent is "more plausible" than the state court version.[150] "Rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome."[151] If the "contrary to" analysis is answered in the negative, then the petitioner must establish that the state court unreasonably applied governing precedent.[152] In meeting this standard, the petitioner's "mere disagreement" with state court conclusions will not suffice.[153] Instead, the petitioner must show that the state court decision cannot be "reasonably justified" under Supreme Court precedent.[154]

C. Overcoming Procedural Default: The Cause-and-Prejudice Standard

Notwithstanding the legal barriers mentioned above, a petitioner may still obtain federal court review of her defaulted claim if she can satisfy the so-called "cause-and-prejudice" test.[155] Under this test, the petitioner must demonstrate either (a) good cause for a failure to follow a state procedural rule and actual prejudice resulting therefrom

146. AEDPA, *supra* note 123.
147. 28 U.S.C. § 2254(d).
148. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885 (3d Cir. 1999) (quoting O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998), *overruled by* McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002)).
149. *Matteo*, 171 F.3d at 885.
150. *Id.* at 888.
151. *Id.* (emphasis omitted).
152. *Id.* at 889.
153. *Id.* at 890.
154. *Id.*
155. Wainwright v. Sykes, 433 U.S. 72, 84-85 (1977).

or (b) that a miscarriage of justice would result if the court did not address the petitioner's claim.[156] A showing of *good cause* for a procedural default requires the petitioner to establish the default was attributable to an *external* and *objective factor* that cannot be *fairly attributed* to her.[157]

In many cases involving procedural default, a petitioner's attempt to fulfill the cause element is founded upon a claim of ineffective assistance of counsel during state proceedings.[158] Sufficient demonstration of the cause prong, however, requires more than mere proof that the petitioner's counsel failed to recognize the factual or legal basis for a claim.[159] Rather, a petitioner must establish that her counsel failed to meet the Sixth Amendment standard for effective assistance of counsel.[160] To do so, the petitioner must first show that her counsel made errors so serious that counsel did not meet the level guaranteed by the Sixth Amendment.[161] The petitioner must then show that counsel's errors deprived the petitioner of a fair trial.[162] In essence, a petitioner must demonstrate a reasonable probability that, but for counsel's ineffectiveness, the outcome would have been different.[163]

In order to show cause, a petitioner's argument must transcend "the mere fact that counsel failed to recognize the legal basis for a claim, or failed to raise the claim despite recognizing it . . . ."[164] Likewise, "attorney ignorance is not cause."[165] For example, in *Murray v. Carrier*,[166] the petitioner was convicted of rape and abduction.[167] On appeal, his counsel failed to raise a claim relating to the prosecution's withholding of exculpatory statements made by the victim.[168] The petitioner subsequently sought habeas relief pro se, claiming that he had been denied due process as a result of the prosecution's actions.[169] The United States Supreme Court dismissed his claim on the ground that the failure to raise the issue on appeal amounted to procedural

156. *Wainwright*, 433 U.S. at 84-85, 90-91.
157. Murray v. Carrier, 477 U.S. 478, 489 (1986).
158. *See Murray*, 477 U.S. at 488 (noting that other meritorious grounds for cause include a showing that the basis for a factual or legal claim was not reasonably available to counsel in time to comply with the rule or interference by state officials that made compliance impracticable).
159. *Id.* at 486.
160. *Id.* at 488.
161. Strickland v. Washington, 466 U.S. 668, 687 (1984).
162. *Strickland*, 466 U.S. at 687.
163. *Id.* at 694.
164. *Murray*, 477 U.S. at 486.
165. Coleman v. Thompson, 501 U.S. 722, 753 (1991).
166. 477 U.S. 478 (1986).
167. *Murray*, 477 U.S. at 482.
168. *Id.*
169. *Id.* at 482.

default.[170] With the assistance of counsel, the petitioner amended the petition to allege that the procedural default was due to the ineffective assistance of his appellate counsel.[171] The Court again rejected the claim, ruling that the existence of cause for procedural default must "ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule."[172] By citing only his counsel's inadvertence as grounds for cause, the petitioner's claim fell short.[173]

As the *Murray* Court stated, the cause component may be met through a demonstration of "some objective factor" that impeded the petitioner's efforts to comply with the state's procedural rule.[174] For instance, in *Reed v. Ross*,[175] the United States Supreme Court examined whether the failure of the defendant's attorney to raise an appeal as to the constitutionality of a jury instruction forfeited the petitioner's right to relief.[176] The instruction at issue, however, was not ruled unconstitutional until six years after the petitioner's state trial.[177] In holding that the petitioner retained his right to appeal the instruction despite his attorney's failure to appeal, the Court stated that the "cause" requirement may be satisfied under "certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests."[178] As the petitioner's counsel lacked a reasonable basis to object at the time of trial, the novelty of the constitutional issue satisfied the "cause" element.[179]

The second standard for overcoming procedural default—proof of a fundamental miscarriage of justice—is virtually beyond a petitioner's reach. Only in cases in which a state procedural bar of a constitutional claim has "probably resulted in the conviction of one who is actually innocent" may a federal court grant habeas relief without a showing of "cause."[180] Proof of the defendant's "actual innocence" requires a showing of a fundamental miscarriage of justice, such as the admission of clearly false testimony.[181] A petitioner's demonstration

170. *Id.* at 483.
171. *Id.*
172. *Id.* at 488.
173. *Id.* at 497.
174. *Id.* at 479.
175. 468 U.S. 1 (1984).
176. Reed v. Ross, 468 U.S. 1, 3 (1984).
177. *Reed*, 468 U.S. at 3.
178. *Id.* at 14.
179. *Id.* at 16.
180. *Murray*, 477 U.S. at 496.
181. *Id.* at 496-97.

that a state procedural bar resulted in a legal wrong, such as the improper admission of evidence, is insufficient.[182]

Edwards v. Carpenter[183] highlights the often-tortured interplay between state procedural barriers and claims of ineffective assistance of counsel as well as the nearly insurmountable challenges posed to a petitioner in cases involving both.[184] In *Edwards*, the United States Supreme Court examined whether an ineffective assistance of counsel claim may establish cause for failure to raise a constitutional claim if the ineffective assistance claim *itself* is procedurally defaulted.[185] Like many habeas appeals, the case is rife with procedural entanglements.[186] Carpenter pled guilty to an aggravated murder and aggravated battery charge and received a sentence of life imprisonment with parole eligibility.[187] His trial counsel did not appeal the sentence.[188] After unsuccessfully pursuing post-conviction relief pro se, Carpenter sought to re-open his direct appeal with the assistance of new counsel.[189] The new appeal alleged both that the evidence supporting his plea was insufficient and that his initial counsel was ineffective in failing to appeal the conviction.[190] The appellate court dismissed his petition as untimely as to both claims.[191] Carpenter then sought federal habeas review.[192] In his petition, he argued that the ineffective assistance of his trial counsel established "cause" for his failure to raise the sufficiency-of-the-evidence claim.[193] The district and appellate courts agreed, holding that despite the state court's dismissal of Carpenter's ineffective assistance of counsel claim on procedural grounds, the claim could still serve as "cause" to excuse the default of the evidentiary claim.[194]

The Supreme Court rejected the lower courts' analyses and held that an ineffective assistance of counsel claim that serves to establish "cause" for counsel's failure to argue a separate issue must itself be both timely raised and litigated in state court.[195] In so holding, the Court noted that it has never defined with precision what constitutes cause for procedural default, though, in certain circumstances ineffec-

182. *Id.* at 504 (Stevens, J., concurring).
183. 529 U.S. 446 (2000).
184. Edwards v. Carpenter, 529 U.S. 446, 446 (2000).
185. *Edwards*, 529 U.S. at 448.
186. *Id.* at 448-50.
187. *Id.* at 448.
188. *Id.* at 448-49.
189. *Id.* at 449.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 449–50.
194. *Id.*
195. *Id.* at 450-51.

tive assistance of counsel in failing to properly preserve a claim in state court will suffice.[196] The Court was quick to add that "[n]ot just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution."[197]

D. Procedural Default and Post-Conviction Appeal

The United States Supreme Court has repeatedly held that the right to counsel does not extend to collateral attacks upon a conviction, including a post-conviction appeal.[198] As a result, ineffective assistance of counsel cannot constitute "cause" for procedural default of a post-conviction claim.[199] In its October 2011 term, the Supreme Court is poised to re-examine the right-to-counsel question during state post-conviction proceedings in two cases.[200] First, *Maples v. Thomas*,[201] a capital case, presents a narrow fact-specific question regarding "cause" for procedural default of post-conviction claims.[202] In contrast, *Martinez v. Ryan*[203] asks broadly whether a petitioner has a right to counsel on a first post-conviction appeal.[204]

In *Maples*, Cory Maples was convicted of first degree murder and sentenced to death.[205] Following the denial of his direct appeal, Maples sought post-conviction relief based upon the ineffectiveness of his trial counsel.[206] The trial court denied the petition.[207] Both of Maples's attorneys were served with a notice of the order denying relief.[208] Despite timely receipt of the order, neither attorney timely

196. *Id.* at 451 (citing *Murray*, 477 U.S. at 488-89).

197. *Id.*

198. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 600 (1974) (holding that neither due process nor equal protection requires right to post-conviction counsel); Johnson v. Avery, 393 U.S. 483, 488 (1969) ("[T]he initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available.").

199. Coleman v. Thompson, 501 U.S. 722, 722 (1991) ("[C]ounsel's ineffectiveness will constitute cause only if it is an independent constitutional violation.").

200. Maples v. Allen, 586 F.3d 879 (11th Cir. 2009), *cert. granted sub nom.* Maples v. Thomas, 131 S. Ct. 1718 (2011) (No. 10-63); Martinez v. Schriro, 623 F.3d 731 (9th Cir. 2010), *cert. granted sub nom.* Martinez v. Ryan, 131 S. Ct. 2960 (2011) (No. 10-1001).

201. 131 S. Ct. 1718 (2011) (No. 10-63).

202. *Maples*, 586 F.3d 879.

203. 131 S. Ct. 2960 (2011) (No. 10-1001).

204. *Martinez*, 623 F.3d 731.

205. *Maples*, 586 F.3d at 883.

206. *Id.* at 883-84.

207. *Id.* at 884.

208. *Id.* On direct appeal, attorneys from the New York firm of Sullivan & Cromwell represented Maples pro bono, in addition to local counsel. *Id.*

filed an appeal.[209] Counsel for the Alabama Office of the Attorney General then informed Maples in writing that, while he was barred from pursuing post-conviction relief, four weeks remained to file a federal habeas petition.[210] The letter included the address of where to file the petition in addition to instructions on seeking new counsel.[211]

Through new counsel, Maples filed a habeas corpus petition that included the ineffective assistance of counsel claims raised in his post-conviction appeal.[212] The United States District Court for the Northern District of Alabama denied relief, concluding that the claims were procedurally defaulted because Maples failed to file an appeal of the denial of post-conviction relief.[213] The court held that, as Maples was not entitled to post-conviction counsel, he could not overcome the default based on his lawyers' ineffectiveness.[214] On appeal, the United States Court of Appeals for the Eleventh Circuit agreed as to Maples's defaulted claims, reasoning that Alabama courts uniformly enforce the statute of limitations for post-conviction appeals when counsel is informed of the appeal deadline and the petitioner does not request "personal notice."[215] The Eleventh Circuit then rejected Maples's attempts to overcome the default, echoing the Supreme Court's long-standing position that ineffectiveness of post-conviction counsel "cannot establish cause for [procedural] default because there is no right to post-conviction counsel."[216]

The Supreme Court granted certiorari on the question of whether the Eleventh Circuit properly held that there was no "cause" to excuse the procedural default when (1) the petitioner was "blameless for the default," (2) the state's own conduct contributed to the default,[217] and (3) the petitioner's attorneys were no longer functioning as counsel of record at the time of the default.[218] Notably, Maples's request for a Writ of Certiorari observed that the decision of the Eleventh Circuit "exacerbates the uncertainty that already exists over the standards

209. *Id.*

210. *Id.* Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner has one year from the denial of his direct appeal to file a petition for habeas corpus relief in federal district court. AEDPA, *supra* note 123.

211. *Maples*, 586 F.3d at 884-85. Following the running of the post-conviction statute of limitations, new attorneys from Sullivan & Cromwell petitioned the Alabama Court of Criminal Appeals for an out-of-time appeal. *Id.* at 885. The petition was denied. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 890.

216. *Id.* at 891 (citing *Coleman*, 501 U.S. at 752).

217. The "conduct" at issue is the State's failure to notify the parties of the resolution of the post-conviction petition. *Id.* at 884.

218. Petition for Writ of Certiorari, *Maples*, 131 S.Ct. 1718 (No. 10-63).

governing procedural defaults."[219] The petition also implores review as the questions presented as to procedural default are "recurring and of immense importance to the thousands of individuals who annually seek habeas review."[220]

In *Martinez*, Luis Martinez was convicted of two counts of sexual conduct with a minor and sentenced to consecutive terms of thirty-five years to life.[221] Both the Arizona Court of Appeals and the Arizona Supreme Court rejected Martinez's direct appeal.[222] Prior to the conclusion of his direct appeal, Martinez's court-appointed counsel filed a Notice of Post-Conviction Relief asserting "that she had 'reviewed the transcripts and trial file and [could] find no colorable claims . . . .'"[223] Martinez's counsel then asked the court to issue an order granting Martinez forty-five days to file pro se a petition for post-conviction relief but did not inform Martinez of his responsibility to file the petition.[224] Consequently, Martinez never filed a petition, prompting the state court to dismiss the pending Notice.[225] Represented by new counsel, Martinez attempted to file a post-conviction appeal attacking the ineffectiveness of his trial counsel.[226] The Arizona Court of Appeals denied the petition on the basis that the claims could have been raised in the previous post-conviction proceeding but were not.[227] The Arizona Supreme Court declined to review the petition.[228]

Martinez petitioned for habeas corpus relief, arguing that his claims against his trial lawyer were not subject to procedural default because his first post-conviction counsel had rendered ineffective assistance with respect to those claims.[229] The United States District Court for the District of Arizona dismissed the petition on the ground that the claims were procedurally defaulted.[230] The United States Court of Appeals for the Ninth Circuit affirmed the ruling, adding that the lack of a federal right to post-conviction counsel precludes a challenge for "cause" founded on ineffective assistance.[231] The Supreme Court granted certiorari on the following question:

> Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of

219. *Id.*
220. *Id.*
221. *Martinez*, 623 F.3d at 733.
222. *Id.*
223. *Id.* at 733-34 (alteration in original).
224. *Id.* at 734.
225. *Id.*
226. *Id.*
227. *Id.* at 733.
228. *Id.*
229. *Id.* at 736.
230. *Id.* at 734.
231. *Id.* at 743.

> 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 counsel specifically with respect to his ineffective-assistance-of-trial counsel claim.[232]

IV. IMPROVING ACCESS TO HABEAS CORPUS REVIEW BY EXTENDING THE RIGHT TO COUNSEL TO FIRST POST-CONVICTION PROCEEDINGS

While *Bilbrey v. State*,[233] *Maples v. Thomas*,[234] and *Martinez v. Ryan*[235] differ in specifics, the cases share important commonalities. First, all three petitioners were procedurally barred under state rules from raising critical claims on habeas review. Further, in every case, the procedural default was the result of the ineffective assistance of post-conviction counsel. Finally, the default ended all three petitioners' chances to raise critical constitutional claims. *Maples* and *Martinez* present opportunities for the United States Supreme Court to ease procedural obstacles to habeas corpus review by extending the right to counsel to first post-conviction proceedings. Guaranteeing counsel at this stage will restore meaningful access to habeas review without compromising state procedural rules or undermining the gate-keeping objectives of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In rejecting the right to post-conviction counsel, the Supreme Court has long held that the right "extends to the first appeal of right, and no further."[236] As post-conviction appeals are considered "discretionary," the right to counsel ends at that stage.[237] The notion of post-conviction appeals as "discretionary"—and the corresponding right-to-counsel rejection— emerged largely from *Ross v. Moffitt*,[238] in which the United States Supreme Court determined that the petitioner's opportunity to present his claims fairly did not require counsel in post-conviction proceedings.[239] In *Ross*, the petitioner was convicted of forgery charges in two North Carolina counties.[240] Following the denial of separate direct appeals, the petitioner "invoke[d] the discretionary review procedures of the North Carolina Supreme Court" as to both

232. Petition for Certiorari, *Martinez*, 131 S. Ct. 2960 (No. 10-1001).
233. No. 03C01-9711-CR-00498, 1998 WL 827080, at *6 (Tenn. Crim. App. Dec. 1, 1998).
234. 131 S. Ct. 1718 (2011) (No. 10-63).
235. 131 S. Ct. 2960 (2011) (No. 10-1001).
236. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).
237. *Finley*, 481 U.S. at 555.
238. 417 U.S. 600 (1974).
239. Ross v. Moffitt, 417 U.S. 600, 615 (1974).
240. *Ross*, 417 U.S. at 603.

convictions.[241] The petitioner was denied counsel at various stages of both post-conviction proceedings[242] and sought habeas review on the right-to-counsel question. After the United States District Court for the Middle District of North Carolina denied relief on the issue, the United States Court of Appeals for the Fourth Circuit reversed, holding that "fairness" requires the appointment of counsel for indigent petitioners seeking post-conviction review.[243]

In reversing the Fourth Circuit's ruling, the Supreme Court held that neither due process nor equal protection mandate the appointment of counsel in post-conviction proceedings.[244] The Court focused on the question of whether "indigents are singled out . . . and denied meaningful access to the appellate system because of their poverty."[245] In answering in the negative, the Court relied on its holding in *Douglas v. California*[246] that an "unconstitutional line" is breached in cases in which "the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel . . . ."[247] From *Douglas*, the Court reasoned that a defendant must "[have] an adequate opportunity to present his claims fairly in the context of the state's appellate process."[248] According to the Court, fairness does not require counsel during post-conviction proceedings as the petitioner will have access to her trial and record of direct appeal "supplemented by whatever submission [she] may make *pro se* . . . ."[249] Further, after the direct appeal, the post-conviction proceeding amounts to duplicative review of claims that had "once been presented by a lawyer and passed upon by an appellate court."[250] Therefore, the post-conviction petitioner may simply revive the claims crafted by his counsel on direct appeal.[251] The Court stopped short of declaring that petitioners

241. *Id.*

242. *Id.* at 603-04 (explaining that the petitioner was denied counsel at the commencement of post-conviction review as to one conviction and for his petition for Writ of Certiorari to the North Carolina Supreme Court as to the other conviction).

243. *Id.* at 604-05 (noting the Fourth Circuit's reasoning that "[a]s long as the state provides [post-conviction] procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court").

244. *Id.* at 610-12.

245. *Id.* at 611.

246. 372 U.S. 353 (1963).

247. *Ross*, 417 U.S. at 611 (emphasis in original) (quoting Douglas v. California, 372 U.S. 353, 357 (1963)).

248. *Id.* at 616.

249. *Id.* at 615.

250. *Id.* at 614-15 (quoting *Douglas*, 372 U.S. at 356).

251. *Id.* at 615; *see also* Martinez v. Schriro, 623 F.3d 731, 738 (9th Cir. 2010), *cert. granted sub nom.* Martinez v. Ryan, 131 S. Ct. 2960 (2011) (No. 10-1001) (quoting *Ross*, 417 U.S. at 615) ("Counsel's work, supplemented by a defendant's pro se submissions, would provide the state Supreme Court 'with an adequate basis for its decision to grant or deny review.'").

with and without counsel are on an equal playing field, acknowledging that pro se litigants are "somewhat handicapped" when delving into the "somewhat arcane art" of post-conviction appeal.[252]

The *Ross* Court's reasoning hinges upon two faulty presumptions. First, the Court wrongly took for granted that the "first appeal" assistance of counsel is effective. In fact, in many cases in which a defendant receives ineffective assistance at trial and on appeal, such assistance is anything but effective.[253] For example, John Appman, Emma Jean Bilbrey's trial and appellate counsel, failed to raise the Confrontation Clause claim on appeal. His mishandling of the claim is unsurprising. Had Appman recognized the importance of the claim, he would have raised it in a pre-trial motion. Instead, he conceded that David Harvey's first trial testimony was admissible at the retrial, a foreshadowing of the bungled appeal.

Secondly, an appellant may be prevented from raising an ineffective assistance of counsel claim on direct appeal. As a result, such claims cannot be "presented by a lawyer" and "passed on" at that stage.[254] For instance, state law precluded Maples and Martinez from challenging the effectiveness of trial counsel on direct appeal.[255] In Maples's case, the defaulted claims in his habeas corpus petition include "over ninety pages of allegations of ineffectiveness of [his] trial counsel" including his counsel's failure to present critical mitigation information at sentencing about Maples's "abuse and abandonment by his mother" and "several attempts at suicide."[256] For Bilbrey, an ineffective assistance of counsel challenge was untenable as Appman represented her at both proceedings[257]

The logic in *Maples* and *Martinez* is similarly flawed. In *Maples*, the United States Court of Appeals for the Eleventh Circuit's analysis begins and ends with a reaffirmation that "there is no right to post-conviction counsel."[258] In *Martinez*, the United States Court of Appeals for the Ninth Circuit dug deeper, examining the issue of

252. *Ross*, 417 U.S. at 616.

253. In Bilbrey's case and many others, criminal defendants are represented by the same attorney at trial and on direct appeal.

254. Halbert v. Michigan, 545 U.S. 605, 612 (2005).

255. State v. Allen, 220 P.3d 245, 249 (Ariz. 2009) (citing ARIZ. R. CRIM. P. 32.2); *Ex parte* Ingram, 675 So. 2d 863, 865 (Ala. 1996).

256. Maples v. Allen, 586 F.3d 879, 897 n.3 (11th Cir. 2009) (Barkett, C.J., dissenting), *cert. granted sub nom.* Maples v. Thomas, 131 S. Ct. 1718 (2011) (No.10-63). In her dissent, Judge Rosemary Barkett also observed that, based on Alabama law requiring 10 jury votes for death and the vote of 10-2 in favor of death in Maples's case, "if even *one juror* who voted for the death penalty instead had voted for life imprisonment, the jury verdict would have been for life imprisonment . . . ." *Maples*, 586 F.3d at 897 n.3.

257. State v. Bilbrey, 912 S.W.2d 187, 187 (Tenn. Crim. App. 1995).

258. *Maples*, 586 F.3d at 891 (majority opinion) (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991)).

"whether collateral review might constitute the 'first tier' of review for a petitioner's ineffective-assistance-of-trial-counsel claim, and thus be sufficient to give rise to a right to counsel."[259] The court's reasoning, however, mirrored the defects in *Ross*. First, the court wrongly surmised that, since Martinez was represented on direct appeal, he necessarily received effective assistance of counsel in connection with that appeal.[260] In addition, though acknowledging the state bar on ineffectiveness claims on direct appeal, the court posited that Martinez faced a "lesser handicap" in petitioning for post-conviction review because he "[had] a brief on his behalf in the Court of Appeals setting forth his claims of error . . . ."[261] As in *Ross*, the *Martinez* court's position cannot be reconciled with the reality that the "claims of error" raised in a post-conviction petition are not only different than those set forth on appeal but frequently embody an attack on the appellate attorney's brief itself.

In fact, the United States Supreme Court has previously held that a right to counsel exists for "first-tier" discretionary appeals in circumstances analogous to post-conviction review.[262] That case, *Halbert v. Michigan*,[263] involved a Michigan law requiring defendants who plead guilty or "no contest" to an offense to move for leave of court prior to appealing the conviction.[264] Under then-existing state law, defendants seeking leave to appeal were not entitled to a lawyer.[265] Following his guilty plea to child abuse charges, Halbert filed pro se several unsuccessful motions for leave of court to appeal his conviction.[266] The allegations in Halbert's motions included claims that his lawyer failed to advise him of the statutory elements of the offense and the possible sentencing ranges.[267] Halbert also claimed that his severe learning disabilities and low IQ rendered him incapable of understanding the trial court's plea colloquy.[268] After the Michigan Court of Appeals denied him leave to appeal, Halbert sought federal relief on the basis that his right to the assistance of appellate counsel had been denied.[269]

259. *Martinez*, 623 F.3d at 740.
260. *Id.* at 741 ("Collateral review and direct review are not on equal footing where, as here, a defendant has already benefitted from the assistance of counsel in a direct appeal.").
261. *Id.* (citations omitted).
262. *Halbert*, 545 U.S. at 606-08 (2005).
263. 545 U.S. 605 (2005).
264. *Halbert*, 545 U.S. at 606. Michigan's appellate system affords defendants who are convicted after trial a direct appeal by right. *Id.*
265. *Id.* at 612.
266. *Id.* at 615-16.
267. *Id.*
268. *Id.*
269. *Id.* at 616.

In undertaking its analysis, the Supreme Court deemed the question as "one of classification," that is, "whether [the] case should be bracketed with [*Douglas*] because appointed counsel is sought for initial [appellate] review or with [*Ross*] because a plea-convicted defendant must [apply] for leave to appeal."[270] Aligning the case with *Douglas*, the Court disposed of "formal categori[zations]" regarding the type of appeal and instead focused on fundamental issues shared by all "first-tier" appeals.[271]

The Court first considered a critical distinction between a "first-tier appeal of right" and "subsequent appellate stages."[272] Unlike "second-tier" appeals "at which the claims have once been presented by [appellate] counsel and passed on by an appellate court," "first-tier" appeals are, in effect, a blank canvas.[273] Thus, "[a] first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review."[274] Importantly, the Court reasoned that a "first-tier" pro se litigant seeking discretionary appellate review will derive little benefit from a trial transcript or pleadings prepared by trial counsel in light of the different issues in play on trial and appeal.[275] Indeed, even "comparable materials prepared by trial counsel," the Court opined, "are no substitute for an appellate lawyer's aid."[276]

The Court then turned its analysis to the type of litigant who normally seeks a "first-tier" review following a conviction.[277] It determined that appellants, like Halbert, who seek relief without counsel may be "particularly handicapped as self-representatives" by their imprisonment, limited literacy skills, and mental illness.[278] Finally, the Court examined the nature of the appeal itself, finding that individuals pleading guilty in Michigan faced "myriad and often complicated" issues on appeal, including possible claims of ineffective assistance of counsel.[279] Aside from the complex substantive issues on appeal, the Court noted that "Michigan's very procedures for seeking leave to appeal"—involving the submission of five copies of an application with

270. *Id.* at 616 & n.2.
271. *Id.* at 616-19.
272. *Id.* at 611.
273. *Id.* at 611-12 (alterations in original) (quoting *Douglas*, 372 U.S. at 356).
274. *Id.* at 619.
275. *Id.* at 619-20.
276. *Id.* at 620 (explaining the Court's holding in Swenson v. Bosler, 386 U.S. 258 (1967), with, "[A] transcript and motion by trial counsel are not adequate stand-ins for an appellate lawyer's review of the record and legal research.").
277. *Id.* at 620-21.
278. *Id.* (describing the "perilous endeavor" of "navigating the appellate process" for individuals with "little education, learning disabilities, and mental impairments").
279. *Id.* at 621-22 (quoting Kowalski v. Tesmer, 543 U.S. 125, 141 (2004)).

detailed case information—"may intimidate the uncounseled."[280] In sum, the Court held that despite the discretionary nature of Michigan's appeals process for individuals who plead guilty, equal protection and due process concerns required counsel for indigent litigants seeking leave of court to appeal.[281]

In concert with the *Halbert* reasoning, Justice William Douglas's succinct but sharply worded dissent in *Ross* provides a framework for the expansion of the right to counsel to post-conviction proceedings.[282] Contrary to the *Ross* majority's piecemeal reading of *Douglas*, Justice Douglas captured the overarching theme of fair play and equal protection at the heart of the decision to extend counsel to direct appeal.[283] He stressed that discretionary review, like direct appeal, is a "substantial" right and one "where a lawyer can be of significant assistance . . . ."[284] Thus, those "same concepts of fairness and equality" demand counsel during first post-conviction proceedings.[285]

When viewed through a lens of "fairness and equality," *Maples* and *Martinez* "should be bracketed" with *Halbert* and *Douglas*.[286] While *Maples* and *Martinez* focus upon the right to post-conviction counsel, all four cases share essential characteristics regarding "first-tier" appeals. Like the proceedings at issue in *Halbert* and *Douglas*, state post-conviction review presented *the one and only appeal* for both Maples and Martinez to challenge the effectiveness of their trial and appellate counsel.[287] Further, like the petitioners in *Halbert* and *Douglas*, neither Maples nor Martinez received the assistance of counsel in connection with post-conviction proceedings.

A right-to-counsel analysis that is rooted in "fairness and equality" reveals an inextricable link between trial, direct appeal, and post-conviction appeal. Many courts, including *Ross* and *Martinez*, highlight the seeming divide between direct and collateral appeals in rejecting the right to post-conviction counsel.[288] Direct appeal, they say, is designed to "correct erroneous adjudication of guilt in an individual case."[289] Post-conviction review, on the other hand, is more akin to "discretionary appeal to [a state or the United States] Supreme Court [which] is not intended to correct error in individual cases but rather

280. *Id.* at 622.
281. *Id.* at 625 (Thomas, J., dissenting).
282. *Ross*, 417 U.S. at 619 (Douglas, J., dissenting).
283. *Id.* at 621.
284. *Id.*
285. *Id.*
286. *See Halbert*, 545 U.S. at 616 n.2; *Douglas*, 372 U.S. at 355.
287. *See Douglas*, 372 U.S. at 357.
288. *Martinez*, 623 F.3d at 741-42.
289. *Id.* at 741.

to address questions of public importance, critical issues of law, and conflicts in decisions of relevant courts."[290]

This distinction is specious, as the profiled cases demonstrate. In all likelihood, Bilbrey was erroneously convicted of first degree murder based upon her trial attorney's concession to the admissibility of perjured testimony and the related failure of her post-conviction counsel to raise an ineffective assistance claim on those grounds. Similarly, Maples's and Martinez's "individual cases" involve glaring errors that, but for their lack of right to counsel, could have been rectified on subsequent discretionary appeal. In all three cases, the post-conviction proceedings sought not to answer broad "questions of public importance" but to determine whether the deprivation of an individual's life and liberty was preceded by a fair trial.

Finally, "fairness and equality" favor a right to post-conviction counsel given the complexity and importance of ineffective assistance of counsel claims coupled with the unique challenges faced by petitioners. The claims are complex because they invariably center on omissions, i.e, what counsel *failed* to do. As a consequence, the bases for such claims are neither reflected in the record of trial or appeal nor easily identified by a litigant with no legal training. Nevertheless, these claims are of critical importance as procedural default arising from ineffective assistance of counsel may, by itself, be the death knell for an appeal. Despite their importance, would-be petitioners—who are often isolated in prison, poorly educated, or mentally ill—are ill equipped to pursue post-conviction claims without the assistance of counsel. In light of all of these factors, the chasm between petitioners with and without counsel is especially wide.

Contrary to the concerns expressed by the *Ross* majority, extension of the right of counsel to first post-conviction proceedings will not "do violence" to prior Supreme Court rulings.[291] Supreme Court precedent reflects an incremental expansion of the right to counsel over the last several decades.[292] Furthering the right to counsel to first post-conviction proceedings is consistent with the logic and spirit of

290. *Ross*, 417 U.S. at 613-14. "[T]here are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court." *Id.* at 612.

291. *Id.*

292. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending the right to counsel to any "person [who] may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony"); *In re* Gault, 387 U.S. 1, 38-39 (1967) (extending the right to counsel to juvenile proceedings); *Douglas*, 372 U.S. at 355-57 (extending the right to counsel for first matter of right appeal); *see also* Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 345-47 (2010) (discussing how state budget cuts have affected adequate representation for indigent defendants across the country).

Gideon v. Wainwright[293] and other seminal Sixth Amendment cases.[294] Moreover, recent cases curtailing access to habeas review have done so in the name of federalism.[295] Ensuring that post-conviction petitioners have counsel would neither disrupt these rulings nor undermine state procedural requirements. In fact, petitioners assisted by capable counsel would be better positioned to comply with state rules. Finally, expanding the right to counsel to cover first post-conviction proceedings would increase the likelihood that important constitutional claims reach federal courts without falling by the procedural wayside.[296] Even a petitioner who must appeal the denial of relief pro se will "have a brief on his behalf" prepared by counsel that raises claims tailored to post-conviction review.[297] In this sense, the right to post-conviction counsel would act as a fulcrum, balancing the Court's interest in restricting habeas review to petitioners who follow state procedure with its desire to "keep open . . . courthouse doors" for those seeking the protection of the "Great Writ."[298]

V. CONCLUSION

Habeas corpus petitioners most in need of the protections of the Writ—those with ineffective assistance of legal counsel in state proceedings—are often procedurally barred from litigating important constitutional claims in federal court. As the cases of Emma Jean Bilbrey, Cory Maples, and Luis Martinez illustrate, the procedural default *itself* may be caused by incompetent, ill-prepared, or functionally absent counsel. In its upcoming term, the United States Supreme Court would do well to extend the right to counsel to first state post-conviction proceedings. Such a ruling will better enable petitioners to more properly identify, raise, and litigate actionable claims of ineffective assistance of counsel arising during trial or on direct appeal. In addition, it will provide an avenue for prisoners to challenge the effec-

293. 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("[T]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will 'still not be done.'").

294. *See, e.g.*, *Halbert*, 545 U.S. at 620 (explaining the *Swenson* Court held that trial pleadings and "comparable materials prepared by trial counsel are no substitute for an appellate lawyer's aid"); *Argersinger*, 407 U.S. at 37; *Gault*, 387 U.S. at 38-39; *Douglas*, 372 U.S. at 355-57; Powell v. Alabama, 287 U.S. 45, 65 (1932) (holding that a state must appoint counsel to an indigent defendant in a capital case).

295. *See, e.g.*, Walker v. Martin, 131 S. Ct. 1120, 1123 (2011); Beard v. Kindler, 130 S. Ct. 612, 618 (2009).

296. Holland v. Florida, 130 S.Ct. 2549, 2562 (2010) (quoting Slack v. McDaniel, 529 U.S. 473, 483 (2000)) ("[T]he writ of habeas corpus plays a vital role in protecting constitutional rights.").

297. *See Martinez*, 623 F.3d at 740-41 (discussing the advantages of pro se petitioner's access to counsel's appellate brief).

298. *Id.*

tiveness of state post-conviction counsel on "second-tier" post-conviction appeals and in federal habeas proceedings where such a challenge is merited. Most critically, extending the right to counsel to "first-tier" post-conviction review will further embody the overarching Sixth Amendment goal of promoting "fairness and equality" for all litigants seeking access to the justice system.[299]

299. *See* Ross v. Moffitt, 417 U.S. 600, 620 (1974) (opining that the notions of fairness and equality, that mandate counsel on the first appeal of right, also require counsel on discretionary appeals).