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Issue Brief

The "Right-to-Counsel Term"

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I. Introduction

The Supreme Court has granted *cert* in a handful of cases being argued in the upcoming October Term, in which the Court will consider the ineffective assistance of counsel (IAC) in criminal cases. This has earned the Term the nickname—at least by one observer—the "Right-to-Counsel Term."[1] Through these cases, the Supreme Court will have the opportunity to shape the Sixth Amendment right to counsel and related claims in such a way that recognizes the realities of our 21st century criminal justice system. The current system is defined by pervasive plea bargaining to resolve cases, underfunded public defense systems, and no right to effective assistance of counsel in post-conviction (i.e., collateral) appeals. The Court could make small steps in the direction of true justice through the cases it will hear this Term, molding the right to counsel to address these undeniable problems.

Two upcoming cases contemplate the scope of the right to counsel during the plea bargaining stage: *Lafler v. Cooper* (10-209) and *Missouri v. Frye* (10-444), which are not formally consolidated but have the same questions presented. Considering the fact that about 95% of criminal cases are resolved through the plea bargaining process, the effective assistance of counsel in the plea bargaining stage is presently more crucial than ever. A robust right to counsel must extend to plea negotiations with proper remedies when that right is violated.

Three other cases consider the contours of the right to counsel and claims concerning the performance of counsel on post-conviction appeal.[2] *Maples v. Allen* (10-63) presents the question of whether a *habeas* petitioner is entitled to an equitable exception to the Antiterrorism and Effective Death Penalty Act's (AEDPA) procedural default rules when a defendant has been completely abandoned by counsel. *Martinez v. Ryan* (10-1001) requires the court to decide

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[1] Posting of Kent Scheidegger to Crime and Consequences, *The Right-to-Counsel Term*, http://www.crimeandconsequences.com/crimblog/2011/07/the-right-to-counsel-term.html (July 15, 2011, 1:44 PM)

[2] An inmate who is convicted in state court has two ways to challenge his sentence. The first is to pursue direct review; once the state trial court has rendered its judgment, the inmate may appeal his sentence directly to higher-level state courts. Most states guarantee an inmate at least one appeal as of right, usually to the state's first court of appeals. Any subsequent appeals, such as an appeal to the state supreme court, are typically at that court's discretion. Once the state's highest court has heard and ruled on the inmate's case, declined to hear the case, or the statute of limitations for direct appeals has run, the inmate's conviction is deemed final. Larry W. Yackle, *Federal Courts: Habeas Corpus* 219 (2d ed. 2010). The second route, once the conviction is final, is to pursue post-conviction relief (sometimes referred to as a "collateral appeal"). When seeking post-conviction relief, an inmate challenges the fact of his confinement by alleging "fundamental errors that were not cured at trial or on direct review- including errors of constitutional moment." *Id.* at 218-19. Typically, this means pursuing available remedies in state court, and if that is unsuccessful, seeking a writ of *habeas corpus* in federal court. Douglas v. California, 372 U.S. 353, 356 (1963). A petitioner is entitled to counsel during his first direct appeal as of right, but there is no constitutional right to counsel in post-conviction proceedings.

whether the right to counsel should extend to ineffective assistance of counsel claims during post-conviction proceedings, in certain circumstances. Martinez claims his trial counsel was ineffective and that mistakes made by his post-conviction counsel should not prevent him from raising these ineffective-assistance-of-trial-counsel claims. Finally, *Martel v. Clair* (10-1265) considers whether a death row inmate appointed counsel by federal law for his federal *habeas* proceedings may receive new counsel based on claims that his counsel is not pursuing certain claims or investigating certain facts. In a system where individuals lack a right to counsel in post-conviction appeals, *Maples, Martinez,* and *Clair* could provide a modicum of relief to those attempting to navigate the labyrinth of post-conviction review. Never before in our country's history have the shortcomings of indigent defense systems been so well documented; thus defendants' ability to raise IAC claims is crucial. These three cases provide opportunities for the Court to shape jurisprudence in light of the current realities—failures, really—of indigent defense representation, including capital representation, in our current system.

This article previews these five cases in which the Court will consider the right to counsel and related claims in the upcoming Term. It then discusses the context of the cases and why each is of vital importance given the realities of criminal prosecutions today.

II. The Right to Counsel During Plea Bargaining

The Sixth Amendment enumerates many of the familiar rights that criminal defendants enjoy in the U.S. criminal justice system, among them, the right to a speedy and public trial; the right to a trial by an impartial jury; the right to confront witnesses; the right to subpoena witnesses; and the right to counsel. In modern-day criminal prosecutions, many of these rights, save for the last one, are generally inapplicable, because the overwhelming majority of criminal defendants never experience a trial at all. When the Constitution was drafted, the majority of the criminally accused would proceed to a criminal trial and experience the panoply of rights that accompany such a trial. That is no longer true in any sense, with only one in 20 criminal defendants now proceeding to trial.

A. The Right to Counsel at the Plea Bargaining Stage is More Important Than Ever

Plea bargaining largely did not exist as a way to resolve criminal charges prior to 1800. While it began to sporadically occur in the mid-19th century, it did not become popular until the 1920s when the courts became overwhelmed with Prohibition cases. Resolution through plea bargaining later became institutionalized in the 1960s when court dockets were once again flooded with street crimes.[3] Eventually, the system evolved into our current one, where plea bargaining has effectively supplanted the jury trial, and the full panoply of rights that follows, as the primary mode of resolving criminal prosecutions. It has been said, "plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system."[4] Last year, 97% of criminal convictions in federal district court were obtained pursuant to pleas of guilty or

[3] *See* Tara Harrison, Article, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1194 (2006) (brief history of plea bargaining).

[4] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

no contest.[5] Similarly, in 2006 (the most recent year for which such data are available), 94% of all felony convictions in state courts were obtained by guilty pleas rather than trial.[6]

The rise in plea bargaining can be attributed, at least partly, to the growing number of cases that prosecutors must handle.[7] Plea bargaining has become so institutionalized in our system that criminal laws are actually enacted with plea bargaining— not criminal trials—in mind. As Professor Rachel Barkow has explained, prosecutors may now lobby for stiffer penalties to give them leverage in the plea process, not necessarily because they believe those stiffer penalties are warranted.[8] Indeed, prosecutorial overcharging (*i.e.*, adding on charge after charge to make a guilty plea increasingly attractive) in the plea process is almost as pervasive as plea negotiations themselves. Given the institutionalization of plea bargaining and the reliance upon it by prosecutors and judges, substantial pressure to plead guilty weighs on defendants. In fact, defendants who actually refuse to plead guilty, go to trial, and are found guilty often experience a trial penalty—a sentence longer than they would otherwise have faced had they not insisted on going to trial.

As plea negotiations are generally no longer a prelude to a full criminal trial, an essential function of defense counsel has become the negotiation of a beneficial plea bargain. It is already well-established that defendants enjoy the right to counsel during the plea negotiations. In *Hill v. Lockhart*, the Court expressly recognized that the Sixth Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process.[9] The Court's 2010 decision in *Padilla v. Kentucky* left no doubt about this: "[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[10]

As one might expect, the effective assistance of counsel makes a difference as to whether a defendant will plead guilty. A recently released study of Florida's misdemeanor courts by the National Association of Criminal Defense Lawyers found that about 70% of defendants enter a guilty plea in misdemeanor courts during proceedings that most often last less than three minutes.[11] It also found that "[d]efendants who hired counsel or were appointed counsel were less likely than non-represented defendants to enter a plea of guilty or no contest at

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[5] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, TABLE 5.22.2010 (Kathleen Maguire, ed.), *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf.

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, TABLE 5.44.2006 (Kathleen Maguire, ed.), *available at* http://www.albany.edu/sourcebook/pdf/t5462006.pdf.

[7] The NYU Center for the Administration of Criminal Law filed an *amicus* brief in *Lafler v. Cooper* and *Missouri v. Frye* that explains the rise of and rationale for the pervasiveness of plea bargaining in more detail than this brief article. That brief is available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-209_respondent_amcu_centeradmincriminallaw.authcheckdam.pdf.

[8] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) ("Prosecutors have an incentive to lobby for harsher sentences because longer sentences make it easier for them to obtain convictions through plea bargaining . . . Indeed, prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power.").

[9] 474 U.S. 52, 57 (1985).

[10] 130 S. Ct. 1473, 1481 (2010).

[11] ALISA SMITH & SEAN MADDAN, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011).

arraignment."[12] And those who were represented by private counsel rather than appointed counsel were even less likely to plead guilty, by a rate of 15.1% to 21.0%.[13] Similarly, findings by the Bureau of Justice Statistics indicate that having publicly appointed counsel as opposed to privately retained counsel affects whether one will plead not guilty. Almost one-third (31.4%) of defendants with privately retained counsel pled "not guilty" in state court; less than one-fourth (24.3%) of defendants with publicly-appointed counsel pled "not guilty" in state court.[14]

Despite the fact that defendants are entitled to the effective assistance of counsel in plea negotiations, and that counsel actually affects outcomes, the reality is that many defendants do not receive the effective assistance of counsel during plea negotiations. For example, the state of Colorado denies *any* assistance of counsel at the plea bargaining stage to entire classes of defendants. Colorado requires by statute that defendants in misdemeanor cases meet with prosecutors to discuss a plea deal before being appointed counsel.[15] Additionally, Washoe County (Reno), Nevada is considering re-implementing an Early Case Resolution (ECR) program that seeks quick resolutions to cases through plea deals. The ECR program has produced a trial rate of less than half of one percent (0.47%), raising the question of whether "defendants felt coerced to accept pleas without regard to whether they were guilty, simply because their public defenders – lacking the time, tools and training to look beyond the sparse information at their disposal – were advising them to do so."[16] Since the Public Defender has refused to continue to represent defendants through the ECR program, stating it could not ethically do so, the County has proposed a contract with Washoe Legal Services (a civil legal services organization) to provide representation through the ECR program.

The possibility of an innocent defendant pleading guilty makes the existing pressure to plead guilty particularly distressing. Professor Brandon Garrett, who has closely examined the first 250 cases of DNA exonerations, reports that 6% of exonerees (16 of the 250) pled guilty to crimes they did not commit.[17] Similarly, Professor Samuel Gross analyzed non-DNA cases, and in his database of 340 factually innocent defendants, 20 had pled guilty—also approximately 6%.[18] However, 6% may be a significant underestimate of the innocent who plead guilty. Little is known about how many more innocent individuals plead guilty, since those who agree to a

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[12] *Id.*
[13] *Id.* at 23.
[14] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 8 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.
[15] *See* COLO. REV. STAT. § 16-7-301(4) (providing in misdemeanor cases an "application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant."). Fortunately, this unconstitutional practice is being challenged in a lawsuit filed by the Colorado Criminal Defense Bar and the Colorado Criminal Justice Reform Coalition.
[16] Posting of David Carroll to NLADA Justice Standards, Evaluation & Research Initiative, *Gideon Alert: Nevada DA Seeks Way Around Court-Ordered Performance Guidelines*, http://www.nlada.net/jseri/blog/gideon-alert-nevada-da-seeks-way-around-court-ordered-performance-guidelines (Aug. 8, 2011, 12:44 PM).
[17] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 150 (2011).
[18] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005).

plea have shorter sentences (i.e., not sufficiently lengthy to mobilize the time consuming litigation to exonerate them) and have foregone many appellate rights by pleading guilty.[19]

B. Cases this Term: *Missouri v. Frye* & *Lafler v. Cooper*

The fact that the right to counsel at the plea bargaining stage goes unenforced or under-enforced means two cases this Term, *Missouri v. Frye* and *Lafler v. Cooper*, are critically important. In *Frye*, defendant Galin Frye was charged with the felony of driving with a revoked license, and a public defender was appointed to represent him. The prosecutor sent a plea offer to the public defender via mail, offering two options: (i) plead guilty to the felony charge and the prosecutor would recommend a three-year prison sentence (deferring to the court on whether Frye should instead receive probation); or (ii) plead guilty to a lesser misdemeanor charge and the prosecutor would recommend a 90-day sentence in county jail. The public defender received and reviewed the plea offer, but never made any effort to communicate the offer to Frye. The result was that Frye pled guilty and was sentenced to three years imprisonment. Frye learned about the existence of the original plea offer after his conviction and told his appellate counsel that he would have pled guilty to the misdemeanor (and resulting 90-day sentence) if he had been informed of the plea offer.

Cooper similarly involves the ineffective assistance of counsel at the plea bargaining stage. Anthony Cooper was accused of shooting his victim multiple times as she was fleeing from him. Cooper faced a potential life sentence for assault with intent to murder, possession of a firearm by a felon, and using a firearm during the course of a felony. Cooper was appointed counsel by the court. The prosecution offered Cooper a deal: plead guilty to assault with intent to murder with an agreement that Cooper's minimum sentence would be in the 51-to-85 month (approximately 4-7 years) guideline range. Cooper's appointed counsel did inform him of this plea offer, unlike Frye's counsel, but recommended he reject the offer. Counsel erroneously advised Cooper that there was no way the prosecution could prove that Cooper had the requisite intent to murder because the victim's wounds were all below her waist. Following counsel's incorrect advice, Cooper went to trial, where the prosecution did prove its case. Cooper was ultimately sentenced to 185-to-360 months (approximately 15-30 years), which was nearly four times longer than if he had accepted the plea deal.

Frye and *Cooper* involve different facts and defendants—one non-violent and sentenced to a three-year prison sentence for the relatively minor crime of driving without a license; the other violent and sentenced to at least 15 years for a potentially fatal offense. Frye ended up pleading guilty without ever knowing about the prosecution's plea offer; Cooper was well aware of the plea offer but rejected it based on incorrect advice. However, both cases unquestionably involve the ineffective assistance of counsel during the plea negotiation stage. In each case, counsel's failure resulted in a longer sentence than the defendant would have received had he accepted the original offer.

In neither *Frye* nor *Cooper* do the parties vigorously dispute that counsel's performance was deficient. However, *Strickland v. Washington* requires that the defendant show more than

[19] Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1110-11 (2011).

deficient performance to establish a claim of ineffective assistance of counsel. Also required is a showing that the defendant was prejudiced by the deficient performance, meaning the outcome would have been different in its absence.[20] Thus, the parties' briefs focus on *Strickland*'s prejudice prong. The second question before the Court in both cases is what the remedy should be, assuming the defendants in each case have established a claim of ineffective assistance of counsel during the plea stage, yet were convicted and sentenced pursuant to constitutionally adequate procedures.

Petitioners, the State of Missouri and Blaine Lafler, argue that the right to counsel exists to ensure a fair trial, and thus a *Strickland* violation turns on the denial of a fair trial. Since a defendant has no constitutional right to a plea offer, ineffective assistance leading to the rejection of a plea offer does not deprive a defendant of any right. Since both defendants were later convicted and sentenced pursuant to constitutionally adequate procedures, any deficient performance was not prejudicial. Further, petitioners argue that there is no acceptable remedy — a new trial would not benefit defendants and the court cannot force the state to re-offer the original bargain.

Precedent is really on the side of respondents Cooper and Frye, however. As mentioned previously, both *Hill v. Lockhart* and *Padilla v. Kentucky* have established unequivocally that the Sixth Amendment right to counsel applies in the plea context. The fact that *Hill* and *Padilla* involved guilty pleas, while *Cooper* and *Frye* involve not-guilty pleas followed by constitutionally adequate procedures, should not matter. The right at issue is not the right to a guilty plea; rather, it is the right to the effective assistance of counsel during the plea process. As Frye's brief notes, "[e]very federal court of appeal and twenty-five of twenty-seven state courts addressing this issue have rejected the argument that subsequent valid procedures vitiated the harm caused by the constitutional violation[.]"[21] Further, Cooper's and Frye's prejudice is of a different sort than those who enter guilty pleas and then regret it, as in *Hill* and *Padilla*, but still readily apparent: the prejudice to Cooper and Frye was in the form of lengthier sentences.

Further, constitutional violations are remedied by restoring the victim to the position they would have been in had the violation not occurred to the extent possible. In the ineffective assistance of counsel context, the Court has stated that it requires relief to be tailored so that it is "appropriate in the circumstances to assure the defendant the effective assistance of counsel."[22] In these cases, allowing the defendants to accept the original plea bargains would be the precise remedy that puts the defendants in the positions they would have been with the effective assistance of counsel.

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[20] Ineffective assistance of counsel is established by showing (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The Constitution Project's National Right to Counsel Committee has criticized this standard as too burdensome in its 2009 report *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, as discussed in more detail in the following section.

[21] Brief of Respondent Galin E. Frye at 12, Missouri v. Frye, No. 10-444 (U.S. Jul. 15, 2011).

[22] United States v. Morrison, 449 U.S. 361, 365 (1981).

Just as precedent dictates a decision that defendants were prejudiced and entitled to a remedy of the original plea offer, such an outcome is also desirable from a policy standpoint. As explained above, counsel's assistance during plea negotiations is more important than ever before, since plea negotiations have replaced trials in the vast majority of criminal prosecutions. For such a right to have any meaning, an enforceable remedy is absolutely essential. Without a robust right to counsel at the plea stage, defendants will be forced into unfair plea deals disproportionate to their crimes, and innocent defendants may be forced into pleas even though there is insufficient evidence against them. Ultimately, to preserve fairness in our current plea bargaining system, the Court must decide in favor of respondents in this case. A decision otherwise leaves open the door to abuse of the plea process, leading to wrongful convictions and inappropriate sentences.

III. Ineffective Assistance of Counsel & Related Claims in Post-Conviction Proceedings

Indigent defense systems across the country, which perennially face resource shortages, are facing even greater strains due to recent, deep budget cuts. This impacts the quality of representation indigent clients receive and increases the likelihood that they will suffer from ineffective assistance of counsel. Unfortunately, successful ineffective assistance of counsel claims are rare because of the burdensome standard that the Supreme Court articulated in *Strickland*, as well as the limitations of post-conviction review at both the state and federal level. A trio of cases the Supreme Court will consider this Term could begin to reshape this landscape.

A. Strained Indigent Defense Systems and Ineffective Assistance of Counsel

In 2007, statewide public defender offices had a median 67% of the attorneys necessary to meet caseload limits[23] and 73% of county-based public defender offices exceeded the maximum caseload per attorney.[24] Throughout the United States, public defenders are overworked, under-resourced and stretched to the breaking point.

During that same period, state, county and local public defender offices across the United States spent approximately $2.3 billion annually to provide representation to indigent defendants. This is less than half the $5 billion state prosecutors spent annually around that same time[25] and a tiny fraction of the $55.4 billion local police spend annually.[26] Unfortunately, the 2008 global economic collapse and ensuing recession have exacerbated this problem. States have eviscerated their budgets, with indigent defense often one of the first programs on the chopping block. For example, Connecticut cut nearly 7.5% of its public defender budget, losing 33 full-time positions and 42 part-time and contract positions, despite caseloads already above state guidelines. In

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[23] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS 13 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

[24] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES 8 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

[25] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf.

[26] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF LOCAL POLICE DEP'TS, 2007 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf.

North Carolina, the Indigent Defense Service has seen a budget cut of nearly 20% for 2010-2011, prompting many attorneys to remove their names from the state's assigned counsel list. This year, Iowa has experienced an $18 million shortfall in funds to pay appointed counsel, while New York's newly created Office of Indigent Legal Services saw its initial budget slashed in half. A number of states and counties, including California, Tennessee, Arizona and Nevada, are addressing budget shortfalls by proposing potentially harmful reforms such as flat-fee contracts for appointed counsel. These and numerous other examples demonstrate the damage wrought by shrinking budgets, and the problem isn't going away. According to the National Conference of State Legislatures, the outlook for state budgets, at least in the short term, is bleak.[27]

Despite the hard work and dedication of many public defenders and court appointed counsel, deep cuts in indigent defense budgets and the consequent increase in caseloads and reduction in resources mean that indigent defendants are often not receiving constitutionally adequate representation. Limited resources and crushing caseloads result in attorneys being unable to perform all the legal and factual investigation necessary to fully defend their clients. Though willing, many indigent defense attorneys are unable to provide the level of quality representation their clients deserve, resulting in ineffective assistance of counsel.

B. Post-Conviction Review and Ineffective Assistance of Counsel

Despite the fact that many defendants are not receiving constitutionally adequate representation, the chance that the denial of that right will be remedied on appeal is extremely unlikely. A person convicted of a crime in state court generally has two avenues to challenge the conviction. The first is to pursue an appeal of the conviction, also known as a direct review; once the state trial court has rendered its decision, the defendant may appeal his or her conviction directly to higher-level state courts. Most states guarantee a defendant at least one appeal as of right, usually to the state's first court of appeals. Any subsequent appeals, such as an appeal to the state supreme court, are typically at that court's discretion.[28] Once the state's highest court has heard and ruled on the inmate's case, or the statute of limitations for direct appeals has run, the inmate's conviction is deemed final.[29]

After the conviction is final, a person may also challenge the conviction through post-conviction (i.e., collateral) proceedings. Typically, this means pursuing available remedies in state court, and if that is unsuccessful, seeking a writ of *habeas corpus* in federal court.[30] However, there is no constitutional right to counsel in post-conviction review, as the Supreme Court established in *Pennsylvania v. Finley*.[31] No constitutional right to counsel in post-

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[27] NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE BUDGET UPDATE: NOVEMBER 2010, *available at* http://www.ncsl.org/documents/fiscal/november2010sbu_free.pdf.
[28] *See, e.g.*, N.C. GEN. STAT. § 15A-1444 (2010).
[29] *See, e.g.*, Teague v. Lane, 489 U.S. 288, 295 (1989).
[30] *See id.* at 218-19.
[31] 481 U.S. 551, 555 (1987); *see also* Murray v. Giaratano, 492 U.S. 1, 3-4 (1989).

conviction review also means there is no right to effective assistance of counsel at this stage.[32] Thus, a petitioner may not raise claims for ineffective assistance of counsel that occurred during the post-conviction stage as part of a post-conviction or *habeas* petition, regardless of whether counsel is retained by the petitioner or provided by a state or the federal government.

One key remedy for indigent clients represented by overburdened and under-resourced counsel at trial and direct appeal *should be* a claim of ineffective assistance of counsel. Unfortunately, as the Constitution Project's National Right to Counsel Committee noted in its 2009 report *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, "it is extremely difficult to overturn a conviction by arguing that institutional deficiencies in public defense [such as under-funding, heavy caseloads, or untrained lawyers] mean that ineffective assistance of counsel was rendered."[33] In general, under the test the Supreme Court articulated in *Strickland*, a defendant must establish that the representation by counsel "fell below an objective standard of reasonableness," and that there is a "reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."[34] This has proven to be a difficult burden to meet. In the first five years after the *Strickland* decision, only 4.3% of claims of ineffective assistance of counsel were successful at the circuit court level, while there were no successful claims at the Supreme Court level.[35]

More recently, the Supreme Court has found ineffective assistance of counsel in several capital cases.[36] This may be a reflection of the greater likelihood of success for capital *habeas* petitions, in general, compared with non-capital petitions.[37] The greater success rate in capital cases likely results from the availability of counsel for indigent petitioners in such cases. Under federal statutory law, indigent petitioners are appointed counsel for their federal *habeas corpus*

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[32] *Compare* Evitts v. Lucey, 469 U.S. 387, 395-96 (1985) (right to counsel includes right to effective assistance of counsel) *and* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (no right to counsel means no right to effective assistance of counsel).

[33] THE CONSTITUTION PROJECT, REPORT OF THE NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 42 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.

[34] 466 U.S. 668, 688, 694 (1984).

[35] Martin C. Calhoun, *How to Thread the Needle: Toward a Check-List Based Standard for Evaluating Effective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 457 (1988); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 262 (2006).

[36] *See* THE CONSTITUTION PROJECT, supra note 31 (citing Rompilla v. Beard, 545 U.S. 374 (2005)) (noting that lawyers who failed to review a court file that would have yielded possible mitigation evidence relevant to death penalty sentencing hearing failed *Strickland's* test and were ineffective); Wiggins v. Smith, 539 U.S. 510 (2003) (noting that lawyer's failure to look beyond pre-sentence report and department of social services records to discover mitigation evidence in a capital case that showed years of abuse, homelessness, foster care, and physical torment, failed *Strickland's* test and was ineffective); Williams v. Taylor, 529 U.S. 362 (2000) (noting that lawyer's failure to discover and present certain mitigation evidence in a capital case sentencing hearing failed *Strickland's* test and was ineffective).

[37] From 1976 to 1983, federal appellate courts ruled in favor of the petitioners in 73.2 percent of the capital *habeas* appeals heard, compared with only 6.5 percent of the decisions in noncapital *habeas* cases. MICHAEL A. MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT 137-38 (1997).The success rate of both capital and non-capital petitions has declined since passage of AEDPA. *See generally id*.

claims in capital cases.[38] Most states also provide some sort of state-funded counsel to indigent petitioners for their state post-convictions claims in capital cases. Contrast that to non-capital cases, in which petitioners must either pay for their own counsel or represent themselves. Because it is not constitutionally mandated, few if any states provide meaningful representation for indigent defendants in post-conviction proceedings in non-capital cases. Successfully navigating the complex and often confusing federal *habeas corpus* and state post-conviction schemes is difficult enough; doing it without the help of a knowledgeable attorney is nearly impossible.

The task of navigating *habeas* and successfully arguing an ineffective assistance of counsel claim was made even more difficult when Congress enacted AEDPA fifteen years ago. AEDPA amended the federal *habeas* statutes for both capital and non-capital cases by applying a first-ever statute of limitations for *habeas* petitions, granting presumptions of correctness to state court fact-findings and legal determinations, and ending second or successive petitions, except in very limited circumstances.[39] The result has been a *habeas* remedy that is now entirely and unnecessarily too complex, particularly for the vast number of petitioners who have no legal counsel. It provides too much deference to state interests over the interests of petitioners with legitimate claims, and the statute of limitations has barred numerous meritorious petitions, even for capital litigants. These hurdles are even more daunting when petitioners are expected to properly navigate complex state post-conviction procedures or risk being barred from federal courts altogether.

As a part of AEDPA, Congress made some effort to address the deficiency of counsel at the state level for capital petitioners through an opt-in program. The opt-in program provides the states with fast-track review of *habeas* petitions if they provide capital defendants in state post-conviction proceedings with counsel in accordance with a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings."[40] The AEDPA opt-in system encourages states to provide death row inmates with counsel by offering them expedited *habeas* review.

AEDPA's opt-in system, however, has been mired in controversy since its creation. Despite numerous attempts, no state has been certified as providing a system that guarantees death row inmates adequate assistance of counsel in state post-conviction proceedings sufficient to achieve fast-track status.[41] Additionally, AEDPA specifically exempts counsel appointed

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[38] 18 U.S.C. § 3599(a)(2) (2006) (entitling indigent *habeas* petitioners seeking to vacate or set aside a death sentence to the appointment of counsel).

[39] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241 *et seq.*).

[40] *Id.* § 2261.

[41] Previously, a state's eligibility for the opt-in program would be determined by the court that evaluated a petitioner's federal *habeas* claim. During this time, no court held that a state was eligible for the opt-in. *See, e.g.*, Burris v. Park, 95 F.3d 465 (7th Cir. 1996) (*en banc*) (Indiana); Scott v. Anderson, 958 F. Supp. 330 (N.D. Ohio 1997) (Ohio); Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) (Texas); Wright v. Angelone, 944 F. Supp. 460 (E.D. Va. 1996) (Virginia). *But cf.* Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2002) (holding "that Arizona's mechanism for the appointment of counsel for indigent capital defendants in state post-conviction proceedings met the requirements of Chapter 154 and, accordingly, qualified for opt-in status as of that date. However . . . Arizona is not entitled to enforce the procedures of Chapter 154 in this case, because it did not comply with the timeliness requirement of its own system with respect to Petitioner."). Now, however, a state seeking to opt in to the shorter

under the opt-in system from claims of ineffective assistance of counsel.[42] Therefore, states may qualify for expedited *habeas* review even though the counsel in a particular case provided ineffective representation. Even if a federal court exercises its authority to refuse to provide a state with expedited review because of attorney ineffectiveness, the petitioner is still barred from using this to remedy errors the attorney may have committed that prejudice the petitioner's claims; again, no constitutional right to post-conviction counsel means no constitutional right to effective assistance of post-conviction counsel.

The intersection of the lack of effective counsel and AEDPA is also problematic because petitioners who have colorable claims may nonetheless be barred from pursuing those claims in either state or federal proceedings if they fail to meet state and federal deadlines or fail to follow the intricate procedures required. Procedural default, which occurs when the petitioner fails to follow state-court procedural requirements for filing and preserving his claims, can bar the petitioner from federal *habeas* relief. These bars to federal review can apply even if attorney error or incompetence caused the default.[43]

In its 2010 decision in *Holland v. Florida*, the Supreme Court took a small but important step in addressing these issues.[44] The Court held that AEDPA's statute of limitations is subject to equitable tolling when petitioners show that they have been pursuing their rights diligently and "extraordinary circumstances" prevented timely filing. In the case, Holland was convicted of murder in 1996 and sentenced to death by a Florida state court. His direct and collateral appeals to Florida appellate courts were denied, beginning a limited period for filing a federal *habeas* petition. Despite Holland's repeated requests for his state-appointed lawyer to file for federal *habeas* relief in a timely manner, the lawyer failed to do so. The Court held that a petitioner does not have to show "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part" in order to demonstrate that the attorney's failure to satisfy professional standards of care constituted "extraordinary circumstances" sufficient to meet the equitable tolling standard.[45] It remains to be seen, however, how the "extraordinary circumstances" standard interacts with the *Strickland* standards for ineffective assistance of counsel. In addition, *Holland* only applies to failure to file a federal *habeas* petition within the statute of limitations, and does not address general procedural default resulting from failure to pursue claims.

C. Cases This Term Offer Opportunity for Improvement in Post-Conviction Proceedings: *Maples v. Thomas*, *Martinez v. Ryan*, & *Martel v. Clair*

Three cases in which the Supreme Court will hear arguments this fall provide an opportunity to address some of the shortcomings of ineffective assistance of counsel in post-

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habeas statute of limitations must seek certification from the Attorney General of the United States. 28 U.S.C. § 2265 (2006). The Department of Justice has not yet promulgated regulations on how it will evaluate state petitions for certification.

[42] 28 U.S.C. § 2261(e) (2006) (providing, "The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 [federal *habeas*].").

[43] Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

[44] 130 S. Ct. 2549 (2010).

[45] *Id.* at 2562-63 (quoting Holland v. Florida, 539 F.3d 1334, 1139 (11th Cir. 2008)).

conviction review. None of these cases directly addresses the general lack of a right to post-conviction counsel and the resulting consequence of the inability to raise ineffective assistance of post-conviction counsel as a general matter. However, each in its discrete way could take an important step toward ensuring that petitioners in post-conviction proceedings do not become hapless victims of counsel's ineffectiveness.

i. *Maples v. Thomas*

In *Maples v. Thomas*, the Court will be asked to decide whether a *habeas* petitioner is entitled to an equitable exception to AEDPA's procedural default rules because, among other things and most relevant to this discussion, his attorneys abandoned representation of him without informing the court.[46] Cory Maples was convicted of the capital murder of two individuals and sentenced to death by an Alabama jury. His court-appointed trial counsel were inexperienced with capital cases and completely ineffective; their poorly planned defense lasted merely one hour; and at the penalty phase, certain mitigating evidence that might have spared Maples from a death sentence was never introduced. The jury imposed a death sentence by a vote of 10-2; a vote of 9-3 would have meant a jury recommendation for life. Since Alabama does not provide post-conviction counsel in capital cases, Maples could have been forced to proceed *pro se* after his direct appeal. However, lawyers from a well-known New York law firm stepped in to defend him *pro bono* in post-conviction proceedings. They represented him during his state post-conviction proceedings, but then left their firm without informing the state court. When the state court sent a notice that the petition had been denied, the firm's mailroom returned the notice to the court noting that the two attorneys had left the firm. However, neither the mailroom clerk nor the court clerk took further action. Thus, Maples never received notice and hence missed the filing deadline for his federal *habeas* petition, resulting in a district court decision that his petition was procedurally barred when he did file it. Consequently, while Maples has colorable claims of ineffective assistance of trial counsel, the abandonment by his attorney handling the post-conviction review has caused him to be barred from raising such claims in federal court.

Maples relies on *Holland*'s "extraordinary circumstances" standard and argues that this standard should be applied beyond equitable tolling of the statute of limitation to include an equitable exception to procedural default. In general, the law treats a *habeas* petitioner's attorney as the petitioner's agent, and a procedural default caused by the attorney is considered fairly attributable to the petitioner.[47] The Supreme Court has made clear that attorney failure that does not rise to the level of ineffective assistance will not excuse procedural default and cannot be regarded as "objective factors external to the defense" so long as the attorney is acting as the defendant's agent.[48] In the *Maples* case, by leaving their law firm without informing the petitioner or the court, the petitioner's attorneys effectively abandoned him. Therefore, they were no longer the petitioner's agents, and their failure to timely file in the petitioner's post-conviction proceeding could not be fairly attributable to the petitioner. It is these extraordinary

[46] Brief of Petitioner at 2, Maples v. Thomas, No. 10-63 (U.S. May 18, 2011).
[47] Coleman v. Thompson, 501 U.S. 722, 753 (1992).
[48] Murray v. Carrier, 477 U.S. 478, 488 (1986).

circumstances that the petitioner asserts entitle him to an equitable exception to the procedural default.

The respondent argues that it was the law firm, not the two attorneys of record, who represented the petitioner. Therefore, the fact that the attorneys left the law firm and did not inform the court of their withdrawal from the case did not amount to abandonment. Of course, even if this argument is accepted, no attorney at the law firm sought to be added as counsel of record in the post-conviction proceeding, underscoring the abandonment. Additionally, respondent argues that local counsel in the case continued to represent petitioner and could have made the required filings. But, as petitioner notes, local counsel is not required to participate in petitioner's case; a 2006 change to Alabama law was designed to address the severe shortages in indigent defense resources and "to facilitate the provision of indigent defense services by foreign attorneys who volunteer to represent indigent defendants *pro bono*."[49] Local counsel served exclusively to sponsor the *pro hac vice* motions[50] of the two attorneys who represented the petitioner.

In light of *Holland*, the Court ought to decide in Maples' favor. As in *Holland*, a decision in the petitioner's favor in the *Maples* case would not create an ineffective assistance of counsel claim in post-conviction proceedings, but it would provide a remedy for petitioners who are unfairly prejudiced by a procedural default that results from the failures of their counsel. Such a decision, acknowledging that "extraordinary circumstances" can unfairly prejudice a petitioner, would strike a balance to address the most egregious behavior of post-conviction counsel without extending a right to effective assistance. As a result, the decision would likely impact very few cases, but would allow petitioners in the most extreme cases an opportunity to have their claims heard.

ii. *Martinez v. Ryan*

A second case being argued on the same day, *Martinez v. Ryan*, provides the Court the opportunity to extend the right to effective assistance of counsel to post-conviction proceedings, when (and only when) state law prevents a defendant from raising ineffective assistance claims on direct appeal. Luis Mariano Martinez was charged with two counts of sexual misconduct with his minor step-daughter. However, the step-daughter recanted her accusations against Martinez before and during trial, and physical evidence presented at trial was called into question. Still, Martinez was convicted and sentenced to consecutive terms of 35 years to life.

As discussed above, a defendant is entitled to the effective assistance of counsel during a direct appeal. However, Arizona, like many states, does not allow a defendant to raise ineffective-assistance-of-trial-counsel claims on direct appeal; such claims will not be considered by the court on direct appeal "regardless of merit."[51] Thus, Martinez was not able to raise his

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[49] Brief of Petitioner at 5, Maples v. Thomas, No. 10-63 (U.S. May 18, 2011) (citing Ala. R. for Admission to Ala. Bar VII(C) (1998) (JA 377)).

[50] A *pro hac vice* motion is made by an attorney admitted to practice in a particular jurisdiction to request that a court allow another attorney (who is not admitted in that jurisdiction) be allowed to practice there temporarily for the purpose of trying a particular case.

[51] State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

ineffective-assistance-of-trial-counsel claims on direct appeal when he had the benefit of a constitutional right to counsel.

Martinez was appointed post-conviction counsel, but, without his consent, she filed a statement declaring she could find no issues to raise in a first state post-conviction proceeding. When Martinez filed a second state post-conviction appeal with the assistance of other volunteer counsel, the Arizona state courts held that he had procedurally defaulted his ineffective-assistance-of-trial-counsel claims by not raising them in the first post-conviction proceeding.

Normally, the failure to raise a claim in state post-conviction proceedings also results in procedural default barring the claims from being raised in federal *habeas*. However, Martinez argues in his federal *habeas* petition that the ineffective assistance of his *appellate* counsel (the one who waived his claims without his consent) was cause to excuse the default. While there is generally no constitutional right to the effective assistance of counsel in post-conviction proceedings, Martinez argues that he would have been entitled to constitutionally effective assistance of counsel on a direct appeal pursuant to the Court's decision in *Douglas v. California*.[52] But, having been barred from making the ineffective-assistance-of-trial-counsel claim until his first post-conviction proceeding, the principles behind *Douglas* mean that he is entitled to effective assistance during his first post-conviction proceeding (i.e., the first court proceeding where he was able to raise the claim).

In response, the state argues that a federal constitutional right to effective assistance of post-conviction counsel cannot be created simply because Arizona provides criminal defendants with counsel to challenge their convictions and sentences in state post-conviction proceedings following the conclusion of direct appeal. It further asserts that ineffective assistance claims are traditionally and appropriately part of post-conviction proceedings and that nothing in the manner in which Arizona law requires such claims to be raised creates an exception to the generally applicable federal law that bars claims in *habeas* proceedings that a petitioner failed to raise in state post-conviction proceedings.

If the Court accepts petitioner's argument in *Martinez*, as it should, the expansion of the right to counsel would be minimal. It would, however, honor the goals of the constitutional right to counsel by making certain that petitioners have at least one opportunity, with the critical guidance and aid of counsel, to evaluate whether their trial representation was constitutionally adequate. Whether it can first be raised on direct appeal or in post-conviction proceedings, the right to raise a claim of ineffective assistance of trial counsel is nearly meaningless if a defendant does not have counsel to help him or her evaluate and develop the claim.

iii. *Martel v. Clair*

Finally, in *Martel v. Clair*, the Court will consider whether a death row inmate for whom a court appointed counsel for his federal *habeas* proceedings pursuant to federal law, may

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[52] 372 U.S. 353 (1963) (noting that due process and equal protection require appointment of counsel to indigent on first appeal); *see also* Halbert v. Michigan, 545 U.S. 605 (2005) (noting the same for indigents who pleaded guilty to take discretionary appeal).

receive new counsel based on claims that his current counsel is not pursuing certain claims or investigating certain facts. As in *Maples*, the *habeas* petitioner is not claiming ineffective assistance of counsel. In this case, the petitioner is claiming that the federal district court, which refused to appoint new counsel, abused its discretion under federal law.

Kenneth Clair was convicted in 1987 of a burglary-murder and sentenced to death by a California jury. Clair's first federal *habeas* petition was filed in 1995; nine years later, after extensive discovery, an evidentiary hearing was conducted. However, just before the district court's anticipated ruling after the hearing in 2005, Clair complained that he was dissatisfied with his Federal Public Defender (FPD) attorneys, who had been appointed pursuant to federal law. He alleged his FPD attorneys had not presented certain exculpatory evidence at the hearing, and he now wanted to be represented by a Stanford Law School attorney. The district court declined to substitute counsel and denied all of his *habeas* claims. On appeal, however, the U.S. Appeals Court for the Ninth Circuit substituted counsel pursuant to the FPD's request and later held the district court had abused its discretion in denying Clair's request to substitute new counsel.

Petitioner Clair asserts that the Ninth Circuit was correct when it held that federal law permits a district court to substitute post-conviction counsel in the "interest of justice." To reach this conclusion, the Ninth Circuit looked beyond 18 U.S.C. § 3599, which allows a defendant in a capital case to request new counsel but provides no standard for courts to apply in reviewing such a request.[53] Citing provisions for reviewing requests for new non-capital counsel contained in 18 U.S.C. § 3006A, the court held that a capital defendant is entitled to new counsel in federal post-conviction proceedings when "the interests of justice required that the request be granted."[54] According to the petitioner and the Ninth Circuit, the district court failed to analyze whether such a substitution was in the interest of justice and instead relied on the fact that there was no evidence of a conflict of interest or inadequacy of counsel.

The state claims that the Ninth Circuit improperly allowed the petitioner to argue an ineffective assistance claim and that its decision expanded the statutory right to counsel and contravened the express provisions of AEDPA. The state additionally asserts that the court failed to even require the petitioner to demonstrate any actual ineffectiveness of his counsel before deciding in his favor. The result, the state argues, is a regime that allows *habeas* petitioners to seek new counsel if they are simply dissatisfied with their present counsel, regardless of counsel's performance.

In *Clair*, the Court should uphold the Ninth Circuit's decision to allow new counsel. In this case, it will provide the petitioner the opportunity to present newly discovered evidence he claims establishes his innocence; otherwise, he will be procedurally barred from presenting the evidence. The outcome is obviously critical to this petitioner. Beyond this case, upholding the Ninth Circuit's decision would also provide guidance for federal courts when considering a *habeas* petitioner's claim that his or her current appointed counsel is not adequately pursuing claims. Though not a true ineffective assistance of counsel claim, this would at least provide

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[53] Clair v. Ayers, 403 F. App'x 276, 278 (9th Cir. 2010).
[54] *Id.*

petitioners with some minimum standard of competency they can expect from their federally appointed counsel and an opportunity to seek a remedy from the court when these minimum standards are not met.

IV. Conclusion

This Term presents several opportunities for the Supreme Court to weigh in on the problem of ineffective assistance of counsel throughout the pre-trial and post-conviction process. In *Cooper* and *Frye*, the Court should clarify that the right to counsel during plea negotiations is robust and its violation requires appropriate remedies. In *Maples*, *Martinez*, and *Clair*, the Court should protect individuals whose counsels' errors or problems have prevented defendants from raising colorable claims. Such outcomes are critical in our current justice system, which relies heavily on plea bargaining to resolve charges and which makes it extraordinarily difficult to succeed on claims of ineffective assistance of counsel despite the fact that such ineffective assistance is pervasive.