February, 2002

Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas

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DIABOLICAL FEDERALISM: A FUNCTIONAL CRITIQUE AND PROPOSED RECONSTRUCTION OF DEATH PENALTY FEDERAL HABEAS

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I. INTRODUCTION

In a 1977 article entitled *Dialectical Federalism: Habeas Corpus and the Court*, Professor Robert M. Cover and T. Alexander Aleinikoff argued that two major principles—redundancy and indirection—drove the Warren Court's expansion of habeas jurisdiction. Redundancy forced federal courts to address de novo federal constitutional issues previously addressed by state courts. It contained two components: (1) the exhaustion doctrine, which required state prisoners to present their federal claims to the state courts as a precondition to federal review; and (2) the requirement of de novo review of state court adjudications of federal issues. Indirection minimized the perceived costs of criminal-justice reform by channeling it into piecemeal adjudications of the merits of individual cases. These doctrines, Cover and Aleinikoff observed, yoked state and federal courts together into a "dialogue . . . that helped define and evolve constitutional rights." The coordinate jurisdictions were forced "both to speak and listen as equals." In Cover and Aleinikoff's vision, the Supreme Court set the agenda of discussion by "designating issues and values of particular concern." The lower federal courts then defined the contours of the Supreme Court's broadly worded and "utopian" criminal procedure decisions. The states, in turn, drew on their ground-level knowledge to advise federal tribunals of the unintended consequences and structural limitations that informed the practical implementation of the Warren Court's decisions.

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2. *See id.* at 1044.
3. *See id.* at 1044-45.
4. *Id.*
5. *Id.* at 1036.
6. *Id.* at 1054.
criminal procedure revolution.\(^7\)

Cover and Aleinikoff, as friends of the Warren Court’s criminal procedure revolution, suspected that they were writing at the end of the golden age of federal habeas review. When they began *Dialectical Federalism*, the Burger Court had begun to use reinvigorated waiver doctrines to chip away at the Warren Court’s habeas jurisprudence, which had given federal courts enormous power to remedy injustices and promote procedural reform in state criminal justice systems.\(^8\) The Burger Court’s retrenchment in habeas review began in earnest shortly after Cover and Aleinikoff finished their piece, with the Court’s decision in *Wainwright v. Sykes*.\(^9\) *Wainwright* signaled the first dramatic expansion of the waiver doctrine—which Cover and Aleinikoff termed a “general attack upon the very idea of redundancy.”\(^10\) The attack continued apace in the ensuing decades. Though the general principles of comity and good order the exhaustion doctrine claims to serve remain unchanged since Cover and Aleinikoff’s day,\(^11\) newly-minted restrictions on habeas jurisdiction created by the states, the federal courts, and Congress have fundamentally altered its practice.\(^12\)

These changes have practically abolished federal court review of the adequacy of state court post-conviction forums. In Cover and Aleinikoff’s day, the federal courts actively supervised the states to ensure—that at least in theory—that inmates had a fair opportunity to plead and prove their federal claims in state courts. The federal courts’ supervisory role has now almost vanished. The convergence between the doctrines of exhaustion and procedural default now permits states to render claims permanently unreviewable by denying inmates effective counsel in post-conviction proceedings and creating strict bars on successive habeas petitions.

These stringent doctrines, which greatly increased the need for zealous post-conviction representation, were finalized just as the previous means of securing

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\(^7\) See id. at 1052-64 (describing priorities of state tribunals and setting out examples of the dialectic in the areas of parole/probation revocation proceedings and ineffective assistance of counsel claims).

\(^8\) See id. at 1084-86 (pointing out increasing importance of waiver in the Court’s habeas jurisprudence and arguing that waiver theories “eliminate readjudication of rights without taking seriously other means of quality control [of state criminal proceedings],” and thus “purely and simply lie about the legal and moral foundations of the criminal process”).

\(^9\) 433 U.S. 72 (1977); see Cover & Aleinikoff, supra note 1, at 1100 (citing *Wainwright* as the first case to “openly confront and limit” Court’s expansive habeas decisions).

\(^10\) Cover & Aleinikoff, supra note 1, at 1077.

\(^11\) See, e.g., O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (asserting that exhaustion doctrine serves principles of comity and reduces friction by preventing the “unseem[ly]” spectacle “of a federal district court’s overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance” (citations omitted)). *Boerckel* required state prisoners to present all of their federal claims during discretionary review in the state’s highest court in order to preserve them for later federal review, even if the State’s discretionary standards asked petitioners to winnow out all but the most significant and potentially far-reaching of their claims. See id. at 847-48. As Professor Larry Yackle has observed, this holding “deliberately creates friction [between state and federal courts] by forcing prisoners to press claims on state supreme courts that those courts do not wish to consider.” Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1736 (2000).

\(^12\) See infra Part IIA & IIB (describing operation of current exhaustion and procedural default doctrines).
that representation was being eliminated. In 1996, Congress eliminated the federally funded death penalty resource centers which had provided lawyers to indigent death row inmates and passed the Antiterrorism and Effective Death Penalty Act (AEDPA),\(^\text{13}\) which encouraged states to provide “competent” counsel to their death row populations. However, the half-hearted reform incentives offered by the AEDPA triggered only half-hearted state reforms. Many states promised competent counsel to death row inmates but instead provided inexperienced lawyers. Unfamiliar with the demands of death penalty representation, these lawyers irreversibly defaulted many of their clients’ claims. As these mishandled cases reach the federal courts, the states that appointed the incompetent lawyers in the first place then often take full advantage of the devastating power of modern exhaustion/procedural default doctrine to deny review of any claims the lawyers overlooked. In doing so, these states secure the execution of death row inmates after little or no substantive post-conviction review.

Part II of the Article will briefly trace developments in two doctrinal areas, procedural default and exhaustion of state remedies, and in the changing context of state post-conviction review. Part III will bring together the separate strands of the narrative and, with reference to the state of Texas, illustrate the consequences of the new procedural regime. Part IV will assess other habeas reform proposals and develop a critique which suggests that, because the assumptions that underlie contemporary habeas doctrine do not take into account the changing purpose and context of post-conviction review in death penalty cases, reform proposals which rely too heavily on the ideas that drive current habeas doctrine offer limited practical benefits. Drawing on recent empirical and anecdotal insights into modern capital post-conviction review, the article will argue for a pragmatic, functional realignment of federal habeas procedure. Finally, Part V proposes reforms to the current federal habeas corpus statute drawn from the principles developed.

II. THE DEVELOPMENT AND CONVERGENCE OF THE DOCTRINES OF EXHAUSTION AND PROCEDURAL DEFAULT

A. Origins of the Exhaustion Requirement

In 1886, the United States Supreme Court first applied the exhaustion requirement—the requirement that state inmates present their federal constitutional claims to the state courts as a precondition to later federal review—to habeas corpus actions filed by state prisoners.\(^\text{14}\) The Court advised federal courts which were presented with claims which had not been aired in state court to exercise “discretion . . . in recognition of the fact that the public good requires that . . . rela-


\(^{14}\) Ex Parte Royall, 117 U.S. 241, 253 (holding that “when the State shall have finally acted upon the case, the Circuit Court has . . . discretion whether . . . the accused . . . shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of habeas corpus . . .”)}
tions [between state and federal courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."15 Neither the Constitution nor any statute required this course; it was merely a "principle of comity" intended to "avoid interference" with orderly state procedure.16 The Court, in Ex Parte Hawk,17 stated the principle in its modern form:

Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.18

The rationale of the doctrine—to prevent "interference with the administration of justice in state courts"19—remained consistent. The Hawk Court noted that some exceptions had been engrafted onto the exhaustion requirement: exhaustion could be excused in "exceptional circumstances of peculiar urgency,"20 and when a state court remedy was either unavailable or "because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate."21 In 1948, Congress codified the doctrine, and certain exceptions, in the federal habeas corpus statute.22

In 1982, the Court significantly strengthened the exhaustion doctrine in Rose v. Lundy.23 The Rose Court took up the issue of so-called "mixed petitions"—federal habeas petitions containing both exhausted and unexhausted claims. Lower courts had divided on the proper treatment of such petitions, with some dismissing them in their entirety (thus requiring "total exhaustion") and others ruling on the exhausted claims while withholding judgment on unexhausted ones.24 To resolve the question, the Court considered the text of the habeas statute and "the policies underlying the exhaustion doctrine,"25 which were to "minimize[ ] friction" between the state and federal systems.26

The Court adopted a "rigorous[ ]" rule of total exhaustion.27 Total exhaustion, the Court argued, served the underlying purposes of the exhaustion rule by "encouraging[ ] state prisoners to seek full relief first from the state courts, thus

15. Id. at 251.
16. Id. at 252 (quoting Covell v. Heyman, 111 U.S. 176, 182 (1884)).
17. 321 U.S. 114 (1944).
18. Id. at 116-17.
19. Id. at 117.
20. Id. (quoting United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17 (1925)).
21. Id. at 118 (citations omitted).
24. See id. at 514 n.5.
25. See id. at 515.
26. See id. at 518 (quoting Duckworth v. Serrano, 454 U.S. 1, 2 (1981)).
27. See Lundy, 455 U.S. at 518.
giving those courts the first opportunity to review all claims of constitutional error," and by forcing state courts to face more federal claims, leaving them "increasingly familiar with and hospitable toward federal constitutional issues." Finally, it would streamline federal review by increasing the chance that an inmate's claims would reach federal court with a "complete factual record."

Like Rose, most Supreme Court exhaustion decisions assume that rigid enforcement of the doctrine will foster collegial, cooperative relations between the state and federal courts. In the Court's exhaustion decisions, state courts are portrayed as coordinate and equally respectable. A prisoner who suggests that state courts may be hostile to federal claims will earn a lecture from the Supreme Court denouncing the prisoner's mistrust of the state courts and praising the state courts as generally sensitive to federal claims and issues. Although some commentators differ as to whether this trust is warranted, there is no question that it has guided the Court's habeas jurisprudence in recent years. Both the Court and Congress have recently demonstrated near-total trust in state court systems by designing rigid waiver doctrines that presuppose a fair state forum, deemphasizing case-by-case review of state court decision-making procedures, and requiring substantive deference to state court resolutions of federal issues.

B. The Parallel Growth of Procedural Default

The modern doctrine of procedural default in federal habeas corpus cases emerged in earnest with the Supreme Court's 1977 decision in Wainwright v. Sykes. In its earlier decision in Fay v. Noia, the Court permitted state prisoners
who did not plead or develop their federal claims in state court to overcome the resulting default by showing that they personally had not "understandingly," "knowingly," or "deliberate[ly]" bypassed the state court forum.\textsuperscript{38} The Sykes Court attacked the Fay Court’s "deliberate bypass" standard on several grounds.

First, the Fay rule conveyed insufficient "respect" for state procedural rules, such as the contemporaneous objection rule that Sykes had violated.\textsuperscript{39} Second, stricter enforcement of state procedural rules would enhance finality in criminal litigation by establishing stronger incentives for state inmates to litigate claims in state court.\textsuperscript{40} Third, a stronger rule would discourage "sandbagging" by criminal defense attorneys, which the Court defined as "tak[ing] their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."\textsuperscript{41} Finally, the Court reasoned, a stronger default rule would make the state criminal trial seem a "more decisive and portentous event" by making its result less subject to eventual revision or reversal.\textsuperscript{42}

The Sykes Court replaced "deliberate bypass" with the "cause and prejudice" standard, which it adopted from an earlier habeas case,\textsuperscript{43} but left undefined the "precise content" of cause and prejudice.\textsuperscript{44} The Court later held that showing cause to excuse a procedural default required the prisoner to "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."\textsuperscript{45} It cited as examples "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable."\textsuperscript{46}

To show prejudice, an inmate must demonstrate that the constitutional claim he had defaulted had merit. However, because the standard is "cause and prejudice," review of the case ends immediately if the inmate cannot demonstrate cause to excuse his default. The Court endorsed a very narrow exception: even if the inmate could not show cause, he could nevertheless win review of a defaulted claim by demonstrating that his continued incarceration or execution would be a "fundamental miscarriage of justice"—that is, that he is literally, factually innocent of the crime for which he is being punished.

\textsuperscript{38} Id. at 439.
\textsuperscript{39} Id. at 88-89.
\textsuperscript{40} Id. at 89.
\textsuperscript{41} Id. at 90.
\textsuperscript{42} Id. at 90-91 (citing Francis v. Henderson, 425 U.S. 536 (1976)).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 90-91 (citing Francis v. Henderson, 425 U.S. 536 (1976)).
\textsuperscript{46} Id. (quoting Brown v. Allen, 344 U.S. 443, 486 (1953)).
\textsuperscript{47} Id. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).
C. Sealing the Exits: Entangling Exhaustion and Procedural Default

Beginning in the late 1980s, a series of changes wrought by the Supreme Court, the Congress, and various state legislatures greatly increased the significance of an existing overlap between the doctrines of exhaustion and of procedural default. By now, the doctrine of exhaustion has been completely swallowed by the doctrine of procedural default: in most federal habeas cases arising from state prosecutions, every unexcused failure to exhaust a claim or fact is virtually always automatically a federal procedural default.48 This convergence has drastically changed the relationship between the state and federal courts.

1. The Supreme Court

The Supreme Court moved first. In 1989, a plurality of the United States Supreme Court decided, in Murray v. Giarratano,49 that neither the Sixth Amendment nor the right of meaningful access to courts required the state to appoint lawyers to help death-sentenced inmates pursue state or federal habeas corpus appeals.50 Justice Kennedy, concurring in the judgment, declined to endorse the plurality’s flat denial. He observed that death row habeas appeals routinely uncovered reversible constitutional error, and that capital habeas corpus law had become so complex that it was unlikely a death row inmate could file a meaningful habeas challenge “without the assistance of persons learned in the law.”51 Nevertheless, Kennedy continued, the record showed that condemned Virginia prisoners had some form of legal assistance in filing their appeals. Therefore, “[o]n the facts and record of this case,” Kennedy concurred in the result.52

Two years later, the Court considered the case of Roger Keith Coleman.53 After a Virginia district court held a post-conviction hearing and denied him relief, Coleman’s attorneys filed an appeal to the Virginia Supreme Court. Coleman’s attorneys misinterpreted a local procedural rule and filed their notice of appeal from this judgment three days late.54 The Virginia Supreme Court, citing this violation of its appellate rules, dismissed Coleman’s entire appeal on procedural grounds.55 The federal courts upheld the procedural bar, and the Supreme Court did the same.56

There are two key aspects of Coleman: its holding and a dictum. To avoid the

48. See infra note 100 and accompanying text.
50. Id. at 9, 12.
51. Id. at 14.
52. Id. at 15.
54. Id. at 727 (asserting Coleman filed his notice of appeal “33 days” after entry of final judgment, rather than the “30 days” required by Virginia court rule).
55. Id. at 727-28.
56. Id. at 757.
consequences of his state post-conviction lawyer's default, Coleman argued that the ineffectiveness of his habeas lawyers supplied cause. In response, the Court invoked its precedents establishing that no attorney error could constitute cause sufficient to excuse a procedural default unless that error constituted a violation of the Sixth Amendment. It is not the "gravity" of the attorney's error that counts, the Court maintained, but whether that error violates the petitioner's "right to counsel." Because the Murray Court had earlier decided that there was no Sixth Amendment right to the effective assistance of counsel in habeas corpus proceedings, Coleman could never hope to demonstrate cause sufficient to excuse his default. "[T]his case," the Court brusquely declared, "is at an end."

Another portion of the opinion is proving equally fatal for indigent death row inmates. During its survey of the law governing exhaustion of state remedies, the Court reiterated the traditional principle that a federal court could reach the merits of a prisoner's federal claims if the prisoner presented those claims to the state court and that court did not "clearly and expressly" invoke a state procedural rule to dismiss the claims. In a footnote to this sentence, the Court noted an exception:

This rule does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

In most cases, the federal courts assessed defaults when inmates had previously presented their claims to the state courts but had done so at the wrong time or in the wrong forum. The Coleman court reaffirmed that a federal court could also preemptively default claims by predicting that the state courts would no longer consent to hear them.

57. Id. at 754.
58. Id. (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).
59. Id.
60. Id.
61. Id. at 752.
62. Id. at 735.
63. Id. at 735 n.1.
64. See, e.g., Teague v. Lane, 489 U.S. 288, 297-98 (1989) (holding that, under Illinois law, petitioner had procedurally defaulted his claim under Swain v. Alabama, 380 U.S. 202 (1965), by failing to raise it during direct appeal proceedings); Engle v. Isaac, 456 U.S. 202, 125-26 n.28 (1982) (holding that, under Ohio law, petitioner had procedurally defaulted his claim by failing to object to jury instructions only on appeal and not at trial); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (holding that, under Florida law, petitioner defaulted his claim by failing to directly appeal the use of exculpatory evidence).
65. Coleman, 501 U.S. at 732 (citing Engle v. Isaac, 456 U.S. 107, 125-26 n.28 (1982)). In Engle, three habeas petitioners had defaulted their constitutional objections to a faulty jury instruction by not objecting to the instruction at trial. Engle, 456 U.S. at 124-25. In two cases, there was apparently no state court judgment holding
A case decided the term after Coleman, Keeney v. Tamayo-Reyes,66 heralded the shape of things to come. Jose Tamayo-Reyes, a Cuban immigrant with “almost no knowledge of English,” pled nolo contendere to first-degree manslaughter in a hearing in which he had the assistance of an attorney and an interpreter.67 In a post-conviction collateral attack in Oregon state court, Tamayo-Reyes alleged, inter alia, that the translator at the plea colloquy had incorrectly translated the mens rea component of first-degree manslaughter, and therefore that his guilty plea was invalid.68 Although Tamayo-Reyes had been granted a post-conviction hearing in state court, the Ninth Circuit observed that his counsel had offered “almost no factual development” of his faulty-translation claim.69 What little factual development there was consisted of counsel applying his “limited knowledge of Spanish” to the plea colloquy transcript in order to show the translator’s mistakes70—a strategy which “quickly disintegrated.”71 While counsel put Tamayo-Reyes on the stand during the habeas evidentiary hearing, he never asked Tamayo-Reyes any questions about his understanding of the translation.72 Presented with no persuasive proof that the translator had erred, the state habeas court found that the translator had “correctly, fully and accurately” translated the relevant concepts, and denied Tamayo-Reyes relief.73

The Ninth Circuit applied the law then in effect. Under Townsend v. Sain,74 a federal habeas petitioner was entitled to an evidentiary hearing in order to develop fully the facts underlying his claims if “the material facts were not adequately developed at the state court hearing.”75 The only exception that might forestall a federal hearing applied if the petitioner had demonstrated “inexcusable neglect” in the claims defaulted, because the prisoners had not raised the claims during their direct appeals. Id. at 113-14. In a third case, the petitioner did object to the faulty instruction on direct appeal and was explicitly denied review by the appellate court for lack of a contemporaneous objection. Id. at 115. The petitioners thus had no state remedies left because they had “long ago” completed their direct appeals, which constituted their only available state forum for the claims they wished to raise. Id. at 126 n.28. The clearest application of the preemptive default rule can be found in Gray v. Netherland, 518 U.S. 152, 162 (1996) (holding petitioner had defaulted a Brady claim for federal purposes because he knew of the potential claim during his initial state post-conviction proceedings but did not present it, and therefore would now be barred from raising it in a successive state petition by the state’s successor bar rules).

67. Id. at 3.
68. Id.
69. Tamayo-Reyes v. Keeney, 926 F.2d 1492, 1499 (9th Cir. 1991).
70. Id.
71. Id. (noting how quickly the presentation fell apart after the State objected that the defendant’s counsel was not qualified as an expert witness in Spanish).
72. Id. at 1500.
73. Id. at 1495-96 (reproducing state post-conviction court findings).
75. Id. at 313 (requiring a federal evidentiary hearing unless the state trier-of-fact reliably found the relevant facts either at the time of trial or later at a collateral proceeding).
failing to develop the facts. The Ninth Circuit held that state habeas counsel's "woefully inadequate" attempts to develop the facts supporting Tamayo-Reyes' claim did not amount to a deliberate bypass of the state court system, and therefore granted Tamayo-Reyes a federal evidentiary hearing.

The Supreme Court reversed. In previous cases, the Court observed, it had rejected the "deliberate bypass" standard and replaced it with Sykes' much more onerous "cause and prejudice" standard. The Keeney Court reckoned that it was thus "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim, and to apply to the latter a remnant of a decision that is no longer upheld with regard to the former." Therefore, the Court announced, the "cause and prejudice" standard would now apply to failures to develop the facts in state court.

Justice O'Connor, writing for four dissenters, limned the consequences of the Court's decision:

For a case to fit within this Townsend circumstance [granting a federal hearing when the facts were not adequately developed in state court,] . . . the case will very likely be like this one, where the material facts were not developed because of attorney error . . . . We have already held [in Coleman] that attorney error short of constitutionally ineffective assistance of counsel does not amount to "cause." As a result, the practical effect of the Court's ruling today will be that for a case to fall within Townsend's fifth circumstance . . . the petitioner's attorney must have rendered constitutionally ineffective assistance in presenting facts to the state factfinder.

This effect is more than a little ironic. Where the state factfinding occurs at the trial itself, counsel's ineffectiveness will not just entitle the petitioner to a hearing—it will entitle the petitioner to a new trial. Where, as in this case, the state factfinding occurs at a post-conviction proceeding, the petitioner has no constitutional right to the effective assistance of counsel, so counsel's poor performance can never constitute "cause" under the cause and prejudice standard.

The majority agreed with Justice O'Connor that "under our holding a claim invoking the fifth circumstance of Townsend will be unavailing where the cause

76. Id. at 317.
77. Tamayo-Reyes, 926 F.2d at 1500 (finding that Townsend and subsequent circuit cases defined "inexcusable neglect" as Fay's deliberate by-pass standard).
78. Id. at 1501-02.
80. Id. at 6 (employing Wainwright v. Sykes 433 U.S. 72, 88 (1977)).
81. Keeney, 504 U.S. at 8.
82. Id. at 8-9.
83. Id. at 21-22 (emphasis added).
asserted is attorney error," but discerned no injustice in that state of affairs.

2. State Post-Conviction Procedure Amendments

Trends toward increasing procedural restrictions in state post-conviction forums have made the Court's procedural default jurisprudence all the more imposing. Currently, all fifty states offer prisoners some form of post-conviction remedy. Since the 1970s, there has been a general trend in the states to restrict access to state post-conviction forums, often in ways analogous to the Supreme Court's restrictions on federal habeas. The restrictions include statutes of limitations requiring habeas petitions to be filed within a certain time from the date of conviction, restrictions on the number of state post-conviction applications an inmate may file, tightened procedural default rules, and the adoption of state-level non-retroactivity doctrines comparable to the one announced by the Supreme Court in Teague v. Lane. The debate over the AEDPA, which occurred in 1995 and 1996, concentrated the attention of those states that had yet to limit their post-conviction schemes. The AEDPA's opt-in provisions promised dramatically faster federal habeas review of death sentences to any state which adopted "by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings." While amending their

84. Id. at 10 n.5.
85. See Donald E. Wilkes, Jr., State Post-conviction Remedies and Relief § 3-2 (1996) The writ of habeas corpus is now the principal post-conviction remedy in twelve states: California, Connecticut, Georgia, Nevada, New Hampshire, New Mexico, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia. In the other thirty-eight states the principal post-conviction remedy is a remedy in the nature of coram nobis. Id. at 118.
86. Wilkes, supra note 85, at 123 (attributing "retrenchment in state post-conviction remedies" to "the criminal procedure counterrevolution this country has been [experiencing] under the leadership and with the blessing of the Burger-Rehnquist Supreme Court").
87. Id. at 120-21 (observing that statutes of limitations on state post-conviction relief existed in only three states in 1972, but that twenty-five states had since adopted them).
88. Id. at 122. (noting that Arkansas, Maryland, and Missouri are among the states that limit to one the total number of applications for relief that a convicted person may file).
89. Id. at 122-23.
90. Id. at 123; Teague v. Lane, 489 U.S. 288 (1989) (holding that a state prisoner seeking habeas relief would be limited to constitutional law as it existed when their appeal became final unless his case fell within one of two exceptions). See also Mary C. Hutton, Retroactivity in the States: The Impact of Teague v. Lane on State Post-conviction Remedies, 44 Ala. L. Rev. 421, 458 & nn.254-57 (1993) (noting that, since Supreme Court's decision in Teague, Illinois, Indiana, Massachusetts, Tennessee, Iowa, Nebraska, Delaware, Kansas, Alabama, New Jersey, Oregon, and South Dakota had either applied Teague wholesale or adopted some version of its ban on retroactive application of new rules of criminal procedure in state post-conviction).
91. 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").
92. 28 U.S.C.A. § 2261(b) (West 2002).
post-conviction procedures to provide standards for counsel in order to comply with the AEDPA's opt-in requirements,93 many States added deadlines and procedural restrictions at the same time. South Carolina, for instance, passed the “South Carolina Effective Death Penalty Act of 1996,” which tightened deadlines for the disposition of capital habeas corpus appeals.94 In two bills passed in 1995 and 1996, Tennessee added several provisions to its post-conviction statutes, including a one-year time limit for filing for post-conviction relief95 and a successor bar which declared that, absent narrow exceptions, “[i]n no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment.”96 Texas imposed a six-month filing deadline and a bar on successive habeas corpus applications.97 As of this writing, virtually every death penalty state applies one form or another of these restrictions.98

D. Diabolical Federalism: The Modern Exhaustion Doctrine

1. The Fate of Unexhausted Claims

The law in most states now permits inmates to file a second state post-conviction petition only if the inmate can demonstrate (1) that the claims in the new petition are based on facts or legal arguments which were not available to the inmate when the first petition was filed; or (2) that the error they complain of created a “fundamental miscarriage of justice” or resulted in the conviction of an innocent person.99 Assume an inmate or his lawyer files a post-conviction petition in one of

93. See infra text accompanying note 110 (describing AEDPA's opt-in provisions).
97. See TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon Supp. 2002).
98. See, e.g. supra notes 87-91 and accompanying text.
99. See, e.g., OHIO REV. CODE ANN. § 2953.23 (2001) (barring a second petition or successive petitions unless, inter alia, the petitioner was “unavoidably prevented from discovery of facts upon which the petitioner must rely”); ALA. R. CRIM. PROC. 32.2(b) (allowing successive petitions with new claims only when “the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.”); TEX. CODE CRIM. PROC. ann. art. 11.071 § 5(a) (1)-(3) (Vernon Supp. 2002) (barring successors except where facts were “previously unavailable” to petitioner or petitioner can prove that “no rational juror” would have convicted him or sentenced him to death in light of newly-discovered evidence); In re Clark, 855 P.2d 729, 745 (Cal. 1993) (adopting bar on successive applications for post-conviction relief subject to exception for, inter alia, claims based on newly-discovered evidence which could not previously have been obtained by due diligence); Young v. State, 724 So.2d 665, 665 (Fla. Dist. Ct. App. 1999) (barring successive petitions “absent allegations of newly discovered evidence or a new constitutional right”); Tucker v. Kemp, 351 S.E.2d 196, 198 (Ga. 1987) (forbidding successive petitions unless they are based on claims which are “constitutionally nonwaivable or which could not reasonably have been raised in the earlier petition.”); Commonwealth v. Allen, 732 A.2d 582, 586 (Pa. 1999) (noting that a second or subsequent petition for
the above states, loses, and proceeds to federal court. In federal court proceedings, he discovers a new claim for relief (or new facts in support of an existing claim), and pleads this unexhausted claim in his federal habeas corpus application. Professor Larry Yackle describes what happens next:

A familiar sequence is repeated again and again. A prisoner who seeks to litigate a federal claim in federal court is met by a boilerplate motion to dismiss for failure to exhaust state remedies . . . . [If the prisoner is sent back to exhaust state-court remedies] the state courts explicitly hold that the prisoner committed default [by failing to raise the claim in his first state post-conviction petition] and, for that reason, cannot now raise the claim in state court by any means.

***

Things are no different if, in the first instance, the petitioner avoids dismissal for want of exhaustion on the theory that, because of his default . . . state post-conviction procedures are unavailable. In that case, the petitioner's federal petition may be dismissed with prejudice immediately. Either way, a prisoner who escapes the exhaustion doctrine's frying pan falls irretrievably into the default doctrine's fire.  

Current habeas doctrine, as one court recognized, sees "no substantial difference between nonexhaustion and procedural default" in states with strict successor bars.  

The federal court can review the defaulted claim only if the inmate demonstrates cause and prejudice. However, under Coleman, the post-conviction counsel's ineffectiveness is not cause. The claim, therefore, is lost forever: the state court will not touch it unless it meets the restrictive standards for consideration of a successive application, and the federal court cannot review it because, in the jargon of federal habeas review, it is inexcusably procedurally defaulted. If the inmate did exhaust the claim in state post-conviction, but, like the petitioner in Tamayo-Reyes, didn't find sufficient proof, he will also be out of luck. As Justice O'Connor lamented in her Tamayo-Reyes dissent, any additional facts the inmate discovers in federal court will be procedurally defaulted, as state habeas counsel did not "exhaust" them in state court, and his ineffectiveness, again, cannot constitute post-conviction relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred.

100. Larry W. Yackel, Reclaiming the Federal Courts 204-05 (1994). Professor Yackel argues that this state of affairs "wastes all manner of resources in circular litigation, both frustrating and fruitless," and argues that "[n]one of the justifications typically offered for this state of affairs is entitled to credit." Id. at 204, 205.

101. Magouirk v. Phillips, 144 F.3d 348, 358 (5th Cir. 1998) (adopting a rule that a "federal court may, in the exercise of its discretion, raise a habeas petitioner's procedural default sua sponte and then apply that default as a bar to further litigation of petitioner's claims").


103. Id. at 731-32.
cause to excuse the default. 104

The law, therefore, places an overwhelming premium on quality state post-conviction representation. State habeas counsel—or the prisoner himself, if the state does not provide counsel—must investigate and litigate every possible claim in the first post-conviction petition. The inmate is litigating without a net. If he or his counsel omits a legal theory or limits investigation, any claim that does not establish his likely innocence is generally gone forever. Further, this thorough job must be done within the state’s statute of limitations period, and within the new one-year federal limitations period, which begins running when the inmate’s conviction becomes final and which is not tolled during the preparation of the state writ. 105 Inmates with lawyers (virtually all death-sentenced inmates) are totally dependent on their post-conviction counsel to do a thorough job. The situation for non-capital inmates is yet more dire. They are generally too poor to pay for lawyers, and in thirty-seven states they are not automatically entitled to appointed counsel to prepare and present petitions for state post-conviction relief. 106

2. Weak Incentives, Partial Reforms: Increasing State Participation in Postconviction Proceedings

By drawing states into the process of appointing counsel to death row inmates, the AEDPA transformed the question of accountability for default in capital habeas proceedings. Before the AEDPA, death row inmates whose states did not provide post-conviction counsel relied either on an informal recruitment network which convinced large private law firms to take cases, 107 or on federally-funded death penalty resource centers whose mission was to represent some death row clients and find private counsel for others. In 1995, Congress voted to eliminate funding

105. See 28 U.S.C.A. § 2254(d)(1) (West 2002) (providing for “1-year period of limitation” on federal post-conviction proceedings beginning when state court direct appeal is denied); id. at § 2244(d)(1)(A)-(D) (establishing various tolling and timing provisions, none of which toll the limitations period during the assembly of the state writ).
106. See Appendix A. The states that explicitly guarantee indigent inmates counsel from the very beginning of their first post-conviction proceedings are Alaska, California, Connecticut, Indiana, Iowa, Maine, Maryland, Missouri, New Jersey, Oregon, Pennsylvania, Rhode Island, and Vermont. See id. In some states, an inmate may become entitled to the appointment of counsel once he files a non-frivolous post-conviction petition (Colorado, Hawaii, Illinois, Kansas, Kentucky, New Mexico, South Carolina, Tennessee, and West Virginia) or demonstrates a need for a hearing (Louisiana, Michigan, Montana), but he must prepare the initial post-conviction petition without a right to appointed counsel. See id.
107. See, e.g., SR. HELEN PREJEAN, DEAD MAN WALKING 14, 112 (1993) (describing role of Louisiana Prison Coalition in recruiting volunteer attorneys, over half of whom were from out of state, to represent inmates on Louisiana’s death row in the early 1980s, and describing later creation of small office called the Louisiana Capital Defense Project to fill same need); DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW 138-39 (1996) (describing efforts of Scharlette Holdman, director of the Florida Clearinghouse on Criminal Justice, to find volunteer lawyers for the condemned on Florida’s death row in the late 1970s and early 1980s and likening the task to “bailing out the Titanic with a teaspoon”).
for the Resource Centers entirely by 1996.\textsuperscript{108} With the resource centers gone, inmates in death penalty states that did not provide appointed counsel in state post-conviction proceedings were left largely to their own devices. Some former death penalty resource center staffers formed private groups to try to continue placing cases with law firms.\textsuperscript{109}

Congress offered death row inmates a consolation prize, however. Chapter 154 of the AEDPA offered expedited and limited federal habeas review to states that offered counsel to their death row inmates. The Supreme Court described the benefits:

Chapter 154 revises procedural rules for federal habeas proceedings in capital cases. Most notably, it provides for an expedited review process in proceedings brought against qualifying States. It imposes a 180-day limitation period for filing a federal habeas petition. It treats an untimely petition as a successive petition for purposes of obtaining a stay of execution, and it allows a prisoner to amend a petition after an answer is filed only where the prisoner meets the requirements for a successive petition. Chapter 154 also obligates a federal district court to render a final judgment on any petition within 180 days of its filing, and a court of appeals to render a final determination within 120 days of the briefing.\textsuperscript{110}

To qualify for these benefits, a State had to “establish[] by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings,”\textsuperscript{111} and promulgate “standards of competency” for appointed counsel.\textsuperscript{112} Some states (for instance, Arkansas, Missouri, Montana, Ohio, South Carolina, Tennessee, Texas, and Utah)\textsuperscript{113} tried to opt in by creating or significantly expanding a statutory right to post-conviction counsel in the wake of the AEDPA’s passage, while others simply argued that their existing procedures were sufficient.\textsuperscript{114} To date, however, no state has been found qualified to opt in. Some federal courts have cited inadequate

\begin{itemize}
  \item \textsuperscript{108} See Roscoe C. Howard, Jr., \textit{The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel}, 98 W. Va. L. Rev. 863, 865 (1996). Congressional opponents of the resource centers claimed they were staffed with obstructionist lawyers intent on delaying executions at any cost (while supporters claimed Congress’ real objection was to the resource centers’ success). See id. at 912-15.
  \item \textsuperscript{109} See, e.g., Marcia Coyle, \textit{Death Resource Centers Reborn as Private Groups}, Nat’l J., January 15, 1996, at A9 (noting that private organizations had much smaller staffs and budgets than resource centers they replaced and noting several observers’ predictions that rise in unrepresented inmates caused by defunding of resource centers would create additional confusion and expense in death penalty appeals).
  \item \textsuperscript{110} 28 U.S.C.A. § 2261(b) (West 2002).
  \item \textsuperscript{111} See Appendix A (listing dates of revision for relevant statutes).
  \item \textsuperscript{112} 523 U.S. 740, 742 (1998).
  \item \textsuperscript{113} Calderon v. Ashmuns, 523 U.S. 740, 742 (1998).
\end{itemize}
funding for appointed counsel,115 while others have pointed to vague or unduly lenient competency standards.116

Even though the states’ attempts to opt in failed, they have generally kept their capital post-conviction counsel laws on the books. Of the thirty-eight American states which authorize the death penalty, thirty—Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington—require mandatory appointment of counsel upon request by any death row inmate.117 In six other death penalty states, the statute is not mandatory, but there is no post-conviction crisis because either (1) the death row is empty or small enough that volunteer counsel can easily handle all cases; or (2) the state courts follow a consistent policy of appointing counsel to all indigent death-sentenced inmates, even though they are not explicitly required to do so by statute.118 In only two states—Alabama and Georgia—are large death row populations not entitled to, and not routinely assigned, counsel to pursue post-conviction appeals.119 Thus, although not for particularly altruistic reasons, most death penalty states have taken responsibility for appointing lawyers to help their death row prisoners through the state post-conviction process. This state of affairs is a major and welcome change from that which existed as of the late 1980s, when “the vast majority of capital states, including Texas, Georgia, Alabama and Virginia, [did] not formally provide for counsel in capital post-conviction litigation.”120

However, there is no sanction for states that break faith with death row inmates

115. See, e.g., Baker v. Corcoran, 220 F.3d 276, 285-86 (4th Cir. 2000) (finding that Maryland’s capital post-conviction compensation scheme, which imposed a fee cap and limited hourly compensation, could not be deemed “adequate” because it often required appointed attorneys to sustain considerable losses).

116. See, e.g., Mata v. Johnson, 99 F.3d 1261, 1267 (5th Cir. 1996) (denying Texas opt-in status owing to the state’s lack of mandatory standards of competence for appointed counsel), vacated in part on other grounds on reh’g, 105 F.3d 209 (5th Cir. 1997); see also Baker, 220 F.3d at 286-87 (Maryland’s competency standards inadequate to opt-in because they were not mandatory and were, often ignored in practice) Ashmus v. Woodford, 202 F.3d 1160, 1167-69 (9th Cir. 2000) (denying opt-in status to California in part because California’s counsel-competency standards were not mandatory), cert. denied, 531 U.S. 916 (2000); Schlup v. Bowersox, No. 4:92CV443, 1996 WL 1570463 at *10 (E.D. Mo. May 2, 1996) (“Currently Missouri does not have in place such a mechanism for the compensation and appointment of post-conviction counsel and does not have standards of competency for the appointment of such counsel. In absence of such procedures, chapter 154 does not apply to this matter.”).

117. See Appendix A.

118. See id. The states in these categories are Delaware, Nebraska, New Hampshire, New Mexico, South Dakota, and Wyoming.


120. Michael Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 AM. U. L. REV. 513, 516 (1988). The Appendix establishes that (1) the vast majority of death penalty states now have laws
by appointing unqualified lawyers. They do not violate any constitutional guarantee by doing so, and they stand to reap the vast majority of unconditional benefits conferred on them by the AEDPA—including a one-year statute of limitations,\textsuperscript{121} strict bars on successive federal habeas applications and evidentiary hearings,\textsuperscript{122} and deferential review of state court judgments\textsuperscript{123}—whether they opt in or not.\textsuperscript{124} Thus, there is a great risk that states will take their promise of counsel lightly (by appointing inexperienced or incompetent counsel, or by starving appointed counsel of adequate funds), because (1) there is no constitutional barrier to their doing so, (2) they receive significant benefits in federal habeas regardless of whether they do so or not, and (3) the prospect of winning opt-in status from a skeptical federal court (often after an initial failure to do so) would involve a substantial additional outlay of resources and no guarantee of success. Indeed, some of the state post-conviction statutes—such as the ones in Colorado, Montana, North Carolina, Ohio, and Virginia—take the bizarre step of promulgating standards for the competence of appointed post-conviction counsel while \textit{simultaneously} providing that incompetent performance by appointed counsel is not a ground for relief or cause to excuse a state procedural default.\textsuperscript{125}

3. Whose Default is it, Anyway? The Cautionary Example of Texas

The situation in the state of Texas provides an ideal illustration of the perverse incentives of the new capital habeas regime. Texas is significant for two reasons. First, for all practical purposes, the modern American death penalty is Texas' death penalty. With more than 240 executions since 1976, Texas leads all other states by a wide margin.\textsuperscript{126} One county in Texas, Harris County (which includes the city of Houston), has executed sixty-one people since the reintroduction of capital requiring the appointment of post-conviction counsel to death row inmates; and (2) that the majority of these laws were passed since the late 1980s.


\textsuperscript{122} See 28 U.S.C. § 2244(b)(2) & (b)(3) (Supp. V 1999) (requiring certain conditions be met to avoid dismissal of successive habeas corpus applications).

\textsuperscript{123} See 28 U.S.C. § 2254(d)(1) (Supp. V 1999) (state court judgment “shall be presumed to be correct, unless . . . the merits of the factual dispute were not resolved in the State court hearing”).

\textsuperscript{124} See James S. Liebman, The Overproduction of Death, 100 COLUM. L. REV. 2030, 2143 n.268 (observing that the “AEDPA made its most inviting review-truncating reforms available ‘for free’ to all states in all cases [capital and noncapital], thus giving capital punishment states little reason to spend a lot more money to secure relatively little additional truncation of the habeas review process”); Rundlet, supra note 114, at 688 (arguing that the failure of many states to respond to the AEDPA’s incentives, or to respond only with halfhearted or piecemeal reforms, indicated that “the States have concluded that the finality benefits offered in the opt-in provisions, when weighed against the finality benefits unqualifiedly offered in the general reform of habeas corpus, are not compelling compared to the costs”).

\textsuperscript{125} See \textit{infra} Appendix A.

\textsuperscript{126} A Deadly Distinction: By the Numbers, HOUS. CHRON., Feb. 4, 2001, at A1 (reporting that Texas has performed 242 executions, as opposed to a national total of 693).
punishment. As of February, 2001, if Harris County were a state, it would be third in the nation in executions, behind the rest of Texas and Virginia; notably, Virginia has only thirty people on its death row, while 150 Harris County convicts await execution. Most of them will very likely be executed.

The Texas Court of Criminal Appeals, Texas’ highest criminal court and the one that all death penalty direct appeals must pass through, reversed only eight out of the 256 death sentences it reviewed between 1995 and 2000. This is the lowest reversal rate, over that period, of any American death penalty state. Florida’s rate, for instance, was fifty percent, and Illinois’ was thirty percent. The United States Court of Appeals for the Fifth Circuit, which hears capital appeals from Texas, likewise has, in recent years, developed one of the lowest capital-case reversal rates of any federal appellate court.

Aside from sheer volume, another reason to study Texas is that other death penalty states are doing so. A 1999 judicial conference sponsored by the Eleventh Circuit Court of Appeals, which hears capital appeals from Florida, Georgia, and Alabama, featured a panel discussion of how death penalty cases are handled in Texas. Florida adopted amendments to its post-conviction procedures in capital cases modeled on reforms Texas had enacted in 1995. Brad Thomas, criminal justice policy adviser to Florida Governor Jeb Bush, declared he spearheaded the Death Penalty Reform Act, which contained reforms similar to those enacted by the Texas Legislature in 1995, in the “hope that [Florida could] become like Texas.” Although most of the Act was struck down by the Florida Supreme Court on separation-of-powers grounds, that court simultaneously promulgated amendments to its rules governing the timing of appeals in capital cases which were “modeled . . . very closely” on the Act’s framework.

127. Id.
128. Id.
130. See, e.g., Bill Rankin, The Death Penalty: Upcoming Judicial Forum Under Fire as Slanted, ATLANTA J. & CONST., Aug. 10, 1999, at 11A (discussing defense attorneys’ objections to judicial conference in which judges from the Eleventh Circuit Court of Appeals and the high courts of Eleventh Circuit states met to discuss procedure and administration of capital cases; noting that Judge Jones of the Fifth Circuit would lead a panel on the death penalty in Texas).
131. 2000 Fla. Laws ch. 3 (outlining procedures for death penalty cases).
132. TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon Supp. 2002) (establishing procedures for death penalty cases).
133. William Yardley, Bush’s Adviser Key in Push for Quicker Death Row: Appeals, ST. PETERSBURG TIMES, Jan. 6, 2000, at 5B (quoting Thomas as stating: “What I hope is that we become like Texas: Bring in the witnesses, put them on a gurney and let’s rock and roll.”).
134. See Allen v. Butterworth, 756 So.2d 52, 62 (Fla. 2000) (concluding that Florida Constitution gave Florida Supreme Court “exclusive authority to set deadlines for post conviction motions”).
135. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, 772 So.2d 488, 488, 490 (Fla. 2000) (proposing amendments to Florida Rules of Criminal Procedure that “create a dual-track system similar to that enacted by the Legislature.”).
a. Establishing Limits on Petitions and Creating a Right to Counsel: Article 11.071

Texas monitored the AEDPA's legislative progress carefully. Dan Morales, then Texas' Attorney General, testified before the Senate Committee of the Judiciary in favor of the Act.\(^{136}\) Morales told the Committee that his office had drafted legislation, then pending in the Texas legislature, which would permit Texas to opt in by arranging for "the routine and regular appointment of competent counsel to represent indigent, death-sentenced inmates in state collateral review."\(^{137}\) The law Morales mentioned, which modified Texas' existing code of criminal procedure and added a new provision governing capital post-conviction appeals, took effect on September 1, 1995, and the new capital post-conviction scheme, codified at Article 11.071 of the Texas Code of Criminal Procedure, ordered the Texas Court of Criminal Appeals ("CCA") "under rules and standards adopted by the court, [to] appoint competent counsel" to indigent death row inmates for state post-conviction appeals.\(^{138}\) The lawyers, the statute provided, "shall investigate expeditiously . . . the factual and legal grounds for the filing of an application for a writ of habeas corpus."\(^{139}\)

Section 5(a) of the law established strict new bars to successive applications in death penalty cases. An inmate could file a successive application only if he demonstrated either (1) that the "factual or legal basis of the claim was unavailable on the date the applicant filed the previous application";\(^{140}\) (2) that by a "preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt";\(^{141}\) or that (3) "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have [sentenced the defendant to death]."\(^{142}\)

A sponsor of the legislation described the desired effect of the new successor bars:

[W]e tell individuals that, everything that you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot . . . . [W]hat we're attempting to do here is to say, raise everything at one time. You get one bite of the apple. If you have to stick the kitchen sink in there, put it all in there. And, we will go through those claims, one at a time, and make a decision, but


\(^{137}\) Id. at 2.

\(^{138}\) TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(d) (Vernon Supp. 2002) (establishing procedures for death penalty cases).

\(^{139}\) Id. § 3(a).

\(^{140}\) Id. § 5(a)(1).

\(^{141}\) Id. § 5(a)(2).

\(^{142}\) Id. § 5(a)(3).
none of this, one—one—every week you file a new petition which is currently basically what happens.143

The restrictions on piecemeal litigation applied not only to death row inmates—who were guaranteed counsel by the new law—but also to non-capital inmates, who were not.144 Finally, Article 11.071 established a 180-day statute of limitations on filing state habeas applications (subject to one optional ninety-day extension) and warned inmates’ counsel that failure to observe the deadline would “constitute[] waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed.”145

The implementation of Article 11.071 immediately faced problems. Responding to an inquiry from the Texas Legislature, the CCA estimated the cost of providing lawyers for Texas’ sizable death row at $4 million.146 The Legislature appropriated less than half that amount.147 After dividing the reduced appropriation by the number of inmates likely to need representation, the CCA announced a presumptive cap of $7,500 on compensation for counsel appointed under Article 11.071.148 The CCA mailed descriptions of the new scheme to most Texas criminal defense attorneys and invited them to fill out a questionnaire if they were interested in taking a case. No doubt aware that requiring significant capital post-conviction experience would restrict the pool of qualified attorneys to a tiny fraction of the number required to represent Texas’ large death row, the CCA did not announce any minimum qualifications for appointment.

Even with the relaxed qualifications, the CCA’s appeal did not draw an adequate response. For one thing, there were simply too few attorneys who felt comfortable taking on a capital case. After the closing of the Texas Resource Center dispersed a key group of experienced post-conviction attorneys,149 the pool of remaining Texas lawyers who had extensive experience in representing Texas death row inmates in post-conviction was quite small. Those Texas lawyers who had represented death row inmates in post-conviction appeals knew that the task

144. See id. at 471-72 (applying TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) to an appeal of kidnapping and aggravated sexual assault conviction where death sentence was not possible).
145. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(e) (Vernon’s 2002).
147. See id. (noting Judge Baird’s comment that “[t]hey gave us $1.8 million . . . . You can’t appoint lawyers if you can’t pay them”).
148. Mata v. Johnson, 99 F.3d 1261, 1266 (5th Cir. 1996) (noting “strict guidelines limiting compensation [under art. 11.071] to $7,500 and reimbursement of expenses to $2,500”). The CCA later raised the fee cap to $15,000. See Janet Elliott, Habeas System Fails Death Row Appellant, Tex. Law., Mar. 9, 1998, at 1, 26 (describing fee cap). In 1999, the Legislature raised the fee cap to $25,000 in state funding, and advised that payments in excess of that cap “are the obligation of the county [in which the case is being litigated].”
149. See Staff, Advocacy Center for Prisoners on Death Row to Close, Hous. Chron., Sept. 30, 1995, at A33 (observing that the number of lawyers on staff at the Texas Resource Center had dwindled from twenty to six as federal funding dried up, and that the Executive Director of the center was preparing to shut it down completely).
involved hundreds of hours of work, rendering wholly inadequate the maximum fee of $15,000.151

Because the timelines set by federal and state habeas reform were running regardless of whether an inmate was represented, the CCA began simply ordering criminal defense lawyers to take habeas cases.152 In November of 1996, the Court of Criminal Appeals conscripted forty-eight defense lawyers. One report noted that some of them “hadn’t handled a capital case in 15 years” and others “had never been connected to a capital murder case.”153 The CCA also often relied on outdated information—one of the forty-eight conscripts was, at the time he was appointed, working as a prosecutor with the National Church Arson Task Force.154

At first, individual CCA judges exercised the only quality control over the appointments.155 Appointed lawyers were not required to have any appellate experience, but were required to be board-certified in criminal law, according to CCA personnel.156 Shortly after the mass conscription, one experienced Texas post-conviction attorney reported receiving dozens of calls from inexperienced 11.071 appointees who complained that they were “in over their heads.”157 In the words of one observer, Texas lawmakers and judges “by ignorance, delay, and arrogance, created a textbook case on how not to deal with habeas reforms.”158

b. Turning a Blind Eye to Incompetent Representation

Article 11.071 establishes a straightforward review scheme. An inmate’s attorn
ney first files the post-conviction writ in the same district court in which the client was convicted.\textsuperscript{159} The judge decides whether a hearing is necessary to resolve the claims of error.\textsuperscript{160} After a hearing, if one is ordered, the district judge solicits "proposed findings of fact and conclusions of law" from the parties.\textsuperscript{161} After the judge signs a set of proposed findings—or, more rarely, creates his own—\textsuperscript{162} the case file is packed up and transferred to the CCA.\textsuperscript{163} The district judge can only recommend action; the CCA decides whether to grant a defendant a new trial or deny him relief.\textsuperscript{164}

Article 11.071 litigation is conducted mostly below the radar, in proceedings that are held in disparate counties and which rarely generate published opinions. Therefore, the first real opportunity to evaluate the performance of appointed counsel occurs when the case files reach the CCA, at which point they are available for inspection.

Before considering the performance of the appointed lawyers, it may be helpful to establish a benchmark of effective death penalty representation. Professor James Liebman, author of the leading treatise on federal habeas corpus proceedings, likens state post-conviction representation to a civil trial:

\begin{quote}
\textit{When necessary to assure the full and fair adjudication of the client's federal claims, post-conviction counsel should request that the state post-conviction case be conducted, and should be prepared to conduct it, as a civil trial proceeding, initiated by her on behalf of the client, complete with frequent and productive interaction with the client; comprehensive prefiling and pretrial documentary, field, and legal investigation to identify and prepare to litigate the appropriate causes of action; careful pleadings; motions practice; evidentiary hearings; briefing; and any other procedures that counsel might use in civil litigation on a plaintiff's behalf.}\textsuperscript{165}
\end{quote}

Thorough preparatory investigation is essential. One former capital post-conviction defender describes the task facing the death row attorney:

\begin{quote}
Effective post-conviction litigation requires a complete reinvestigation of the case, with a focus on material not in the trial transcript. What evidence was not presented and why? What evidence was not presented and why? The trial
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{159} See TEX. CODE CRIM. PROC. art. 11.071 § 4(a) (Vernon's 2002).
\item \textsuperscript{160} See id. § 8(a).
\item \textsuperscript{161} See id. § 8(b).
\item \textsuperscript{162} See supra note 150 (reporting results of study of Texas post-conviction appeals which demonstrated that state court judges signed prosecutor's proposed findings of fact and conclusions of law in 83.7 percent of all Article 11.071 appeals).
\item \textsuperscript{163} See TEX. CODE CRIM. PROC. art. 11.071 § 8(d) (Vernon's 2002).
\item \textsuperscript{164} See id. § 11.
\item \textsuperscript{165} JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRAC. & PROC. § 7.1a (3d. ed. 1998) (footnotes omitted).
\end{itemize}
transcript provides clues, but those clues mark only the beginning of the post-conviction litigator’s task.

** **

The person litigating the post-conviction case must review the trial court docket sheets, . . . [and] physical evidence, exhibits, and notes of the court clerk about proceedings not designated as part of the formal record on direct appeal. Witnesses must be located and interviewed, including co-defendants and prior counsel. Records of proceedings relevant to co-defendants must be obtained and reviewed. Media coverage must be gathered and reviewed.

** **

Because capital post-conviction litigation often turns on trial counsel’s failure to investigate mitigating evidence, the post-conviction investigation requires not only an informed evaluation of trial counsel’s performance but also a complete background investigation of the client’s life, literally from embryo to death row.166

As these descriptions suggest, properly-litigated state habeas proceedings not only involve hundreds of hours of work167 but also invariably generates long and complex pleadings and supporting documentation.

As the habeas writs completed by the 11.071 lawyers reached the CCA, it became apparent that many appointed 11.071 counsel had little idea what was expected of them. To draw attention to the problem of poor performance by appointed counsel, two judges on the Court of Criminal Appeals began publishing dissents to highlight particularly shoddy work. The following opinion is typical:

Applicant is represented by counsel appointed by this Court. The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this “application” appears to be a motion for discovery.168

In another case, Ex Parte Martinez,169 the dissenter observed that appointed counsel filed a six page long habeas petition which “never quoted” the trial record and cited only three cases,170 had billed the court for no travel or investigation expenses, and had spent fewer than fifty hours on the case.171

The Article 11.071 attorney appointed to represent inmate Ricky Kerr filed a three-page habeas corpus application which contained one legal argument that did

167. See supra note 150 (reporting results of study of post-conviction attorneys).
170. Id.
171. Id. at n.2.
not even challenge Kerr’s trial or death sentence. Kerr’s appeal was dismissed in short order by all Texas courts, and his execution was scheduled. As the date approached, Kerr’s lawyer began experiencing severe health problems and ceased work on the case. Another lawyer responded to Kerr’s entreaties and, days before Kerr’s execution, filed an emergency motion with the CCA seeking a stay of execution and the appointment of competent counsel. Kerr’s new lawyer attached an affidavit in which Kerr’s former counsel confessed that his “decision concerning how to protect Mr. Kerr’s rights under 11.071 may have been a gross error in judgment” and that “[i]t may be that I was not competent to represent Mr. Kerr in a death penalty cause.” The CCA denied relief, prompting an anguished outcry from a dissenting judge: “If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing it to go forward without applicant being permitted to raise claims by Texas state habeas corpus application. By this dissent, I wash my hands of such repugnance.” A federal judge ordered a stay of Kerr’s execution shortly before it was to happen.

Attorneys appointed to other death row clients committed Coleman-style blunders by not filing their client’s appeals within Article 11.071’s mandatory filing deadlines. Following the language of Article 11.071, the CCA dismissed their appeals entirely. In dissent, CCA Judge Charles Baird chided the majority for “piously contending that [Article 11.071’s deadlines] must be followed” while “wholly ignor[ing] that WE failed in our [mandatory statutory] duty to appoint competent counsel.” Paradoxically, these inmates were lucky. After the press criticized the CCA for denying relief to inmates whose “competent” court-appointed lawyers had missed clear deadlines, the Texas Legislature amended Article 11.071 to permit the affected inmates to return to the state court system to

174. Id.
175. Kerr, 977 S.W.2d at 585.
176. See Ex Parte Smith, 977 S.W.2d 610, 610 (Tex. Crim. App. 1998) (noting previous dismissal of application for untimely filing); id. at 612 (Baird, J., dissenting) (writ containing “twenty claims for relief which allege serious constitutional violations” dismissed because counsel filed application nine days late); Ex Parte Colella, 977 S.W.2d 621, 621 (Tex. Crim. App. 1998) (entire writ dismissed due to untimeliness).
177. See, e.g., Smith, 977 S.W.2d at 611 (observing that statutory language clearly required dismissal of writ and that excusing late filing would amount to doing what was “fair’ rather than what was lawful”); Colella, 977 S.W.2d at 621 (dismissing writ).
178. Smith, 977 S.W.2d at 614 (Baird, J., dissenting) (arguing that the majority decision violates the intent of Article 11.071).
exhaust their appeals. Thus, a death row inmate whose counsel filed his initial appeal late may return to state court to exhaust his claims, while an inmate whose lawyer filed a superficial appeal on time proceeds to federal court with only those post-conviction claims presented in the appeal. As the tone of the dissenting opinions suggests, a majority of the CCA had denied relief in each of these cases without inquiring whether the habeas applicant had received the “competent” representation promised him by Article 11.071.

After denying relief in these cases, the CCA decided in October, 2000, to use the case of Anthony Charles Graves to consider what the “competent” representation mandated by Article 11.071 actually requires. After granting review on this issue, the CCA took the unusual step of staying impending executions on short notice in order to consider claims of incompetent performance by appointed state habeas lawyers. In one such case, the CCA-appointed state habeas attorney who handled the case of Napoleon Beazley admitted, in an affidavit filed on the brink of Beazley’s execution and after Beazley’s state and federal habeas appeals had been denied, that “his legal investigation was inadequate and that he did not identify, research or brief any issues pertinent to Beazley’s status as a 17-year-old juvenile at the time of the crime” and failed “to interview two co-defendants who testified against Beazley, even though that was highest on his list of investigative tasks.” In 1996, the CCA had appointed this lawyer to five death penalty habeas cases, including Beazley’s, which were all due 180 days from the time he was appointed. According to Beazley’s new lawyer, experienced criminal defense attorneys termed this workload “incomprehensible.”

On January 2, 2002, the CCA finally decided Ex Parte Graves and held that Article 11.071’s guarantee of “competent” counsel only afforded inmates a right to counsel with proper initial qualifications, not “a constitutional or statutory right to effective assistance of that counsel in [his] particular case[.]” Three judges dissented from this decision. One of them commented:

I have grave concerns about dismissing claims like the applicant’s. By its own hand, this Court appointed the applicant’s first habeas counsel, an attorney who

182. See Janet Elliott, Beazley Avoids Execution Chamber, Hous. Chron., Aug. 16, 2001, at A1 (noting that CCA had granted stay to Napoleon Beazley four hours before his execution when presented with a successive state habeas appeal raising the issue of Beazley’s youth and the competence of his original habeas corpus attorney).
184. Id.
185. Id.
by any reasonable assessment was not prepared to handle a case of this type. Now the same Court washes its hands of applicants who wish to have heard the merits of claims ignored or undiscovered by the inexperienced habeas counsel that we appointed.187

After Ex Parte Graves, the fate of Texas death row inmates who received incompetent assistance of state post-conviction counsel appears grim—only the Supreme Court can now remedy the situation, and it does not appear eager to do so.188

Although these cases are the most glaring examples, there is reason to suspect that many other Texas post-conviction appeals have serious problems. A study of 11.071 counsel performance in 103 cases recently performed by a Texas-based group of death penalty specialists found many warning signs of poor representation.189 Although death penalty appeals involve complex legal and factual briefing—one federal appeals court judge called it “the most complex area of the law I deal with”—many of the 11.071 attorneys filed extremely short habeas petitions. Eight of the 103 petitions were fewer than ten pages long, eighteen were under fifteen pages long, and thirty-six were under thirty pages long.190 In forty-four of the cases, the post-conviction petition contained only record-based claims,191 even though Article 11.071 explicitly requires counsel to investigate the “factual basis” for new claims.192

Other lawyers simply repeated claims which had already been rejected by the courts during direct appeal—some simply transcribed the direct appeal almost verbatim.193 Because these recycled direct appeal claims had already been heard and denied by the same courts that would hear the state post-conviction petition, these appeals did effectively nothing to advance the inmates’ interests. The situation can be summed up by former CCA Judge Charles Baird, who shared responsibility for appointing counsel under 11.071 during his tenure on the CCA: “We appointed some absolutely terrible lawyers. I mean lawyers that nobody

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187. Id. at *10 (Price, J., dissenting) (footnote omitted).
188. See infra Part IV.1 (arguing that current Court is not likely to announce a right to effective assistance of post-conviction counsel in capital cases).
191. See TEXAS DEFENDER SERVICE, supra note 189. The Author helped to design this portion of the study and reviewed many of the primary documents on which it was based.
192. Id. at 106-07.
193. See supra note 139 and accompanying text.
194. See TEXAS DEFENDER SERVICE, supra note 189, at 107-08, 110 (describing petitions in which most or all claims had been transcribed from direct appeal brief); id. at 109 (reprinting pages from near-identical direct appeal and state post-conviction petition).
should have, much less somebody on death row on his last appeal."¹⁹⁵

Nor is the problem limited to the state of Texas. In 1997, after disputes with the management of Florida’s death penalty post-conviction appeals agency, the Florida Legislature overhauled the office. The office’s prior staff of experienced death penalty lawyers was fired or resigned, and the Florida Legislature split the office into three independent components. Florida’s Governor appointed an ex-prosecutor with no death penalty experience to run one of the new agencies. Charges of nepotism and unethical conduct have dogged his office.¹⁹⁶ While deciding one of the appeals filed by this office the Florida Supreme Court excoriated the inmate’s state-appointed lawyers for the poor quality of their briefing:

We are also constrained to comment on the representation afforded [defendant] in these proceedings. [Defendant]’s brief on appeal raised nine issues, but was only 24 pages in length. While we are cognizant that quantity does not reflect quality, the majority of the issues raised were conclusory in nature and made it very difficult and burdensome for this Court to conduct a meaningful review . . . . In addition to the poor quality of the initial brief, this Court has received several complaints concerning counsel’s representation, including complaints by [defendant] himself . . . . Most of [defendant]’s issues on appeal rely on the substance of the motions filed at the trial level or are simply conclusory in nature . . . . [W]e urge the trial court, upon remand, to be certain that Peede receives effective representation.¹⁹⁷

4. Confusion and Dismay in the Federal Courts

When these mishandled appeals reach the federal court level, they often provoke acute conflict. Federal law provides counsel to all state capital inmates who file federal habeas petitions,¹⁹⁸ and provides for investigation and expert assistance when “reasonably necessary."¹⁹⁹ If state post-conviction counsel has missed some important claim or fact, this will often become clear early in federal post-conviction proceedings. At this point, the Assistant Attorney General representing the state in federal court must decide whether to enforce procedural defaults caused by state post-conviction counsel’s omission. Occasionally, the state will come to some informal arrangement with the inmate’s counsel permitting the

¹⁹⁷. Peede v. State, 748 So.2d 253, 256 n.5 (Fla. 1999).
¹⁹⁹. See id. § 848(q)(10).
inmate to exhaust his claims.\textsuperscript{200} Usually, the state seeks to enforce all defaults.\textsuperscript{201} When this happens, the federal judge faces a dilemma. The judge is obviously aware that an inmate has no right to effective representation in the post-conviction context, but may simultaneously be dismayed to see states—especially ones who have promised inmates competent counsel—knowingly exploiting Coleman in order to deny inmates any forum for new claims federal habeas counsel may have discovered. The judge may therefore begin searching for ways to avoid ratifying the state’s bad faith.

The first stop is Coleman itself. The majority’s language did seem to leave a small loophole which might permit a sympathetic federal court to recognize a limited, contingent right to effective representation in post-conviction appeals. Coleman had argued that because Virginia allowed ineffective assistance of counsel claims to be litigated only in the post-conviction setting, the Court’s prior holding that an inmate had the right to effective assistance of counsel during his “first appeal as of right”\textsuperscript{202} in state court entitled him to effective assistance of post-conviction counsel as he litigated trial-ineffectiveness claims.\textsuperscript{203} The Court avoided the issue on the basis that Coleman had already received at least one opportunity to present his claims and obtain a judgment on their merits. Coleman, the Court reasoned:

\begin{quote}
has had his ‘one and only appeal,’ if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman’s claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from that determination. Our case law will not support it.\textsuperscript{204}
\end{quote}

A federal court faced with an obvious case of post-conviction incompetence in a capital case could draw on Coleman's language to recognize some sort of right to the effective assistance of counsel at the initial, trial-level, factfinding phase of a state post-conviction proceeding.\textsuperscript{205} This right would, of course, be limited only to those claims that can be raised only in state post-conviction proceedings.

\textsuperscript{200} See infra text accompanying note 238-39.
\textsuperscript{201} See Trest v. Cain, 522 U.S. 87, 89 (1997) (“[P]rocedural default is normally a ‘defense’ that the State is ‘obligated to raise’ and ‘preserv[e]’ if it is not to ‘lose the right to assert the defense thereafter.’” (citations omitted)); Brian M. Hoffstadt, How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus, 49 DUKE L.J. 947, 960-61 (2000) (reporting that majority of claims in habeas petitions filed in 1992 and 1995 were disposed of on procedural grounds).
\textsuperscript{203} Id. at 755-56 (paraphrasing Coleman’s argument).
\textsuperscript{204} Id. at 756 (first emphasis added).
\textsuperscript{205} Of course, such a holding would be in some tension with Keeney v. Tamayo-Reyes, as Tamayo-Reyes’ lawyer had performed poorly at precisely this phase of Tamayo-Reyes’ state post-conviction proceeding. See supra Part II.C.1. However, the discussion of a potential right to counsel in Tamayo-Reyes is probably dicta, although ominous dicta indeed from the post-conviction petitioner’s point of view.
To date no federal court has recognized such a right. Most courts have simply cited Coleman’s broad conclusion that there simply is no Sixth Amendment right to counsel in post-conviction proceedings, and dismissed the apparent exception. Seeking a policy rationale for this course of action, some courts have pointed to the potential for an endless daisy chain of appeals:

The actual impact of [recognizing the Coleman loophole] would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state post-conviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state post-conviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel’s performance in the first state post-conviction proceeding.207

Other courts have bridled at the prospect of shutting indigent inmates—especially those on death row—out of any appellate forum solely because of their lawyers’ mistakes. Justice O’Connor, in her Tamayo-Reyes dissent, was the first to recognize this unsavory effect of the Court’s rulings.208 One panel of the United States Court of Appeals for the Fourth Circuit bucked the trend and recognized the Coleman exception, citing the unfairness of holding that “the defendant is not entitled in any forum to an attorney’s assistance in presenting a fundamental constitutional claim.”209 The panel’s opinion, however, was quickly reheard and vacated by the en banc court.210

Other courts find that the suffocating logic of the exhaustion/procedural default doctrine leaves them with nowhere to turn, and try to encourage an informal settlement of the case in order to avoid sending a death row inmate to execution with no meaningful post-conviction review. In the case of Ricky Kerr, described above,211 the federal judge who stayed Kerr’s execution held a hearing on the circumstances of his post-conviction proceedings and issued a stinging opinion in which he faulted Texas for refusing to adopt meaningful competency standards and called the state courts’ failure to offer Kerr a remedy “cynical and reprehensible.”212 Strangely, though, the court then dismissed Kerr’s petition and sent the case back to those very same courts, even though Kerr had made no attempt to

206. See, e.g., Mackall v. Angelone, 131 F.3d 442, 448-49 (4th Cir. 1997) (en banc); Hill v. Jones, 81 F.3d 1015, 1025-26 (11th Cir. 1996); Bonin v. Vasquez, 999 F.2d 425, 430 (9th Cir. 1993) (rejecting a right to effective counsel in post-conviction proceedings).
207. Bonin, 999 F.2d at 429.
208. See supra Part II.C.1.
211. See supra Part II.C.3.b.
show that he might be entitled to file a successive habeas application under Article 11.071. The federal district judge warned the Texas courts that he would “carefully scrutinize the course selected by the Texas courts when they are faced with petitioner’s first real state habeas corpus application.”

Anticipating such a reaction, the Assistant Attorney General responsible for handling the case for the State of Texas agreed to let Kerr file an additional state post-conviction appeal, reasoning: “I don’t see the point in taking the position that he didn’t have a right to anything more than he received. I don’t think that’s a point we’re going to win on the federal level.”

The Assistant Attorney General’s decision in the Kerr case was an act of largesse. Had she wished to, she could likely have appealed successfully the district court’s dismissal order to the United States Court of Appeals for the Fifth Circuit and placed Kerr back on the track to execution. The Fifth Circuit rigidly enforces pre-emptive procedural defaults founded on Article 11.071’s successor bar, even when those defaults stem from superficial state post-conviction representation by 11.071 counsel.

In an unpublished opinion, that court denied relief to death row inmate Robert Earl Carter, whose state post-conviction lawyer had filed a three-page state habeas corpus petition. The Court enforced defaults against the new information Carter’s federal attorneys had discovered—even though Carter’s Article 11.071 counsel had not bothered even to sign or date his three-page petition, admitted in the petition itself that the record-based arguments he presented had previously been “rejected” by the courts he was presenting them to and did not even request an evidentiary hearing.

When the Martinez case described above reached the federal district court level, the district court judge convened a hearing to determine whether Martinez’s federal habeas counsel should receive expert and investigative assistance as they prepared his federal petition. An Assistant Attorney General instructed the federal judge that because he had no authority to entertain any claims or facts which had not already been discovered in state post-conviction, he should not pay Martinez’s counsel to discover defaulted facts and claims. The district judge, in response to

213. Id. at 25.
215. See, e.g., Jones v. Johnson, 171 F.3d 270, 276-77 (5th Cir. 1999) (holding that inmate had procedurally defaulted ineffective assistance of counsel claim by failing to include claim in his first state post-conviction application, and that attorney “error committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause” to excuse the default).
217. See id. at 3-5.
the state's argument that Coleman had definitively rejected any right to competent state post-conviction counsel, expressed his frustration at Coleman's consequences in the contemporary habeas environment:

Well, maybe [the Supreme Court will] want to look at [the issue of competent state habeas representation] again after the AEDPA has been passed. Maybe they'll try to say, well, maybe now that the burden's a little bit shifted and now that the state courts are more in the play, now that they control more of what happens, then they bear more of the responsibility to provide competent counsel.220

Later, the judge mused "I don't know what's holding up the State of Texas giving competent counsel to persons who have been sentenced to die."221 Nevertheless, he later denied all relief. Although he called the result "harsh," he concluded that "binding precedent" left him no choice but to ignore the unexhausted claims advanced by Martinez in his federal proceedings, and denied relief.222 The United States Court of Appeals for the Fifth Circuit, citing many previous decisions firmly rejecting any notion of a right to competent counsel in state post-conviction, upheld the district court's grant of summary judgment to the state and ignored the unexhausted claims Martinez's federal habeas lawyers had advanced.223

Another example of a judge forced to extremes by Coleman comes from Georgia.224 Exzavious Gibson, a mentally impaired225 Georgia death row inmate, earned brief national prominence when he represented himself in his own state post-conviction evidentiary hearing.226 He did not do so voluntarily. Georgia does not provide post-conviction counsel to death row inmates, and no volunteer counsel had agreed to take his case.227

The federal court surely saw the writing on the wall. The United States Court of Appeals for the Eleventh Circuit had held that Georgia's successor bar dooms any claims not exhausted in an inmate's initial state habeas corpus application.228 Georgia's successor bar does not permit inmates to file successive state post-conviction applications unless "the Constitution of the United States or this

220. Id. at 18.
221. Id. at 19.
222. See Order Granting Motion for Summary Judgment, Martinez v. Johnson, No. 98-CV-300, at 5 (S. D. Tex. August 24, 1999). Martinez had argued that post-conviction counsel had erred by failing to investigate trial counsel's performance, which Martinez's counsel argued was constitutionally ineffective.
223. See Martinez v. Johnson, 255 F.3d 229, 241 (5th Cir. 2001).
225. Id. at 195-96 (noting that Gibson was in the "'borderline range of intelligence' with an IQ between 76 and 82").
227. See id.
228. See, e.g., Mincey v. Head, 206 F.3d 1106, 1142 (11th Cir. 2000) (holding that inmate had procedurally defaulted Brady claim by not presenting it to the Georgia courts).
state . . . requires” them to be permitted, or unless the inmate demonstrates that his grounds for relief “could not reasonably have been raised” in his original application.\textsuperscript{229} Under Coleman, the Constitution of the United States obviously did not provide cause to permit Gibson to file a successive application merely because he had been forced to represent himself during the initial proceeding.

As for the state constitution, the Georgia Supreme Court had ruled, in Gibson’s very case, that Georgia law recognizes no right to the assistance of counsel in capital post-conviction appeals.\textsuperscript{230} Protesting that ruling, three dissenting Georgia Supreme Court judges lamented that there could be no “glimmer of hope that fundamental fairness will prevail”\textsuperscript{231} when a death row inmate is forced to proceed without counsel and called the majority’s decision “an outcome that no just government should countenance.”\textsuperscript{232}

The federal court shared the Georgia judges’ concerns. During a hearing on Gibson’s appeal, he called the 1996 hearing a “sparring match,” and asserted that “[t]here is not a lawyer in this courtroom who, in the exercise of intellectual honesty, could say that this case is one which has no troubled background, . . . [t]his case has got some problems.”\textsuperscript{233} The judge then actually left the bench to telephone a state court judge and try to persuade him to permit Gibson to file an additional appeal in state court.\textsuperscript{234} Fortunately for Gibson, the judge apparently succeeded.\textsuperscript{235}

5. Conclusion

Some people are so attached to their homes that they refuse to sell them to a developer at any price, even though their neighbors have all sold out, and the developer intends to build a factory on the surrounding land come what may. The doctrines of exhaustion and procedural default, as they work in the capital context, are like that home. If one looks at them close-up, in isolation, and with the “right” assumptions (that is, assumptions that make the doctrine coherent, regardless of whether they obtain in the world) they make a certain amount of sense. Viewed as autonomous agents, capable of and responsible for marshaling their claims, inmates who poorly investigate their cases or omit claims during state post-conviction proceedings should bear the burden of their defaults.

Even if one deems the current state of habeas doctrine as “calamitous,” in the words of Professor Larry Yackle,\textsuperscript{236} it is hardly unanticipated. The Supreme Court,

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\item \textsuperscript{229} GA. CODE ANN. § 9-14-51 (2001).
\item \textsuperscript{230} Gibson, 513 S.E.2d at 192.
\item \textsuperscript{231} Id. at 199 (Fletcher, J., dissenting).
\item \textsuperscript{232} Id. at 199 (Sears, J., dissenting).
\item \textsuperscript{233} Bill Rankin, Judge Calls for Review of Gibson Death Case, ATLANTA J. & CONST., Sept. 20, 2000, at 1B.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Yackle, supra note 11, at 1764 (2000).
\end{itemize}
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adopting the autonomy assumption and looking on with approval as state courts have limited post-conviction remedies, has designed federal default doctrine to work in lockstep with state forfeiture rules. To be sure, an inmate or his lawyer may sometimes simply miss a claim and thereby default it inadvertently. It may be difficult for an outside observer to determine whether the forfeiture was genuinely inadvertent, or whether the claim was purposely withheld to pursue piecemeal, abusive litigation. In these situations, the law now simply foists the burden of the default on the inmate no matter what and reasons that the state’s considerable interest in finality outweighs any potential wrong done to the inmate. He chose which claims to pursue (or chose which lawyer to employ to pursue them) and must live with the consequences of his choices.

When one widens the focus and takes in more of the context, however, the illusion begins to crumble. The assumption that a death row inmate makes a free and enlightened choice of which claims to advance in post-conviction proceedings has always been a legal fiction. Nor has the assumption that a represented inmate “freely chooses” his lawyer often been true. Indeed, the Coleman Court, ironically, bound Coleman to his lawyer’s mistakes by citing a line of agency cases that explicitly stressed the fact that the clients had freely-chosen their attorneys—even though Coleman himself had not chosen his own attorney.

In the past, though, the contradictions between the autonomy assumption and


238. See generally Coleman v. Thompson, 501 U.S. 722 (1991) (enforcing state procedural default despite evidence that default was the product of inadvertent attorney error).

239. See generally Mello, supra note 166, at 145-58 (arguing that complexity of death penalty representation, coupled with educational and psychological problems common among death row prisoners, makes it effectively impossible for death row inmates to litigate post-conviction claims effectively); Clive A. Stafford-Smith & Rémy Voisin Starns, Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in Post-conviction Proceedings, 45 LOY. L. REV. 55 (1999) (noting results of study of Mississippi death row inmates' psychiatric and educational histories which reached conclusion that they were hopelessly ill-prepared to successfully litigate habeas corpus actions).

240. See Coleman, 501 U.S. at 753 (stating that habeas petitioners must “bear the risk of attorney error” because the attorney acts as the petitioner’s agent). Coleman cited two cases in which the Court had imposed their attorneys’ mistakes on litigants. In the first, Link v. Wabash Railroad Co., 370 U.S. 626 (1962), the Court stressed that the litigant “voluntarily chose” his attorney and that thus that he could not now hope to avoid the “consequences of the acts or omissions of this freely selected agent.” Id. at 633-34. The second case, Irwin v. Dept. of Veterans’ Affairs, 498 U.S. 89 (1990), involved an employee whose retained attorney had missed a deadline in a wrongful-termination suit against the Department of Veterans’ Affairs. Id. at 92. The Irwin Court, citing Link, stressed the importance of binding litigants by the actions of their counsel in a system of “representative litigation.” Id.

241. After his conviction was affirmed on direct appeal by the Virginia Supreme Court, Coleman wrote the Virginia branch of the American Civil Liberties Union and asked them to find him an attorney because Virginia did not provide counsel to death row inmates in post-conviction proceedings in 1983. JOHN C. TUCKER, MAY GOD HAVE MERCY 98 (1997). When his letter went unanswered, Coleman actually dropped his appeals “Without a lawyer there was little hope of success, and it seemed better to die than to continue enduring the conditions on death row.” Id. Eventually, a local activist named Marie Deans persuaded a large Washington, D.C. law firm, Arnold & Porter, to represent Coleman. Id. at 99.
conditions in the world were tolerable. Although the process of securing counsel was often delay-ridden and chaotic,242 death penalty resource centers were usually able to arrange for decent representation at some point in the appellate process. State courts, even as they chivvied cases along by setting execution dates, usually still grudgingly agreed that no inmate should be executed until he had some sort of meaningful opportunity to file for post-conviction relief. Even if the inmate filed a skeletal petition to secure a last-minute stay of execution, inmates in states which had lax or nonexistent successor bars could make up for the deficiencies in a first state post-conviction petition by filing a more thorough successive petition with better counsel.243

Now, however, the conflict between the assumptions and real-world conditions has become grotesque. The elimination of the resource centers has dispersed the pool of talented post-conviction attorneys that formerly assured high-quality representation in capital cases, and weakened the recruitment scheme that routinely brought large private firms into the picture. In most death penalty states, the state itself has stepped into the picture and displaced whatever previous system existed for providing post-conviction representation with one of its own—often inferior—design. Simultaneously, these states have created or tightened limitations periods and successor bars, increasing the need for the efficient, talented representation they promise to provide. However, even though the state’s fingerprints are now all over the process by which a death row inmate must prosecute his claims, the exhaustion and procedural default doctrines continue to blame the inmate for defaults.

To complete my analogy, focus has shifted completely and the house is an incongruous speck surrounded by a massive factory. The disparity between the doctrine and the world creates bizarre contradictions in the logic of federalism. In some other areas of habeas corpus law, the state is still expected to do its part to offer a meaningful forum to death row inmates. For example, habeas doctrine “punishes” states (by refusing to recognize state procedural bars) which do not afford inmates an “adequate” forum for their claims, or who deny inmates access to information they reasonably need to press their cases.244 Procedural default doctrine, however, grants the state ultimate practical authority to determine the


243. These characterizations of the habeas corpus process are derived from the Author’s experience as a capital post-conviction litigator.

244. See, e.g., Williams v. Taylor, 529 U.S. 420, 440-42 (2000) (holding that an inmate whose state habeas lawyer had tried diligently to investigate his case, but who had been frustrated by state officials’ failure to disclose information relevant to his claims, would be permitted to explore the claims further at a federal evidentiary hearing despite failure to exhaust claims in state court proceedings); Strickler v. Greene, 527 U.S. 263, 277-78 (1999) (affording petitioner federal merits review of claim not pressed in state court proceedings based on evidence that state officials had falsely represented to inmates’ previous attorneys that they had disclosed all information relevant to potential defenses, when in fact they had concealed evidence that a key prosecution witness’ story had suspiciously evolved over the course of repeated interviews with police).
limits of federal review by either denying counsel to inmates or appointing inexperienced or incompetent lawyers who can be expected to mishandle these complex cases. By this expedient, the state can accomplish indirectly what it could never accomplish directly.

This twist in the doctrine puts sympathetic judges in a bind that forces them to reach outside the law. One judge reluctantly sends a death row inmate back to the same state court system that had treated him “cynical[ly] and reprehensible[y]” the first time through, hoping to achieve with a stern lecture what he cannot achieve by applying doctrine. Another judge concludes that his hands are tied, and after excoriating the state, reluctantly accedes to its wishes. In Georgia, a federal judge resorts to back-room arm-twisting to try to obtain a forum for an inmate who was denied counsel in state court. Cover and Aleinikoff predicted that if the waiver doctrine were allowed to metastasize, it might lead to a “quintessentially linear criminal process, devoid of redundancy, virtually costless, and without meaning”—a process filled with “unforgiving trap[s] for the defendant.” At least in some states, this prediction is coming true. In place of Cover and Aleinikoff’s vision of an orderly dialectic between relative equals, we have the strange prospect of powerless federal judges cajoling, threatening, and pleading with state court judges to allow death row inmates an appellate forum. We have diabolical federalism.

III. FOUNDATIONS FOR REFORM: ANALYZING CURRENT SCHEMES AND ESTABLISHING SOME FIRST PRINCIPLES

A. Other Reform Proposals

The Court’s silence has not prevented commentators from weighing in with proposals to mend the flaws in the existing habeas regime. Capital habeas is like a patient with a fascinating, grave, and mysterious illness. Extraordinarily capable specialists from all over the world have flocked to its bedside and have proposed every remedy imaginable. Many of these proposals are quite thoughtful and have much to recommend them, and should be considered before proposing another (one might say, yet another) one. This part develops a critique of the proposed schemes with a view to demonstrating the fundamental objects which should inform any proposed review scheme: political workability and careful attention to the practical function of habeas review in capital cases in the modern era.

245. See supra notes 212-15 and accompanying text.
246. See supra notes 217-22 and accompanying text.
247. See supra notes 233-35 and accompanying text.
248. Cover & Aleinikoff, supra note 1, at 1100.
I. "Innocence-Privileging" Schemes

Since Judge Henry T. Friendly’s groundbreaking article Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, there has been a strain of habeas-reform reasoning (with friends of the Court), which proposes either (1) limiting habeas relief to those inmates who can prove that they are innocent, or (2) providing a separate and more lenient form of habeas review to such inmates, while relegating claims which do not establish an inmate’s innocence to a lesser status.

Perhaps the best recent expression of the innocence-privileging idea is Professors Hoffman and Stuntz’s 1993 article Habeas After the Revolution. Hoffman and Stuntz propose a two-track scheme of federal habeas review—a common trope, and one that I will employ as well, although in a very different way. Under their formulation, an inmate who demonstrates a “reasonable probability of [his factual] innocence” would be entitled to generous review of his habeas claims in federal court. The federal court would overlook any procedural defaults, ignore retroactivity concerns, entertain all potential claims, and grant the inmate de novo review. Inmates who cannot make the innocence showing would receive review which looks much like what they currently get under the AEDPA: defaults would be enforced, and state court judgments would be reviewed only for “reasonableness.”

Hoffman and Stuntz recognize that death penalty cases present special issues. They would apply their scheme to capital cases, with one modification—the law would recognize a special category of “innocence” for the death penalty (not defined by Hoffman and Stuntz) which would entitle death row inmates to de novo review of their Eighth Amendment claims. Professor Larry Yackle has criticized this proposal for its stringent definition of innocence which, he argues, will relegate the overwhelming majority of inmates to the second track of review, which he terms “one of the most restrictive models of federal habeas that has previously appeared either in the law or in the law reviews.”

Hoffman and Stuntz are certainly keenly sensitive to the injustice of incarcerating an innocent inmate—they call it a “horrible injustice that cries out for

250. 1993 SUP. CT. REV. 65.
251. Id. at 94.
252. See id. at 113-14.
253. See id. at 116.
254. See id. at 95.
255. See id. at 96.
256. See id. at 116-17.
257. See id. at 121-22.
258. Yackle, supra note 11, at 1763.
correction"—but their worthy goal of extending special solicitude to innocence-based habeas claims is hampered by insufficient sensitivity to the practical questions of resources and representation that now define the context of federal habeas review, especially in capital cases. First, virtually all death row prisoners are indigent, many of them have mental deficiencies, and they are all locked in maximum-security prisons. They are simply in no position to litigate ordinary habeas claims effectively, much less shoulder the vastly more demanding task of proving their probable innocence.

Second, judicial opinions that overturn the convictions of probably-innocent inmates rarely, if ever, describe how the new evidence that casts doubt on the defendant's guilt was found. There is generally no reason to dwell on this point because the topic is usually legally irrelevant. However, an examination of the circumstances of recent exonerations of death-sentenced inmates confirm resoundingly that "innocence" does not just happen. Rather, a finding of "innocence" is the culmination of an extremely labor-intensive, expensive, painstaking process of reinvestigation.

For example, after a trial that resulted in a hung jury on guilt and a mistrial, Clarence Brandley was convicted of capital murder and sentenced to death in Montgomery County, Texas in 1981. Fortunately for Brandley, a high-profile criminal defense attorney represented him in state post-conviction proceedings and hired a skilled investigator to reevaluate the case. Working without any compensation, the defense team spent months interviewing witnesses to develop leads to an alternate suspect, and the investigator flew to South Carolina repeatedly to cajole the alternate suspect to return to Texas and take a polygraph test and to testify in a post-conviction hearing. The defense team, aided by a nonprofit organization called Centurion Ministries that specializes in probing...
convicts’ claims of innocence, set about to patiently reinvestigate and disassemble the case against Brandley. Centurion Ministries gradually and laboriously convinced other witnesses, often at some risk, to come forward to testify to the questionable tactics the state had used to secure Brandley’s conviction. The district judge who presided over the hearings ultimately voided Brandley’s conviction and death sentence and remarked that in his thirty years as a judge, he was never involved in a case which “presented a more shocking scenario of the effects of racial prejudice [against Brandley, who was African-American], perjured testimony, [and] witness intimidation.” The court ruled that Brandley should receive a new trial, and the Texas Court of Criminal Appeals agreed. Brandley was not reindicted, however, and is now a free man.

Further evidence of the work required to establish innocence may be found in the case of Randall Dale Adams, who spent over a decade on death row in Texas and, after his death sentence was invalidated, began serving a life sentence. He was freed after a defense lawyer thoroughly reinvestigated his case and after an independent filmmaker made him the subject of an acclaimed documentary. It also took over a decade to free all of the three young men imprisoned for the murder of Jeanine Nicarico in Naperville, Illinois, in 1983. Eventually, an investigation performed mostly by appointed attorneys revealed that a key piece of the state’s forensic evidence was unreliable, that police probably had fabricated an incriminating statement from one of the young men, and that police and prosecutors had downplayed the fact that another person with a history of similar violent crimes had admitted being the sole perpetrator of the crime. Similarly, Walter McMillian was released from prison and after a thorough re-investigation of his case by an experienced capital defender uncovered grave constitutional flaws, including the prosecution’s pervasive failure to disclose exculpatory evidence to

267. See id. at 266-69 (describing creation of Centurion Ministries by a Presbyterian minister named Jim McCloskey and detailing beginning of organization’s role in the Brandley case).

268. See id. at 273-368.

269. Id. at 372 (quoting findings). See Ex Parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) (holding that state’s investigative procedures denied defendant due process of law and fundamental fair trial when prosecution suppressed evidence placing other suspects at scene of crime, created false testimony, and failed to follow up on conflicting physical evidence).

270. Bradley, 781 S.W.2d 886, 895 (Tex. Crim. App. 1989) (holding that state’s investigative procedures denied defendant due process of law and fundamental fair trial when prosecution suppressed evidence placing other suspects at scene of crime, created false testimony, and failed to follow up on conflicting physical evidence).


272. Id.


274. See generally id. The investigation in the Nicarico case was not technically a post-conviction investigation because none of the cases ever reached post-conviction proceedings. See id. at 286-89 (setting out brief chronology of trials stemming from Nicarico murder case). However, the nature of the investigation—often performed in preparation for new trials after appellate reversals—is identical to that usually performed in post-conviction proceedings. See id.
the defense.275

The third and final point that Hoffman and Stuntz overlook about the practical reality of habeas litigation is that there are often strong institutional and personal forces working to keep innocent or wrongfully-convicted inmates behind bars. Defense attorneys who previously represented the client, angered or ashamed at being labeled ineffective, may withhold cooperation. Prosecutors and police officers may be reluctant to reveal acts which contributed to an innocent inmate’s conviction, or may believe so strongly in the inmates’ guilt that they dismiss the value of the inculpative evidence at their disposal.276 Even the legal system itself, dedicated as it is to the principle of finality, may resist concerted efforts at upsetting settled verdicts—even, sometimes, when the inmate has a colorable claim of actual innocence.

Hoffman and Stuntz’s proposal, thus, denies inmates the practical assistance they will often need in order to make a threshold showing of actual innocence on the front end. Many innocence claims are “free-standing” and not linked to a clearly meritorious claim of constitutional error. One of the primary goals of any habeas reform should be to cure this “absurdity” of current law, which could potentially oblige a court to “deny relief to a petitioner who has made a substantial showing of the ultimate injustice of his conviction.”277 Although Hoffman and Stuntz’s proposal would permit free-standing innocence claims, they do not address the question of how the inmate is to assemble them in such a way as to

275. See McMillan v. State, 616 So.2d 933, 946-47 (Ala. 1993) (noting discovery, in post-conviction proceedings, of statement which would have impeached credibility of a key state witness, and ruling that suppression of statement was harmful constitutional error).

276. See, e.g., BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED xvi (2000) (observing that in nearly half of cases in which The Innocence Project secured release of wrongfully-convicted inmates by DNA testing, “prosecutors refused to release crime evidence for DNA testing until litigation was threatened or filed”).


Consider Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1999), a death penalty case decided by the United States Court of Appeals for the Fifth Circuit. Petitioner Lucas pointed out that an investigation performed by the state of Texas reached the conclusion that Lucas was almost certainly innocent of the crime for which he awaited execution. The Fifth Circuit, while admitting that the evidence cast doubt on Lucas’ guilt, denied that the evidence conclusively demonstrated his innocence. Citing Herrera v. Collins, 506 U.S. 390 (1993), the Court declared that, in any event, a mere showing of innocence did not state a constitutional violation cognizable in federal habeas corpus, at least as long as an alternate remedy by way of clemency remained available to the petitioner. Lucas, 132 F.3d at 1074-76. The court then rejected each one of Lucas’ specific constitutional claims. Id. at 1078-83. Texas Governor George W. Bush later commuted Lucas’s death sentence to life imprisonment, a move that was also controversial. Bush’s opponent in the 1998 gubernatorial campaign declared that he would have denied Lucas any reprieve because of Lucas’ evident guilt of other crimes. See R.G. Ratcliffe, Mauro: Bush was Wrong to Grant Lucas Clemency, Hous. CHRON., Jul. 1, 1998, at A17. Because the current doctrine offered Lucas no judicial remedy for his innocence, he narrowly escaped execution and is now serving a life sentence for a crime he did not commit.
meet their stringent standard. Hoffman and Stuntz were working at a fairly abstract, doctrinal level, and may have chosen to leave the question of practical implementation for another day. But practical implementation, namely ensuring that inmates have the resources and representation necessary to take meaningful advantage of any forum, or to satisfy any procedural prerequisite, should be considered at all times.

A focus on resources and investigation also practically serves the innocence-privileging goals of Hoffman and Stuntz’ proposal. Factually-specific, investigation-driven claims are what drives federal habeas relief now, and for several reasons. First, federal judges have become reluctant to announce new rulings that might call into question hundreds of death sentences. As Professor Anthony Amsterdam has bluntly put it: “Unless [a federal] judge is satisfied that s/he can give relief in this case with no (or very little) prospect that other accused or convicted persons will escape punishment, the judge will simply not [grant relief].” Further, an effective death row defender must now situate his legal claims within a thorough factual background, so that the reviewing court has sufficient tools with which to tailor relief to the present case and limit its impact. The only way to discover sufficient details to allow the court to “tailor,” in turn, is usually by painstaking extra-record investigation. Finally, the claims that generally require the most detailed investigation, such as ineffective assistance of counsel claims or claims related to the prosecution sponsorship of perjured testimony or withholding of exculpatory evidence, require showings of prejudice: that the error more likely than not affected the outcome of the trial. A court which is generally reluctant to reverse convictions or death sentences will feel more secure doing so when it can make a plausible argument that the error affecting the petitioner’s trial harmed the basic functioning of the “adversarial process that our system counts on to produce just results.”

Indeed, the substantive focus of modern post-conviction practice—which de-
mands (but doesn’t always provide) significant resources for the defendant—would go a long way to assuaging the concerns of the first innocence-privileging reformer, Judge Friendly. He defined his standard of innocence as requiring a petitioner to show “a fair probability that, in light of all the [existing] evidence, . . . and [new] evidence tenably claimed to have been wrongly excluded or to have become available only after his trial, the trier of facts would have entertained a reasonable doubt as to his guilt.”283 This standard is strikingly similar to the standard governing modern “substance-driven” post-conviction claims.

As for the sentencing phase, even Hoffman and Stuntz concede that the gravity of the death penalty requires special solicitude for a correct sentencing outcome, even in those cases in which a defendant is clearly guilty.284 Since the Court has stopped announcing new broad procedural safeguards for the sentencing phase, winning sentencing-phase challenges now also requires case-specific proof that the sentencing hearing leading to the death verdict was unreliable.285

2. Procedural Streamlining

Professor Jordan Steiker has taken Congress and the Supreme Court to task for “erect[ing] labyrinthine obstacles to merits review on federal habeas” which ultimately produced a system of “lengthy, repetitive litigation that cannot be justified by the minimal constitutional norm enforcement that it ultimately secures.”286 To remedy these flaws, he has proposed a scheme which separates record and non-record federal claims. Inmates would be permitted to litigate record-based claims in the federal court of appeals directly after their convictions were upheld by the last state court to review them. The circuit court would consider all claims de novo, apply prevailing constitutional norms, and enforce procedural defaults “jurisdictionally,”287—that is, even if the inmate can demonstrate cause to excuse them.288 Non-record claims would proceed on a different track. Inmates would go through the state post-conviction process as normally, and then present their claims to the federal district court.289 If the federal court determines that “the state court’s procedures for adjudicating disputed facts were

283. Friendly, supra note 249, at 160.
284. See Hoffman & Stuntz, supra note 250, at 122, 123 (arguing that “the special nature of substantive justice in capital proceedings” requires that federal courts grant de novo review to capital defendants who can demonstrate a “sufficiently substantial allegation of ‘injustice’ in capital sentencing” regardless of their substantive guilt of the crime).
285. See, e.g., Williams v. Taylor, 529 U.S. 362, 370-71, 395-96 (2000) (reversing petitioner’s death sentence based on extensive evidence, gathered and presented in state post-conviction proceeding, that petitioner’s trial counsel had performed ineffectively by failing to discover and present extensive mitigating evidence of abuse and neglect in petitioner’s background).
286. See Steiker, supra note 277, at 344.
287. Id. at 320.
288. Id. at 328.
289. Id. at 320-21.
adequate” and that the “state court’s fact-findings were supported by the record,” the district court would transfer the case to the court of appeals for de novo review of the state court’s conclusions. If the district court found the procedures inadequate, it would hold a hearing itself.

There are many merits to Professor Steiker’s scheme. First, he recognizes, correctly in my view, that many reformers “have taken too much of the status quo for granted.” Current habeas doctrine has become so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it. Second, his scheme recognizes that any reform, if it is to have a chance of success, must address the felt need to make habeas procedures more streamlined and efficient. Finally, his scheme confronts an aspect of modern federal habeas procedure that generates needless redundancy: the duplicate review of many claims of error by the federal district court and the circuit court. As any death penalty lawyer knows, many habeas cases are, for all practical purposes, lost at the federal district court level, when a particularly conscientious judge writes an extensive, well-reasoned, and virtually unassailable opinion denying habeas relief. In these cases, if the lawyer were to step out of the advocate’s role, she would have to acknowledge that little more could cogently be said about an inmate’s claims by the circuit court. And, in many cases, little more is said by the circuit court.

Professor Yackle critiques what he takes to be Professor Steiker’s overly indulgent attitude towards state criminal justice systems. First, Steiker “saddle[s]” inmates with the defaults caused by “indifferent” state court attorneys. Although Steiker proposes to lessen this burden by increasing the Sixth Amendment standard for effective assistance of counsel and devising a doctrine that casts procedural defaults caused by attorney incompetence as Fourteenth Amendment violations, Yackle points out that these “prisoner-friendly” changes in constitutional doctrine are unlikely to occur. Second, Yackle argues, Steiker’s proposal overestimates both the present reliability of state fact-finding forums and federal courts’ willingness to genuinely police the adequacy of those forums. The proposal, therefore, would “thus perpetuate a serious embarrassment in current practice: formal federal court approval of state processes that everyone knows are deficient.”

This point is especially troubling. Some federal courts have had little trouble certifying state forums as “adequate” for federal purposes despite obvious deficiencies. This problem is especially insidious because of the low visibility of post-

290. Id. at 321.
291. See id. at 321.
292. Id. at 323.
293. Yackle, supra note 11, at 1767.
294. Id. (summarizing Steiker’s comments); see also infra Part IV.A (arguing that current federal judiciary is unlikely to weaken restrictions on habeas jurisdiction).
295. Yackle, supra note 11, at 1768.
296. Id.
conviction review: as opposed to direct appeal judgments, most of which are published, most post-conviction judgments are unpublished.\textsuperscript{297} In many states, post-conviction cases are decided by the judge simply signing the prosecutor's proposed fact findings and conclusions of law, rather than crafting an opinion of her own.\textsuperscript{298} Some cases involve \textit{ex parte} contact between the prosecutor and the state post-conviction court.\textsuperscript{299} If procedures as minimal as these are "adequate" and "fair" in the eyes of federal courts, then more robust definitions of adequate and fair are in order. A portion of the reform scheme I propose in this Article responds to these problems by setting out specific criteria for review of state court fact-finding forums.

A further problem with the "jurisdictional" approach to enforcement of defaults is the possible incentive it grants to states to withhold potentially exculpatory information. Although it may seem obvious that a federal court would not bar an inmate from raising new information previously withheld from him by the state, this matter is actually not so clear. In a state that enforces a bar on successive state post-conviction applications, an inmate will virtually always default a claim if he does not present it in his first state post-conviction application.\textsuperscript{300} In states that permit inmates to file successive applications based on previously-undiscoverable evidence, an inmate may have a shot at filing a subsequent state habeas application and obtaining a merits ruling. However, the prospect of \textit{federal} merits review is by no means certain.\textsuperscript{301}

Adopting Professor Steiker's proposal for "jurisdictional defaults" in the cur-

\textsuperscript{297} See \textit{Liebman et al.}, \textit{supra} note 279, at 30 (noting that "state post-conviction decisions often are not published, even in capital cases," and suggesting that the reason is "because state post-conviction review often begins—and when it leads to reversal, ends—in trial courts that almost never publish their decisions").

\textsuperscript{298} See, e.g., \textit{Carter v. Lee}, 202 F.3d 257, at *4-*5 & n.5 (4th Cir., Dec. 29, 1999) (unpublished) (noting that court was "deeply troubled" by "cursory" adjudication of state post-conviction judge, who had taken one hour to review several hundred pages of pleadings from state and death-row petitioner's counsel before adopting state's proposed findings); \textit{Texas Defender Service}, \textit{supra} note 189, at 127 n.31 (reporting results of study of ninety-two Texas post-conviction proceedings which found that the state court resolved the state post-conviction proceedings by signing the prosecution's proposed findings without significant alteration in 83.7\% of the cases).

\textsuperscript{299} See, e.g., \textit{White v. Bowersox}, 206 F.3d 776, 783 (8th Cir. 2000) (holding that any prejudice stemming from state post-conviction trial court's \textit{ex parte} contact with prosecutor and verbatim endorsement of prosecutor's proposed findings was removed when state post-conviction court's judgment was vacated on appeal to Missouri Supreme Court); \textit{James v. Collins}, 987 F.2d 1116, 1122 (5th Cir. 1993) (rejecting challenge to adequacy of state court fact-findings when state court endorsed prosecutor's findings verbatim after allegedly engaging in \textit{ex parte} contact with prosecutor).

\textsuperscript{300} See, e.g., \textit{Horsley v. Johnson}, 197 F.3d 134, 137 (5th Cir. 1999) (explaining interplay of state-level abuse of the writ doctrine and federal procedural default rules).

\textsuperscript{301} The following scenario illustrates the risk of default even when the state is at fault for withholding information. Assume an inmate goes all the way through state and federal review once, and alleges a \textit{Brady} violation based on information available to him at the time. After completing the review process once, he discovers a trove of new information which makes his \textit{Brady} claim much stronger than it was the first time around. Even if he is permitted to file a state successor application and obtains merits review of it, he will run into 28 U.S.C. § 2244(b)(1) (West 2002), which flatly declares that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."
rent, post-AEDPA habeas context would create at least a possibility of jurisdic-
tonial default against an inmate who filed a successive habeas corpus application
raising a claim identical to one pled and adjudicated before—but with new
evidence previously withheld by the state. When placed against the backdrop of
the AEDPA, Professor Steiker's default scheme could resemble the "strict liabil-
ity" default regime advocated by the state in Williams v. Taylor,302 which would
have interpreted 28 U.S.C. § 2254(e)(2) to bar federal evidentiary hearings to all
inmates who "failed to develop" the facts of their claims in state court proceedings,
even if the claim lay undeveloped only because the state withheld discoverable
information necessary to develop the claim.303

For his part, Professor Yackle would "forthrightly recover the habeas corpus
doctrines that the Warren Court developed."304 Although this prospect should
make any advocate of strong federal habeas review go a bit misty, such a proposal
is unlikely to succeed in today's political climate. Even after an extraordinary and
recent barrage of publicity about innocents being freed from death row—which
might be expected to sensitize the public to the need for careful review—a recent

a pro-petitioner interpretive gloss, this section deprives petitioners who file successive claims under the same
legal theory, but with important new information, of a federal forum.

There are countervailing principles which might assist a petitioner in this situation. The Court, for instance,
could choose to interpret the AEDPA in light of its existing successive-writ jurisprudence, which generally affords
review to inmates who could demonstrate cause to excuse a failure to discover all facts relevant to a claim the first
time through the system. Cf., e.g., Stewart v. Martinez-Villareal, 523 U.S. 637, 646 (1998) (Scalia, J., dissenting)
(castigating majority for toning down the "unmistakable" language of § 2254(b)(1) in order to afford a forum to an
inmate who had filed an additional federal habeas petition challenging his competency to be executed shortly
before his execution, notwithstanding the fact that he had, much earlier, made the same claim in an earlier habeas
petition when it was dismissed as unripe). Whether the current or future Court would help a petitioner out in this
manner is still a close question.

Another danger to federal merits review is the one-year statute of limitations found in 28 U.S.C. § 2244(d)
(West 2002). Interpreting an ambiguous tolling provision, the Supreme Court recently held that it tolled the
federal limitations period during the pendency of a properly-filed state post-conviction proceeding, but that it did
not toll the deadline during the pendency of a federal habeas petition. See Duncan v. Walker, 121 S. Ct. 2120, 2129
(2001). If a petitioner discovers significant information previously hidden by the state while her petition is
pending in federal court, the federal court might well dismiss the pending federal petition to permit her to exhaust
state court remedies. This course is even more likely if the claim is strong and the federal court wishes to grant
relief, because the habeas statute, as amended by the AEDPA, forbids federal courts to grant relief on unexhausted
claims. See 28 U.S.C. § 2254(b) & (b)(A) (2001) (providing that habeas relief "may not be granted unless it
appears that . . . the applicant has exhausted the remedies available in the courts of the State"). Because the
federal limitations period was not tolled during the time it took the federal court to decide to dismiss the case (an
average of 268 days, see Duncan, 121 S. Ct. at 2131 (Breyer, J., dissenting)), it is entirely possible that the federal
statute of limitations will have run out while the petition was pending in federal court. See id. (describing such a
scenario). If the state denies relief after dismissal, the petitioner will automatically be time-barred from returning
to federal court. In this situation, the state will have successfully deprived the petitioner of any federal merits
review of her claims by keeping evidence suppressed for a sufficiently long time. Once again, many federal courts
would probably try to avoid such an outcome, but there would be no requirement that they do so, and some
probably would not.

303. Id. at 430.
304. See Yackle, supra note 11, at 1769.
poll found that 77.6% of Americans believed it took “too long to resolve appeals and carry out death sentences.” Indeed, Professor Yackle himself refers to the proposed Warren Court reversion in fairly aspirational tones.

3. “Full and Fair” Preclusion

Related to innocence-privileging reforms are those reforms that attempt to build on the Supreme Court’s 1976 decision in Stone v. Powell, which precluded federal post-conviction review of prisoners’ Fourth Amendment claims absent proof that the state court had denied the state prisoner a “full and fair” opportunity to litigate them. One group of proposals popular among conservatives sought to extend Stone’s “full and fair” language to all post-conviction claims. That is, federal courts would not be permitted to review any claim that had been fully and fairly litigated in state proceedings. These proposals were strongly advocated by the Reagan and Bush administrations, but were ultimately rejected.

During the debate over the AEDPA, Senator John Kyl proposed an amendment to the proposed legislation that would have forbidden all habeas jurisdiction to federal courts except upon proof that a state court’s remedies were “inadequate or ineffective to test the legality of the inmate’s detention.” Senator Kyl’s amend-

305. See James Kimberly, Guilty . . . or Merely Proven Guilty?, HOUS. CHRON., Feb. 6, 2001, at A4 (reporting results of poll of 1773 adults carried out in November and December of 2000).

306. Earlier, Professor Yackle had proposed a “removal” framework for federal habeas, under which “[federal] habeas corpus after state criminal proceedings [would be reconceived as] a substitute for the removal jurisdiction that would have been available under 28 U.S.C. § 1441 . . . if the original proceedings in state court had been civil in nature.” Yackle, supra note 100, at 198 (footnote omitted). Under the “removal” proposal, the federal court would “exercise independent judgment on the merits of the claim[s]” presented by the petitioner, and would accord no special deference to any fact-findings entered by the state court. Id. at 198 (setting out proposed statute). Professor Yackle demonstrates that this proposal would bring the federal courts’ habeas jurisdiction into line with the principles that govern federal jurisdiction generally. Id. at 198-99. Professor Yackle would also remove any obligation that state inmates exhaust their claims in state court, rendering exhaustion essentially optional. Id. at 201. Professor Yackle’s removal proposal is clearly the most lenient habeas reform proposal of them all. Although Professor Yackle persuasively argues the doctrinal merits of the proposal, it seems even less workable than the Warren Court reversion.

307. “Full and fair” proposals build on Stone’s procedural component; other proposals have built on its policy reasoning. These latter proposals aim to group habeas claims into those that are more-or-less technical and those that affect the truth-finding accuracy of the underlying trial. See, e.g., Hoffstadt, supra note 201, at 1013-28 (advocating, inter alia, restriction of substantive scope of federal habeas review to claimed violations of “procedures essential to the fairness of the criminal process”). Because my focus is procedural, joining issue on the substantive scope of the writ is beyond the scope of this Article.


309. Id. at 486.


311. Id. at 2361-63 (setting out history of Congressional full and fair proposals, and ascribing their failure to “legislative inertia,” dogged opposition from liberal Democrats and lobbying groups, and the fact that the Supreme Court was actively curbing federal habeas jurisdiction as the bills were being considered, making drastic restrictions on the scope of federal review seem less urgent).

ment was rejected as too extreme; even Senator Arlen Specter, sponsor of the AEDPA, favored retaining federal jurisdiction "as a constitutional matter".313

B. The Problem with Polarized Assumptions

Judges and academics who address federal habeas corpus jurisdiction can be divided into two general camps based on their attitudes toward state courts. In the first camp, the Warren Court's habeas jurisprudence epitomized the skeptical tradition. Although the Court required exhaustion of state post-conviction remedies, it did so merely out of respect, rather than out of an expressed confidence that state court systems would consistently treat federal claims in a thoughtful and fair manner. Indeed, much pre-1970 Supreme Court case law on the adequacy of state post-conviction forums often brimmed with thinly-veiled frustration at their Byzantine procedural rules and structural deficiencies.314 In addition to the procedural deficiencies, the Warren Court also seemed to recognize the real differences then existing between state and federal judges in terms of ability, temperament, and insulation from political pressure.315 A former Supreme Court clerk put the assumption bluntly:

[a]s practicing lawyers know, in aggregate, state court judges are just not as good as federal court judges. They tend to be less well-educated and less distinguished in the profession. Many lack experience with or sophistication about federal constitutional law. State courts also lack the resources of federal courts, including top-flight law clerks and even, in some places, the rudiments of a federal law library.316

State judges' reluctance to implement the Warren Court's federal mandates was no secret.317 The Warren Court was a wary and worldly Court; one acutely

313. Id. at 15050 (statement of Sen. Specter).
314. See, e.g., Case v. Nebraska, 381 U.S. 336, 338-40 (1966) (Clark, J., concurring) (arguing that "the great variations in the scope and availability of [state post-conviction] remedies result in their being entirely inadequate" and that many state procedures "failed to provide genuine opportunities for testing constitutional issues of the most numerous and important types"); id. at 344-45 (Brennan, J., concurring) (advocating comprehensive reform of state post-conviction procedures and observing that incomplete and adequate state post-conviction procedures were creating friction between the state and federal courts by forcing more and more state prisoners to resort to federal forums). Cf. Brown v. Allen, 344 U.S. 443, 554 (1953) (Black, J., dissenting) (arguing that purpose of habeas review is "to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution"); see also, Young v. Ragen, 337 U.S. 235, 236 (1949) (noting "recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised").
315. See, e.g. Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1120-28 (1977) (pointing to federal courts' higher level of "technical competence," their "psychological set" in favor of enforcing federal rights, and their "insulation from majoritarian pressures").
317. See Neuborne, supra note 315, at 1116 n.46 (noting the widespread expression of state hostility to the federal mandates).
conscious of the political and social realities of state-level criminal justice and "profound[ly] skeptic[al] toward criminal adjudication." The Court required careful monitoring of state court hearing procedures, permitted federal courts to essentially disregard state courts’ resolutions of federal issues, and stressed the role of counsel in ensuring substantive as well as formal equality. The skepticism was mutual—state court judges, irritated among other things by the Warren Court’s expansive conception of federal habeas review, helped to advocate an amendment to the United States Constitution which would have created a “Court of the Union” to review the Supreme Court’s federalism decisions.

Sykes, however, heralded the development of a second camp, based on a growing Supreme Court confidence in state court justice systems. Part of this confidence was justified: in the late 1960s, many states reformed their confusing and inefficient post-conviction schemes. The Burger and Rehnquist Courts, however, went beyond merely recognizing improvement to embrace the notion of “parity”—that is, the “assumption] that no factors exist which render federal . . . courts more effective than state . . . courts for the enforcement of federal rights.” This assumption surfaced in the Burger and Rehnquist Courts’ opinions both explicitly, in the form of praise for state forums, and implicitly, in the form of strict waiver precedents that presupposed a fair state forum. Where the Warren Court carefully inquired into the substantive ability of defendants to enjoy the rights the Court was granting them, more recent Courts expressed less and less interest in the real conditions of state trials or appeals, and have instead enacted reforms and restrictions which presuppose an airbrushed, generalized ideal of state court justice.

The Court’s recent refusal to grapple with everyday realities has opened a yawning gulf between the assumptions which drive its decisions and the real world. The Court has also endorsed as a rationale for many of its habeas decisions a desire to make the trial of a capital case the “main event.” To this end, it devised the Sykes procedural default doctrine to prevent “sandbagging” by trial counsel without demonstrating that sandbagging was a serious problem in the criminal justice system or, for that matter, citing to a single instance of it. The attitude of complacency towards state criminal trials has filtered down to the appellate

319. Roberts v. La Valle, 389 U.S. 40, 42 (1967) (“[]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.”); Anders v. California, 386 U.S. 738, 745 (1967) (recognizing that supplying lawyers to indigent defendants “afford[s the indigent accused] that advocacy which a nonindigent defendant is able to obtain” and thereby satisfies requirement of “substantial equality”).
321. Neuborne, supra note 315, at 1117.
courts—especially the more conservative ones. One Fifth Circuit federal judge, taking his cue from the Court, lamented the tendency to “revolt at [capital punishment’s] imposition by hedges and counter hedges that betray a disturbing distrust of traditional trial process, especially the jury.”

The most glaring example of the disconnect, however, is the Court’s consistent refusal to recognize a right to the assistance of counsel in state capital post-conviction proceedings. In 1969, the Court remarked that preparing a post-conviction petition was an endeavor which “may benefit from the services of a trained and dedicated lawyer” but which could also be performed by a “lay-m[a]n.”

In the intervening decades, capital habeas corpus has become vastly more complicated—largely as a result of the Supreme Court’s own decisions in the realms of the death penalty and habeas procedure. Nevertheless, the Court remains unwilling to acknowledge that assistance by counsel is now an absolute bedrock necessity for the meaningful enjoyment of habeas remedies in capital cases—even as it solemnly intones that “capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding.” The Rehnquist Court has not carefully assessed the claim that counsel is essential in capital post-conviction proceedings and found it exaggerated.

sources questioning empirical basis of sandbagging concern and pointing out real-world implausibility of widespread sandbagging).

324. Judge Patrick E. Higginbotham, Notes on Teague, 66 S. CAL. L. REV. 2433, 2433 (1990). The “trial process” in one Fifth Circuit state—Texas—has recently been searchingly evaluated and found riddled with grave flaws. Lawyers who have represented Texas death row inmates have been disciplined for misconduct at a rate almost eight times greater than that of Texas lawyers as a whole. Defense Called Lacking, supra note 195, at 1A. A recent study of Texas’ provisions for supplying indigent-defense needs “ politicized [and] ineffective” and found that defense attorneys are “provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients.” See COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEXAS, MUTING GIDEON’S TRUMPET: THE CRISIS IN INDIGENT DEFENSE IN TEXAS 22, available at http://justice-policy.net/relatives/17080.PDF (last visited 1/22/02) [hereinafter Committee on Legal Services State Bar of Texas].

The Texas Appleseed Foundation recently performed the “most comprehensive study ever conducted of county-level indigent defense practices” in Texas. See TEXAS APPLESEED FOUNDATION FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS ON INDIGENT DEFENSE PRACTICES IN TEXAS 5 (2000). The study identified dozens of serious problems with Texas’ indigent-defense scheme, including “a complete absence of uniformity in standards and quality of representation” (id. at 11), a “pervasive and serious problem” with “[d]elay in appointing counsel,” (id. at 13), a level of funding of indigent defense of $4.65 per capita, “near the bottom level of funding for indigent defense in all 50 states” (id. at 15), an “imbalance of resources between prosecution and indigent defense,” (id. at 16), and funding caps in capital cases which encouraged counsel to “cut corners in representation.” Id. at 22. The intense recent scrutiny of the Texas criminal justice system has prompted a bipartisan group of legislators to propose a package of fundamental reforms. A state Senator called Texas’ existing indigent-defense system “terribly inadequate,” and a state judge derided it as “the lowest in the country” and a “laughingstock.” Diane Jennings, Hope Seen for Fixing Legal-Aid Problems: Issue Has Captured Legislators’ Attention, DALLAS MORNING NEWS, Feb. 26, 2001, at 1A.


ated or empirically incorrect—it has simply declined to join the issue.327

The Warren Court, Cover and Aleinikoff posited, viewed habeas corpus remedies as a way to "mediate[]" between the "real" world—the "Dickensian netherworld of mass criminal adjudication"—and the "ideal" world of constitutional aspiration envisioned by the Warren Court's criminal procedure revolution.328 Presented with the Supreme Court's retreat into abstraction, lower federal courts seem to react based on how close they are to the realities of state court adjudication. The contrast between the treatment of Texas post-conviction ineffectiveness cases at the federal district court level and the Fifth Circuit level is an example. In the cases discussed above, the district court judges genuinely engaged with the "Dickensian" realities of the Texas habeas corpus scheme. They convened hearings in order to explore the state's efforts to provide adequate counsel, voiced their concern about inadequate representation, and, in some cases, fashioned unconventional remedies. Their conduct was a form of dialectical federalism, albeit in a very different register. The Fifth Circuit, by contrast, has yet to display any concern over Texas' provision of counsel to its death row population. In cases that raise the issue of a 11.071 counsel's competence, the court frequently does not even bother to publish its resolution of the case, and when it does, rejects with little comment all arguments that Texas should be bound by its statutory promise of "competent" counsel.329

327. Cf. Coleman v. Thompson, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting) ("One searches the majority's opinion in vain, . . . for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.").

328. Cover & Aleinikoff, supra note 1, at 1099.

329. See supra notes 216-18, and accompanying text (discussing treatment of Robert Earl Carter); see also Etheridge v. Johnson, 209 F.3d 718, slip. op. at 19-20 n.8 (5th Cir., Feb. 2, 2000) (unpublished) (characterizing as "not implausible" petitioner's argument that "because the State of Texas has assumed a responsibility to provide habeas counsel, it must bear the cost of any resulting default by such counsel," but denying relief with little discussion based on prior circuit precedent); but see Martinez v. Johnson, 255 F.3d 229, 234-37 & 238 n.9 (5th Cir. 2001) (extensively discussing quality of state habeas counsel's representation). Two factors make it difficult to assess the scope of the problem. The first factor is the Fifth Circuit's frequent disposition of capital appeals in unpublished opinions. Texas post-conviction cases almost never generate published appeals at the state level. The only study to assess 11.071 appeals thus far has found many which appear short and superficial. See supra Part II.D.3.b. These superficial state habeas petitions may turn into equally superficial federal habeas petitions, especially in cases in which the same lawyer represents a death row inmate in state and federal post-conviction. Because Fifth Circuit courts are especially unlikely to publish dispositions of capital cases that present the kind of simple record-based issues likely to be found in superficial habeas petitions, it is likely that many Texas inmates have been or will be executed without any court, state or federal, issuing a published opinion assessing their post-conviction claims or their post-conviction attorney's performance.

When the Fifth Circuit does publish cases raising the issue of post-conviction counsel's effectiveness, it often summarily rejects the petitioner's claims without discussing post-conviction counsel's performance in terms specific enough to permit an outside observer to independently assess it. In one recent case, the Fifth Circuit, in a brief per curiam opinion, rejected a capital habeas petitioner's argument that his Due Process rights were violated by Texas' failure to observe 11.071's guarantee of "competent" counsel. See In re Goff, 250 F.3d 273, 276 (5th Cir. 2001). Without revealing precisely why Goff believed his appointed counsel had performed incompetently, the court overruled a previous case which had suggested that inmates might enjoy a Due Process-protected right to
The federal courts’ retreat to an idealized and frequently implausible model of state criminal justice forums imposes severe costs. It bears out a frequent criticism of the American legal system: that it treats parties as “equivalent bearers of procedural rights” while ignoring “[i]nequalities which spring from sources other than ‘abstract’ procedural rules.” As the decisions handed down by the federal courts reflect an ever-increasing willed ignorance of real-world conditions, the entire criminal justice system will gradually begin to leach legitimacy, especially among the poorest members of society.

Thus, to the extent that the habeas reform proposals discussed above adopt elements of the Burger/Rehnquist’s Courts’ habeas corpus jurisprudence, they risk perpetuating the misunderstandings and misplaced idealism that undergird it. Innocence-privileging schemes are tainted by the Burger/Rehnquist Courts’ insensitivity to the importance of resources and representation in the capital post-conviction context. The procedural streamlining approach incorporates the procedural default doctrine without alteration, and, like “full and fair” proposals, fails to confront and root out the tendency of federal courts to take the path of least resistance by blessing inadequate state procedures as “full and fair.”

That said, it is also a mistake to move back to the Warren Court’s generalized suspicion of state forums. If general and idealized assumptions about state post-conviction forums result in review structures which under-police state forums, excessive suspicion of state court systems can entrench procedures that over-police them. The suspicious attitude towards the state courts, perhaps best summed up by one scholar’s assertion that “the very existence of federal courts and most federal jurisdiction is based on a distrust of state courts,” risks slighting state courts that are genuinely acting as the colleagues the Supreme Court imagines them to be. For every habeas “rogue state” which subjects death row inmates to an inadequate or haphazard post-conviction forum (and then seeks to enforce defaults in federal court caused by the deficiencies in its procedure), there are other states which demonstrate concern for fair post-conviction procedures.

For instance, Professor Liebman’s study suggests that many death penalty states appear to have taken quite seriously their duty to carefully inspect state death
penalty cases at the post-conviction stage for errors of state or federal law:

Although incomplete, our data . . . reveal that state post conviction review is an important source of review in some states, including Florida, Georgia, Indiana, Mississippi, and North Carolina. In Maryland, for example, at least 52% of capital judgments reviewed in state post conviction proceedings during the study period were overturned due to serious error; the same was true for at least 25% of the capital judgments that were similarly reviewed in Indiana, and at least 20% of those reviewed in Mississippi.\textsuperscript{333}

The Mississippi Supreme Court recently endorsed a right to counsel in capital post-conviction proceedings, and displayed a rare concern for the practical realities of post-conviction review:

\begin{quote}
Indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for [counsel to assist him in seeking] this state-provided remedy.\textsuperscript{334}
\end{quote}

It must be noted that the Mississippi Supreme Court was under pressure when it made this decision: when \textit{Jackson} was handed down, each Supreme Court Justice was a named defendant in a federal lawsuit challenging the Court’s previous policy

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\begin{flushright}
\textsuperscript{333} James S. Liebman et al., \textit{Capital Attrition: Error Rates in Capital Cases 1973-1995}, 78 Tex. L. Rev. 1840, 1848 (2000). These data should be taken with some caveats. The raw number of judgments reversed may not be a reliable indicator of a robust, fair state post-conviction system. First, since the statistics reach back to 1973, it is possible that many of the reversals were prompted by the Supreme Court’s early capital procedure decisions, which often invalidated dozens or hundreds of judgments at once. Second, these data were collected during the era of federally-funded resource centers and therefore probably reflect higher standards of advocacy than prevail today. As the \textit{Gibson} case demonstrates, the situation in Georgia has changed dramatically since the defunding of the resources centers.

Nevertheless, these capital post-conviction reversal percentages contrast with Texas’, which appears recently to have dropped to zero. See \textit{Texas Defender Service}, supra note 189, at 128 & nn.127-28 (noting that study of 103 post-1995 Texas habeas corpus appeals revealed that the inmate had been denied relief in the trial court in every single case, and, because the CCA virtually always follows the trial court’s recommendation, would almost certainly be denied relief by the CCA as well). Defenders of the Texas scheme might cite this result as proof that the Texas trial system generates unusually reliable results. See, e.g., Guy Goldberg & Gena Bunn, \textit{Balancing Finality & Fairness: A Comprehensive Review of the Texas Death Penalty}, 5 Tex. Rev. L. & Pol. 49 (2000) (arguing that Texas’ criminal justice system is adequately reliable). Given the consensus that has recently emerged among Texas legislators, judges, and executive officials that Texas’ indigent-defense system requires a drastic overhaul, this seems unlikely. See \textit{Committee on Legal Services State Bar of Texas}, supra note 324 (collecting sources finding flaws with Texas’ system and citing comments by judges and legislators that Texas’ indigent defense system is “terribly inadequate” and a “laughingstock”). In any event, if many state death row inmates are receiving superficial post-conviction representation, the low reversal rates may stem from the very superficiality of the appeals being filed on inmates’ behalf.

\textsuperscript{334} Jackson v. State, 732 So.2d 187, 191 (Miss. 1999).
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of refusing to recognize any right to counsel in capital post-conviction proceedings. Even if the Mississippi Supreme Court recognized the gulf between the real and the ideal under duress, it still went farther than any federal court has done. It is an indicator of how far some states have progressed—and how far some federal courts have retrenched—that some commentators view the state courts as more hospitable to federal claims than federal courts.

It is easy to see how the very redundancy Cover and Aleinikoff praised might anger a state court which was striving in good faith to provide fair review. This redundancy made federal court relitigation of facts previously determined by a state court relatively common and permitted the federal court to completely "disregard[] the state courts' legal conclusions and reach[] independent judgments on issues presented to them." Surely a state court must consider it an institutional insult to work hard (and spend resources) to give an inmate a fair hearing only to see a federal court largely disregard its efforts. The AEDPA certainly removes this insult, because it affords strong presumptions of correctness to a state court’s fact findings and to its legal conclusions. The problem, however, is that these benefits of the AEDPA “rain both on the just and the unjust”—state courts which run crude or arbitrary post-conviction forums may claim them too.

C. The Model of the Coercive Quid pro Quo

The key, therefore, is to treat the states not as one aggregate mass, but to devise procedures sensitive enough to discover which states are genuinely working to provide a fair post-conviction forum, and which are not. A recent proposal from Professor James S. Liebman attacks a related problem by offering states significant procedural limitations conditioned on their fundamentally overhauling their capital punishment procedures in very specific and far-reaching ways. In The Overproduction of Death, Professor Liebman, drawing on his recent and comprehensive study of flawed capital convictions, develops a detailed critique of the United States' current death penalty system, arguing that it is skewed in favor of

335. See Stafford-Smith & Starns, supra note 239, at 59-60 (1999). The authors of Folly by Fiat, one of whom was involved in the litigation, attributed the Jackson decision to the Mississippi Supreme Court’s desire to avoid the “embarrassing spectacle of the justices under oath trying to explain how, on the one hand, they could speak of the incredible complexity of capital litigation, and yet on the other hand, leave [mentally retarded death row inmates] to represent [themselves].” Id. at 60.

336. See Hoffman & Stuntz, supra note 250, at 111 (arguing that there has been a “dramatic shift” in state courts toward evenhanded enforcement of federal rights since the early 1960s).


338. Lindh v. Murphy, 96 F.3d 856, 861 (7th Cir. 1996) (citing Brown v. Allen, 344 U.S. 443, 458 (1953)).


340. See Liebman, supra note 124.
trials that generate inappropriate death sentences. Liebman argues the sting of appellate reversal is too weak, delayed, and displaced to induce the state to limit the factors that lead to overproduction.341

Professor Liebman proposes nothing less than a drastic and comprehensive overhaul of the entire death penalty justice system. In return for adopting ten sweeping reforms of the death penalty trial and review process,342 a state would be able to “opt-in” to a death penalty review scheme in which state post-conviction review would be eliminated altogether, and federal review would not only be time-limited but would also focus solely on whether the ten reliability-enhancing factors had in fact been applied in the individual inmate’s case.343 If a state is found to have violated any of the ten requirements, it must forfeit the death sentence handed down against the inmate and impose the costs of discovering and litigating the violation on the “government entity that committed it.”344

Professor Liebman proposes a highly coercive incentive scheme in which drastic reforms are accompanied by equally drastic incentives. He wishes to find a way to bypass the welter of conflicting and irreconcilable commitments of all sides of the polarized debate over death penalty procedures:

Pro-death penalty ideologues will resist agreeing to fewer death sentences and executions; front-line government actors will resist giving up a political capital machine that is the stuff of fairy tales; anti-death penalty ideologues will resist a system with the avowed goal of permitting some (even a small number of) executions; and anti-death penalty lawyers will resist forsaking a post-conviction system that adds eleven years on average to each of their clients’ lives and overturns two-thirds of their clients’ death sentences.345

Each side of the debate wants to “cheat” on the quid pro quo: pro-death penalty forces want to lock in restrictions on review with vague promises they have no intention of taking seriously, and anti-death penalty forces, if they are willing to

341. See id. at 2073-129.
342. The proposed reforms are (1) a mandatory 120-day deliberation period before a prosecutor can seek a capital indictment; (2) “full disclosure” by the police and prosecutors of “all relevant information known to them, inculpatory or exculpatory”; (3) a requirement that all confessions be videotaped and turned over to the defense; (4) meaningful standards to ensure reasonable compensation and adequate performance by defense counsel; (5) use of different juries to hear the guilt and penalty phases of capital cases; (6) jury instructions that “fully and accurately inform the jurors of the minimum length of time murderers must serve before being eligible for parole” as well as clear up other common juror misconceptions that result in inappropriate death sentences; (7) “meaningful, substantive, comparative proportionality review” of all capital judgments by the state court; (8) mandatory backup federal review of the substance of cases in which the Supreme Court “discerns a substantial probability of a violation of federal law”; (9) a grant of permission to all death row inmates to file motions arguing their innocence or their ineligibility for the death penalty “at any time while proceedings to review the judgment are permitted and pending”; and (10) a requirement that states compile reports designed to permit evaluation of the reliability of their justice systems. Id. at 2144-50.
343. Id. at 2143.
344. Id. at 2144.
345. Id. at 2142.
countenance any restrictions on review at all, endorse only those that have enough loopholes built into them that almost every case will qualify for special treatment. The result of this wary pas-de-deux is tepid, piecemeal reforms which are "almost surely worse than no change at all."\(^{346}\)

Liebman aims to cut the Gordian knot by proposing revolutionary reforms focused on one objective—securing fair, accurate, thoroughly litigated death penalty trials that lead to reliable verdicts from fully-informed, well-instructed juries. Excepting the extremes, neither side of the debate can sensibly argue against this goal, although it might be possible to argue against some of Professor Liebman's suggested means of achieving it.\(^{347}\) Pro-death penalty forces are asked to concede that there are simply no defensible reasons (that is, reasons consistent with a desire for a fair, thorough trial) to underfund indigent defense schemes, permit prosecutors to withhold information from the defense, or to deny jurors the truth about the sentencing options they are being asked to choose from. Anti-death penalty forces are asked to concede that the death penalty is not going away, and that, if trials are genuinely full and fair, executions should follow swiftly on their heels. The reforms are "presumptively unseverable"—permitting sides to pick and choose would defeat the entire purpose of the enterprise, which is to force a stark, compelling, all-or-nothing choice.

This structure has compelling advantages, and the reform I propose is analogous.\(^{348}\) The approach is functional, rather than doctrinal or theoretical. Step one is to pay close attention to the real-world environment in which the death penalty system operates. Step two requires settling upon a goal that all sides of the mainstream debate would agree to. Step three is to evaluate the current legal landscape with an eye towards reforming or abolishing aspects of the present scheme which frustrate that goal (such as, in Professor Liebman's scheme, state post-conviction review). The final step is to propose reforms that force all relevant actors to remain relentlessly focused on the goal without cheating.

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346. Id. at 2143.
347. Professor Liebman's article concentrates exclusively on the "overproduction" of death—cases in which death sentences were actually not warranted by law (either because the defendant was factually innocent or demonstrably legally ineligible for the death penalty), but were nevertheless generated. Prosecutors routinely complain of capital defendants who evade justified death penalties because of pre-trial rulings or appellate reversals that have nothing to do with either the defendant's guilt or the propriety of the death sentence. See, e.g., Steve Brewer, Deal Takes Woman off Death Row, HOUS. CHRON., July 14, 2000, at A1 (noting prosecutor's complaint that, even though woman who pleaded guilty to a life sentence after an appeals court reversed her death sentence on Sixth Amendment conflict grounds "deserves the death penalty," the case could not be re-prosecuted capitally because witnesses had dispersed and the law changed during the 20-year delay between the original trial and the appellate reversal). One could imagine a conservative critic arguing that if one accepts Professor Liebman's premise that the death penalty system should be fundamentally reformed to aim at "accurately identifying from the start the few cases . . . with demonstrated facts that indubitably warrant the death penalty," Fourth Amendment protections should be scrapped.
348. I first formulated my proposal before Professor Liebman's article was published.
IV. A COERCIVE QUI PRO QUO FOR POST-CONVICTION REVIEW

A. The Way Forward: The Limits of Doctrine

Having articulated a few background principles that should govern capital habeas reform, the task is now to determine how to put them into practice. Many reformers have proposed to remedy the harshness of *Giarratano* and its progeny through new approaches to habeas doctrine or constitutional law. Some, drawing on Justice Kennedy’s *Giarratano* concurrence,349 point to the First and Fourteenth Amendment’s guarantee of meaningful access to courts.350 Others cite equal protection,351 or what remains of the Eighth Amendment’s requirement of “heightened reliability.”352 The habeas statute itself provides a potential remedy: it absolves inmates of any duty to exhaust state court remedies which are “ineffective” to protect the rights of the applicant.353 The Supreme Court has described ineffective state forums generally as ones in which “procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions.”354 Courts have derived more specific applications mostly from application to particular sets of facts.355 If it saw no other option, a federal court could probably invoke this provision to excuse exhaustion in a state which appointed incompetent counsel or no counsel at all to death row inmates. However, no court has yet done so, nor has any court endorsed any of the proposed constitutional fixes. They may well never do so.

Two main themes emerge from the Supreme Court’s recent federal habeas jurisprudence. The first is the Court’s evident unease with the most restrictive

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349. Murray v. Giarratano, 492 U.S. 1, 14 (1990) (Kennedy, J., concurring) (concurring because the facts of this Virginia case revealed prisoners had meaningful access to the courts while making clear that, in cases where meaningful access did not exist, his opinion would be different).


355. Federal courts have found circumstances rendering state remedies ineffective where the state courts failed to alleviate obstacles to state review presented by circumstances such as the petitioner’s pro se status, poor handwriting and illiteracy, Hollis v. Davis, 941 F.2d 1471, 1473-75, 1479 (11th Cir. 1991); where state officials have obstructed the petitioner’s attempts to obtain state remedies, Mayberry v. Petsock, 821 F.2d 179 (3d Cir. 1987); where Byzantine state procedural rules put prisoners to an “untenable” choice of forums, Carter v. Estelle, 677 F.2d 427, 450 (5th Cir. 1982), aff’d en banc, 691 F.2d 777 (5th Cir. 1982); or when state remedies were marked by “unjustified” delay, Dixon v. State of Fla., 388 F.2d 424, 426 (5th Cir. 1968).
provisions of the AEDPA. Almost every time it has addressed the AEDPA, the Court has adopted (or approximated) the habeas petitioner’s proposed interpretation.\textsuperscript{356} The Court seems to be saying to habeas petitioners: “We know that this Act could have been a disaster for inmates. We will help to mitigate its most drastic possible effects whenever possible—the habeas remedy should still mean something, after all.”

When it comes to restrictions on the habeas remedy created by the Court itself, though, the Court has held the line. When a panel of the Fourth Circuit endorsed the Coleman exception argument the \textit{en banc} court, anticipating an almost-certain grant of certiorari and reversal by the Supreme Court, quickly ended the game. When the Sixth Circuit, in \textit{Carpenter v. Mohr},\textsuperscript{357} slightly watered down the Court’s procedural default rules by exempting inmates from the requirement that they exhaust any ineffective-assistance-of-counsel arguments they intend to use in federal court to excuse state court procedural defaults, the Supreme Court reversed unanimously.\textsuperscript{358} The Court has had many opportunities, after the enactment of the AEDPA, to revisit Coleman or supply a work-around solution to avoid its harsher implications, but has declined to do so each time.\textsuperscript{359} Torrents of scholarly criticism notwithstanding, the Supreme Court is proud of its “carefully crafted doctrines of waiver and abuse of the writ,”\textsuperscript{360} and shows no desire to scrap them.

Besides simple pride in craftsmanship, there is the fear of opening the proverbial floodgates. The theme sounded by the Ninth Circuit is typical: courts must strictly police the procedural boundaries of the habeas remedy—especially in death penalty cases—lest they inadvertently open a breach in the procedural defenses that can be used by resourceful and ingenious capital defense attorneys (“guerilla warriors”,\textsuperscript{361} in Justice Scalia’s words) to undermine finality.\textsuperscript{362} The Court has repeatedly faced situations in which it endorsed a broad principle in capital litigation, only to discover later that the guerilla warriors were able to tease out logical implications of the principle which threatened to force either (1) an unpalatable number of reversals;\textsuperscript{363} or (2) a level of supervision of state court

\textsuperscript{356} See Liebman, supra note 124, at 2044 (arguing that the “AEDPA in fact has provided a mini-boon to capital prisoners,” because their appointed counsel are able to exploit the Act’s ambiguous drafting, resulting in capital petitioners prevailing in most of the six Supreme Court decisions interpreting the AEDPA since its passage).

\textsuperscript{357} 163 F.3d 938 (6th Cir. 1998).


\textsuperscript{361} Simmons v. South Carolina, 512 U.S. 154, 185 (Scalia, J., dissenting).

\textsuperscript{362} Bonin v. Vasquez, 999 F.2d 425, 430 (9th Cir. 1993) (rejecting a right to effective counsel in post-conviction proceedings).

\textsuperscript{363} See, e.g., McCleskey v. Kemp, 481 U.S. 279, 314-15 (1987) (denying relief to death row inmate who complained of racial discrimination in the application of the death penalty because his claim, “taken to its logical
Indeed, Coleman itself may be read as such a retreat from principle—in a formal sense, its outcome could have been determined by a simple syllogism. All inmates are entitled to the effective assistance of counsel during their first opportunity to raise a claim in state court appellate proceedings. In Virginia, an allegation of ineffective assistance of trial counsel may be raised only in post-conviction proceedings. Therefore, Coleman had the right to the effective assistance of post-conviction counsel as he litigated his ineffective assistance of counsel claim. Even if one accepts the Supreme Court's rationale that Coleman had his "one and only appeal" at the trial-level phase of his state post-conviction appeal, the syllogism still demands recognition of the Coleman exception for the many inmates who had no lawyers—or deficient ones—at that phase. This syllogism, however, was vanquished by an equal and opposite syllogism. Ineffective assistance of counsel can only excuse procedural default when it violates the Sixth Amendment. The Sixth Amendment does not apply to post-conviction proceedings. Therefore, ineffective assistance of counsel in post-conviction proceedings can never constitute cause.

These are two competing syllogisms, each adequately justified by controlling authority and each roughly plausible on its own terms. It is difficult to imagine a better individual instance of indeterminacy in legal doctrine. As the modernists tell us, when a court can muster equally plausible legal arguments on either side of an

conclusion, throws into serious question the principles that underlie our entire criminal justice system"). A recent example of this phenomenon is Simmons v. South Carolina, 512 U.S. 154 (1994), in which a fractured Court held that "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'" Shafer v. South Carolina, 121 S. Ct. 1263, 1266 (2001) (summarizing Simmons' basic holding). Because many capital sentencing juries are not told whether the defendant will ever be subject to release if he is sentenced to life imprisonment rather than death, the Court soon faced the question of whether the jury should be told the meaning of a life sentence when life means an extremely long (but not life-without-parole) sentence, or when a defendant would be virtually certain to receive a life-without-parole sentence were the jury to decide to spare his life, but this outcome was not definitively assured at the time of capital sentencing.

The Court answered both questions "no," over dissents which accused the majority of imposing artificial and unconvinging limits on Simmons' reasoning. See, e.g., Ramdass v. Angelone, 530 U.S. 156, 182 (2000) (decrying "acute unfairness" of majority's holding that sentencing jury need not have been informed that defendant would almost certainly have become parole-ineligible shortly after they sentenced him based on formal entry of judgment of conviction in another case and arguing that "[e]ven the most miserly reading of [Simmons]" required jury to be informed of this fact); Brown v. Texas, 522 U.S. 940, 940 (1997) (Opinion of Stevens, J., joined by Souter, Ginsburg & Breyer, J.J., respecting denial of certiorari) (noting "obvious tension" between "basic holding" of Simmons and Texas rule forbidding juries from being told that capital defendant would have to serve thirty-five calendar years of a life sentence before parole-eligibility). As Justice Scalia noted in his Shafer dissent, the principle announced in Simmons could be "logical[ly] enough" extended to cover many different capital sentencing regimes, an enterprise which he would curtail by "limit[ing] Simmons to its facts." Shafer, 121 S. Ct. at 1275.

issue, policy preferences will dictate the result in such situations, either overtly or covertly. Here, the pro-state syllogism won by one vote. Why? The ostensible rationale, of course, was embodied in the famous first line of Justice O'Connor's opinion: "This is a case about federalism." But what lay behind was a deeper concern about the procedural genies that might be unleashed by a decision in Coleman's favor.

Any court which contemplates weakening Coleman will immediately face problems keeping its reasoning within that case's box. First, as the Bonin court rhetorically asked, where does one draw the line? Second, how does one gauge whether post-conviction counsel has performed deficiently? The cases of incompetence outlined in Part II.D.3 above might seem obvious, but what about the inevitable borderline cases? Current trial and appellate ineffective-assistance standards provide some guideposts, but the duties of a post-conviction attorney differ from each of these roles. Must a post-conviction attorney always reinvestigate the case to some extent? Must he always attack prior counsel's performance, or might it sometimes be wiser to withhold an ineffectiveness challenge to secure the prior attorney's cooperation with, for instance, a Brady challenge? How many other novel issues will applying existing standards in this unfamiliar environment generate?

The prejudice standard and proper remedy also bristle with potential problems. Lower courts have had some difficulty settling on a consistent prejudice standard for ineffective assistance of appellate counsel--some apparently always require proof that appellate counsel failed to plead a "dead-bang winner" claim; others will grant relief when the appellate attorney has performed extremely poorly, even without a showing of prejudice. In the post-conviction arena—where the standards for relief are more demanding, and deciding claims often involves fact-intensive judgment calls—how does a court spot a "dead-bang winner" claim? Further, what is the remedy for ineffective assistance of post-conviction counsel? A new post-conviction proceeding? How can that remedy be reconciled with the strict deadlines and successor bars that currently define post-conviction review? If an inmate cannot file a successive state court post-conviction petition in order to challenge the effectiveness of his previous state habeas lawyer, how is he to satisfy

365. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) 159 (1997) ("[L]egal materials and legal reasoning are sufficiently plastic that they can offer an acceptable post hoc rationalization of whatever result the judge favors, and judges are habitual rationalizers.").

366. A former Supreme Court clerk has written that other clerks mocked this declaration by beginning e-mails with the phrase: "This is an email about federalism." LAZARUS, supra note 316, at 498.

367. Compare, e.g., Banks v. Reynolds, 54 F.3d 1508, 1515 & n. 13 (10th Cir. 1995) (holding that prisoner can demonstrate prejudice stemming from ineffective performance by appellate counsel only if he shows counsel did not brief an obviously meritorious claim which was obvious from the face of the appellate record) with Jenkins v. Coome, 821 F.2d 158, 161 (2d Cir. 1987) (holding that Strickland prejudice requirement does not apply where appellate counsel files a "paltry" and "inexcusably deficient" brief).
the Supreme Court’s requirement\footnote{369. See Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (holding that ineffective assistance of counsel claims which are asserted as cause to excuse procedural defaults must themselves be exhausted in state court proceedings).} that he exhaust all of his ineffectiveness claims in state court? Finally, how broad should the right be? Requiring the effective assistance of post-conviction counsel in all criminal cases would be a stunning departure from the status quo, and would impose large, new, unpopular burdens on the thirty-seven states which currently do not provide appointed post-conviction counsel to inmates who are serving non-capital sentences.\footnote{370. See Appendix A.} Even states which do provide post-conviction counsel to inmates might have to modify their effective-assistance guarantees—if they provide any—to fit the Court’s guidelines.

It is thus difficult to imagine the present Court endorsing any legal theory which would explicitly or effectively create a general right to the effective assistance of post-conviction counsel. Even if the Court did so, it would feel immediate pressure to limit the right. The most plausible distinction between those prisoners who are entitled to effective assistance of post-conviction counsel and those who are not is the capital/non-capital divide, which has at least been recognized in the Court’s “death is different” doctrine. However, the “death is different” doctrine is arguably not up to the task of justifying a limited right to post-conviction counsel. It was never a “general theory of the fundamental prerequisites to a fair and principled death penalty scheme” but rather a rationale invoked ad hoc to resolve problems on a “case-by-case” basis.\footnote{371. Carol S. Steiker \& Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 HARV. L. REV. 355, 398 (1995).} Given that it has been years since the Court last invoked the doctrine to attach an additional procedural safeguard to the death penalty process, and given that it has had several chances to invoke the doctrine to justify a right to post-conviction counsel in capital cases, there is little hope the Court will reverse course.

It should be noted, however, that some of the seemingly formidable policy arguments outlined above are less convincing than they may initially appear. Take, for instance, the Bonin court’s image of an endless post-conviction process, in which new post-conviction counsel takes issue with previous post-conviction counsel’s work \textit{ad infinitum}. The immediate response to this argument is that Alaska, California, Connecticut, Idaho, Iowa, Maryland, New Jersey, Pennsylvania, and Wisconsin have all recognized a right to effective post-conviction counsel without, apparently, watching their criminal justice systems grind to a halt.\footnote{372. See Appendix A. It bears noting that none of these states has based the right on state or federal constitutional guarantees. Thus, the right to “effective assistance of counsel” cannot be directly and easily compared to the ordinary Sixth Amendment right to effective assistance of counsel explained in \textit{Strickland v. Washington}, 466 U.S. 668, 687 (1984). Nevertheless, these states recognize that appointed post-conviction
work of former post-conviction counsel only once, and then only if the inmate can plausibly identify meritorious issues overlooked by previous counsel. Further, a federal court may provide indigent death row inmates a remedy for ineffective post-conviction counsel without imposing any additional burden on the state. All the federal court need do is certify ineffective assistance of post-conviction counsel as a constitutional violation (most likely, of the Fourteenth Amendment guarantee of due process of law), and therefore as sufficient “cause” to excuse a state procedural default caused by counsel’s deficient performance. This approach is even more viable when the state guarantees appointed counsel to all death row inmates and is easiest when the state guarantees competent counsel, thereby arguably creating a Fourteenth Amendment liberty interest in reasonably competent post-conviction representation. Taking this course, a federal court can simply reach the merits of issues defaulted in state post-conviction after a finding that defaults caused by ineffective assistance of state post-conviction counsel do not bar federal review.

There is one problem: the AEDPA-amended federal habeas statutes prevent a federal court from granting relief on a claim that has not been exhausted in state court proceedings. A federal court could evade this bar, however, by declaring that a post-conviction process in which the defendant received incompetent representation was “ineffective” to protect the applicant’s rights. This finding excuses the exhaustion requirement and permits the federal court to address, and grant relief on, unexhausted issues. Granted, the chain of reasoning sketched above is not currently the law, but it could be.

The second argument, one advanced by the Georgia Supreme Court majority in Gibson, is that recognizing a right to effective state post-conviction counsel in capital cases would entail recognition of such a right in all post-conviction cases, thereby inflicting breathtakingly broad new responsibilities on the vast majority of states—thirty-four in all—which do not automatically, upon request, appoint lawyers to represent all indigent inmates from the very beginning of post-conviction proceedings. This argument is completely unpersuasive. First, it encounters the embarrassing counter-example of the many states which guarantee inmates counsel from the beginning of all post-conviction proceedings, counsel must perform effectively, and afford petitioners who demonstrate that they have been poorly served by their lawyers to re-initiate post-conviction proceedings with different counsel. See id.

373. See 28 U.S.C. § 2254(b)(1) & (b)(1)(A) (2001) (providing that the writ of habeas corpus “shall not be granted” unless it appears that the petitioner has exhausted state remedies).


375. See Gibson v. Turpin, 513 S.E.2d 186, 189-90 (Ga. 1999) (maintaining the argument that assistance of counsel is necessary to afford meaningful access to courts to indigent habeas petitioners, especially when the prisoner is mentally deficient and the issues complex, applies equally to non-capital prisoners, and therefore that recognizing a right to the assistance of counsel in capital cases would necessarily entail recognizing an analogous right in the non-capital context).

376. See Appendix A.
apparently without disaster. Second, the law in many death penalty states—including Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington—now entrenches a massive distinction between non-capital and capital post-conviction proceedings: non-capital inmates are either not entitled to post-conviction counsel at all, or become so entitled only after they have jumped through certain hoops, such as filing a pro se petition that raises meritorious claims, or obtaining an evidentiary hearing. Capital inmates in these states, by contrast, are guaranteed (1) representation (sometimes by more than one lawyer) from the very beginning of post-conviction proceedings; (2) counsel who satisfy defined (and occasionally stringent) standards of experience and commitment; and (3) counsel who will be compensated not only for their time, but also often for investigative and expert services. Not only has this hugely disparate treatment never been found to violate any federal or state constitutional guarantee; it has apparently never been seriously challenged.

Simply put, it makes sense to everyone that persons facing execution should get much more elaborate and intense post-conviction review of their sentences than those facing mere prison sentences. This pragmatic argument can, in turn, rebut the suggestion that the “death is different” doctrine has nothing to say concerning post-conviction review. If a substantial number of death penalty states have effectively recognized that “death is different” for post-conviction purposes without eliciting a peep of dissent, the Court would be well-advised to let these states’ experience and practical judgment inform their decision. And the Court could allay concerns that it was imposing significant and unwelcome new burdens on the states by noting that the majority of death penalty states now provide appointed post-conviction counsel to death row inmates, and often even guarantee that the appointed counsel will possess an appropriate level of experience and commitment.

Yet, the Court still appears to be frightened by the bogeymen discussed above. It has been asked repeatedly to provide a remedy for ineffective assistance of post-conviction counsel, but has done nothing. Meanwhile, death row inmates are being executed without any meaningful post-conviction review of their convictions and sentences. Other inmates face the same imminent fate and cannot afford to wait for the Supreme Court.

377. See Appendix A.
378. See Appendix A.
379. See Appendix A (setting out twenty-two states’ standards for experience and training of death penalty post-conviction counsel).


B. Political Workability

If the courts will not step in, reform will have to come from revisions to the habeas statute. This, of course, means that Congress will have to be convinced of the need for reform. In this regard, there are signs of hope. The “full and fair” proposals mentioned above, coupled with the federal courts’ extremely relaxed standards for fullness and fairness, would effectively have destroyed federal habeas review. Their rejection seems to signal a settled current view in the American body politic that federal habeas review—albeit in a limited, streamlined form—is too fundamental to abolish. The AEDPA’s backers, even as they restricted federal review, denied any intent to destroy it. Senator Orrin Hatch, a co-sponsor of the AEDPA, stressed that the Act’s standards, while deferential, would still permit federal courts to “overturn [I] State court positions that clearly contravene Federal law” and would allow “the Federal courts to review State court decisions that improperly apply clearly established federal law.”

President Clinton, in a statement issued when he signed the AEDPA into law, complained that “[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served,” while declaring his confidence that “the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.”

The clamor to abolish or severely restrict the scope of federal review—especially federal review in death penalty cases—appears to have vanished. The situation which prevailed in the late 1970s and early 1980s—when the Supreme Court seemed yearly to hand down new death-penalty opinions requiring the retrial of dozens or hundreds of prisoners—is long over. The number of executions carried out annually in the United States is increasing, and, driven mainly by Texas’ statistics, may soon reach record levels. Although the occasional extremely prolonged appeal or “technical” reversal of a death verdict may provoke a small furor, there does not appear to be any public outcry to abolish federal review in capital cases. Recent revelations of high numbers of innocent prisoners incarcerated on death row, combined with the media focus on Professor

380. See supra Part III.B.
383. See Joseph L. Hoffman, Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence, 78 Tex. L. Rev. 1771, 1782 (2000) (critiquing Supreme Court’s early approach to the constitutional regulation of capital punishment for its focus on refining Eighth Amendment procedures rather than focusing on devising remedies for individual, substantively unwarranted death sentences, which led to “over-reversal, measured in substantive terms, of state death sentences”).
384. See Tracy L. Snell, U.S. Bureau of Justice Statistics, Capital Punishment 1999, at 12 (noting increased rate of executions in U.S. and reporting that ninety-eight executions were performed in 1999, with forty-seven percent of them in Texas).
James Liebman’s study of error rates in capital cases, seem to have tempered the public’s desire to further truncate review. The fact that a Congressional bill with a serious chance of passage would weaken the current procedural default doctrine signals a change in the public mood.385

That being said, there appears to be no significant desire to curtail the procedural and substantive restrictions imposed by the AEDPA and the Supreme Court’s habeas jurisprudence. The public mood seems to be that federal habeas review as it exists today is “just right”—relax restrictions too much, and we risk returning to the days of, in President Clinton’s words, “endless death row appeals”; tighten restrictions too much more, and we express too much confidence in a trial system whose fallibilities have become painfully clear as of late.386 Thus, a return to the Warren Court’s habeas framework seems unlikely.

C. Functional Effectiveness

If death penalty trials were really as fair as they should be (and, to a great extent, as fair as current habeas doctrine assumes them to be), we would not need searching post-conviction review, or perhaps any post-conviction review at all.387 However, they are not this fair, and they do still generate unwarranted convictions and death sentences. Therefore, post-conviction review still plays a meaningful role, at least until state death penalty trials become vastly more reliable. What the public’s representatives want from post-conviction review in capital cases today is what they have always wanted: a system which will quickly identify those death penalty cases which are tainted by serious error, and just as quickly determine that other cases are free from error serious enough to warrant delaying or preventing the inmates’ execution. To achieve this goal, the state should ideally give state death row inmates, shortly after their convictions have become final, a team of experienced and talented lawyers, enough money, and sufficient procedural safeguards to explore thoroughly all potential claims of error. This goal is simple to state, but has been maddeningly difficult to achieve, often because of outmoded approaches to habeas review, as reflected in the Court’s habeas jurisprudence.

Combining and balancing the goals of practical workability and functional coherence generate the following rough outline. First, procedural restrictions should be retained. The states have gotten used to them, and it seems unlikely that they will endorse any scheme that unconditionally gets rid of them. However, any procedural restrictions adopted into the scheme should never—as the procedural

386. See Liebman, supra note 124, at 2139 (arguing that while taxpayers and legislators “are suspicious of proposals to pour still more public resources into the post-trial review process, . . . [they are not] immune to increasing evidence that capital trials are generating inordinate numbers of flawed outcomes and miscarriages of justice that risk, among other serious harms, the ultimate horror of executing the innocent” (footnote omitted)).
387. See supra note 342 (setting out Professor Liebman’s recommendations designed to improve the quality of capital trials).
The default doctrine now sometimes does—completely frustrate a death row inmates’ access to at least one full and fair forum for the adjudication of post-conviction claims. Therefore, procedural restrictions on federal review should be converted from universal rules applicable to all cases and driven by general doctrinal assumptions into case-specific limitations available only when logically justified by reliable state court procedures. Every death row inmate, by common consensus, is entitled to one searching post-conviction review of his case. To the extent—and only to the extent—that the state court has already provided such review, the federal court may decline to conduct one.

Reconceiving procedural restrictions in this way not only justifies them functionally but converts them into incentives. The incentives must be strong—previous proposals which conditioned enforcement of procedural defaults on the provision of competent counsel have not spurred states to adopt reforms. As Professor Liebman observed, there is always a powerful incentive for each side of the debate to “cheat” when proposing reforms to the death penalty process. The history of the AEDPA opt-in provisions confirms this thesis. Thus a coercive all-or-nothing structure is best.

An all-or-nothing structure is also functionally more coherent. There is no point in providing a death row inmate with competent counsel if he has no power to subpoena witnesses to an evidentiary hearing or pursue discovery of state documents. A thorough hearing, in turn, is of little use if the outcome of the case will inevitably be determined by the judge signing the prosecution’s proposed fact-findings verbatim. The entire point of post-conviction review is to provide death row prisoners a forum in which they will not only have a meaningful opportunity to develop and present claims, but also will actually obtain relief from their convictions or sentences if warranted. This aspiration is hardly extravagant or unworkable—in fact, federal habeas proceedings generally fulfill it today.

388. In its comprehensive report on death penalty reform the American Bar Association also recommended making the enforcement of most procedural defaults conditional on states’ providing qualified post-conviction counsel to death row inmates. See Amer. Bar Ass’n, Toward a More Just and Effective System of Review in State Death Penalty Cases 12-13 (1990) [hereinafter Just and Effective] (noting that reform proposal would condition enforcement of the exhaustion requirement, presumption of correctness of state court fact-findings, and enforcement of procedural defaults on the provision of competent counsel in state post-conviction proceedings). The ABA Committee was clearly frustrated with the states’ failure to recognize that appointing competent state post-conviction counsel was the “sensible” choice. See id. at 13 (arguing that states will get “not only better justice, but swifter justice” by appointing “proper counsel”); id. at 7 (arguing that providing competent post-conviction counsel will actually serve states’ interests because lack of such counsel “greatly aggravates and protracts the death penalty review process”). Perhaps because it felt the benefits to the state from appointing competent post-conviction counsel were so clear, the ABA proposal was all “stick” and no “carrot.” The states risked losing procedural finality protections if they did not appoint competent counsel, but would not have gained any advantages over the then-current scheme by so doing. Obviously, neither the states nor Congress was convinced by this reasoning, as the AEDPA took a very different course indeed.

389. Before the AEDPA (and still, to an extent, after), federal district courts routinely held thorough habeas evidentiary hearings and wrote their own opinions granting or denying relief. See Yackle, supra note 11, at 1768-69 (“Under current law, it is when federal courts appoint [good] lawyers to prepare for and conduct federal
Frankly, it should be considered rudimentary due process, and it is an embarrass-
ment that so many state post-conviction systems fall short of it.

Several procedural restrictions already present in habeas doctrine can be
converted into functionally coherent procedural limitations/incentives to state
reform. I will also endorse some procedural restrictions from the habeas proposals
canvased above.

1. Presumptions of Correctness

The AEDPA confers a strong presumption of correctness both on the facts as
found by the state court and on its federal constitutional reasoning. These
presumptions have a role in habeas reform, but not the one conceived by the
AEDPA. They should be available in any case precisely to the extent that the state
court process justified them.

Fact-findings worthy of deference can be produced only by robust proceedings
in which the defendant is represented by qualified, well-compensated counsel, and
is given access to substantial resources to investigate his case and develop any
claims. Reliable adjudications of federal rights can be produced only by judges
who have been presented with all the relevant facts and legal arguments, and who
demonstrate a genuine willingness to weigh competing arguments. Many courts,
interpreting the AEDPA, have already attached a mild conditionality on the
AEDPA’s presumption of correctness by implying that it applies only when it is
obvious from the state court records that the state court adjudicated the inmate’s
claim with reasonable care and in reasonably good faith. It is difficult to
determine whether a state court adjudicated a claim “reasonably” or not if the court
did not explain its rationale, and it is clearly not reasonable to adjudicate a federal

evidentiary hearings that things begin to happen. Events are reconstructed in a way that could never be achieved
on the basis of barren state court records. Cases come alive.”). If, as our current Court assures us, state courts have
the “duty and competence to vindicate rights secured by the Constitution in state criminal proceedings,” the task

390. There are actually two possibly overlapping presumptions of correctness for state court factfindings. One
appears more geared toward evaluating the process by which the state court created the findings, see 28 U.S.C.
§ 2254(d)(2) (1994) (stating that a federal court may not grant relief on a claim which was “adjudicated on the
merits” in a state court proceeding unless the adjudication of the claim “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”), and the
other appears to deal more with individual findings, and contemplates the possibility that the inmate may be able
to challenge them with new evidence in federal proceedings. See § 2254(e)(1) (1994) (providing that state court
factual determinations shall be presumed correct unless “rebut[ted] by clear and convincing” evidence).

391. See Williams 529 U.S. at 410-11 (O’Connor, J.) (explaining that AEDPA insulates state court applications
of federal law from review so long as they are “reasonable,” and cautioning that judgments may be incorrect in the
eyes of a federal judge without being “unreasonable” in the AEDPA’s terms).

392. See Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), rev’d on other grounds, 521 U.S. 320
(1997) (“By posing the question whether the state court’s treatment was ‘unreasonable,’ [the AEDPA] requires
federal courts to take into account the care with which the state court considered the [inmate’s claims] and defer
more fully to state courts which reached ‘a responsible, thoughtful answer reached after a full opportunity to
litigate’”).
claim in a manner that distorts relevant precedent or the facts of the case. My reform proposal takes this implicit condition on "reasonableness," which makes good judicial common-sense, and makes it explicit.

2. The Procedural Quid Pro Quo

The basic framework of this notion appeared in the Court's 1963 decision in Fay v. Noia, which denied a presumption of correctness to any state court fact-finding reached after a hearing inadequate to resolve the issue. The principle was transformed from a stick (we will revisit this issue in federal court if your state court proceeding was unfair) to a carrot in Stone, which promised states an exemption from federal review of Fourth Amendment claims if the state could demonstrate that it had denied the claim after offering the defendant a "full and fair hearing" on its merits. "Prove to us that your state court process was fair," goes the logic of the procedural quid pro quo, "and we will limit or abolish federal review of whatever issue that process decided."

The AEDPA endorsed this notion, albeit in a somewhat puzzling and contradictory way. While abolishing the former habeas statute's enumerated exceptions to the presumption of correctness of state court fact findings, it endorsed the concept of the quid pro quo in the opt-in provisions. Thus, albeit in many different guises and manifestations, the basic concept of a procedural quid pro quo has always been an integral part of habeas jurisprudence. Even Professor Paul Bator, a skeptic when it came to the Warren Court's expansion of habeas jurisdiction, endorsed the notion of federal court scrutiny of state court decision-making.

394. Id.
396. The former version of the habeas statute provided that state court fact-findings were to be presumed correct unless the hearing that gave rise to them was subject to any of eight enumerated deficiencies. For example, the presumption of correctness vanished if the petitioner could prove that "the merits of the factual dispute were not resolved," that the state tribunal "lacked jurisdiction" to hear the case, or that the hearing was not "full, fair and adequate." See 28 U.S.C. § 2254(d)(1), (4) & (6) (1994) (superseded). The AEDPA deleted these exceptions and replaced them with the two generalized presumptions of correctness cited above. There is little legislative history on this precise change. It is possible that Congress simply assumed that the exceptions to the presumption of correctness were settled law, and did not need to be explicitly re-expressed in the new version of the statute. Professor Larry Yackle has argued that they are essentially co-extensive with the guarantee of due process of law. See Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381, 388 (1996) (noting that "[r]ead literally, [the AEDPA] eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard for the process from which it was generated" and observing potential due process problems which would be generated by such a reading). Professor Liebman interprets the new Act's requirement that state court fact-findings be "reasonable" in light of the state court record as creating a regime "not appreciably different" from the one which prevailed under the former, explicit exceptions. See 1 LIEBMAN & HERTZ, supra note 165, § 20.2c, 753-54 n.78.
procedures. A workable solution can be found by following the quid pro quo principle to its logical conclusion. As expressed in the AEDPA, the quid pro quo incentive scheme is compromised and muddled. States get virtually all of the benefits of limited federal review without meeting the opt-in requirements. No matter what sort of post-conviction procedure the state offers its inmates, the procedure is presumed to generate results worthy of a strong presumption of correctness which can be displaced only by a finding of unreasonableness. This strong, unconditional presumption made the incentives to additional reform offered to the states partial and equivocal. As a result, states enacted only partial, equivocal reforms.

Given the shoddy efforts some states have put into opting-in, and their willingness to exploit procedural defaults created by their own decisions to violate guarantees of competent counsel, it is incorrect to presume, as the AEDPA does, that all states care enough about fair post-conviction procedures to provide inmates with the resources necessary to make them genuine, reliable adversarial contests. A death penalty state should be viewed as the proverbial Holmesian “bad man,” and should be given the unambiguous message about the law’s requirements which the bad man needs to regulate his conduct.

Thus, there should be a genuine, strict and clear quid pro quo system in which the intensity and scope of review in federal court is tied to a thorough, practical assessment of the adequacy of review in state court in a particular case rather than an assumption about the “general” nature of state court review. This stringent new procedural quid pro quo would have deep roots in modern habeas jurisprudence.

3. Time Limits

To be politically palatable, any proposed reform will need to impose meaningful time limits on habeas review in capital cases. Once again, this is not a new idea. Rule 9(a) of the Rules Governing Section 2254 cases has always had a flexible time limitation period, the “laches doctrine,” which served as a mild incentive for state inmates to press their claims. Proposals to enhance finality in capital cases by means of a stricter standard have existed for decades.

397. See Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 511 (1963) (citing with approval the fact that “we already have accorded to federal judges a large power to supervise the fairness of the methods by which the state adjudicates claims of federal right”).

398. See, e.g., Lonchar v. Thomas, 517 U.S. 314, 326-27 (1996) (quoting and discussing Rule 9(a) of the Rules governing Section 2254 cases, which provides that a habeas petition may be dismissed because of a “delay in its filing” which prejudices the state); Brecht v. Abrahamson, 507 U.S. 619, 637 (1991) (noting that “laches” doctrine embodied by Rule 9(a) is not particularly strong because it is conditioned on the state showing that its “ability to defend against the claims raised on habeas” has been affected).

399. See, e.g., H.R. 14, 534, 93d Cong., 2d Sess., 120 CONG. REC. 12,562 (1974) (proposal of House Judiciary Chairman Peter Rodino to apply limitations period to litigation in capital cases when states have provided assistance of counsel to inmates); see also AMERICAN BAR ASS’N, JUST AND EFFECTIVE, supra note 388, at 142-43 (tracking Congressional proposals to attach limitations periods to habeas review during the 1980s).
The consensus in favor of time limitations solidified in the late 1980s. The two major post-conviction reform proposals generated in the late 1980s, one produced by a special committee headed by former Supreme Court Justice Lewis Powell and another by a blue-ribbon panel created by the American Bar Association, both endorsed the need for limitations periods. The Powell Committee and the American Bar Association proposals recommended six months and one year, respectively. Currently, the AEDPA imposes a statute of limitations of one year on all federal habeas corpus actions, regardless of the quality of the state court proceedings.

The limitations period should be converted into another incentive for robust review. Once again, the principle is one of practical justification: if the state court post-conviction process were thorough and reliable, it would have generated a substantial factual record and a careful adjudication of an inmate's federal claims. The issues would have been thoroughly explored and well defined in state court. Therefore, an inmate's federal counsel would have little cause to investigate further and would be able to work from a stable, exhaustive, factual background. Under these circumstances, little time would be needed to identify the issues the state court may have decided incorrectly (especially if the standard for federal relief is set high, so that only the most clearly incorrect adjudications would justify federal relief).

On the other hand, thorough federal relitigation will be necessary if the state court proceedings were deficient. For two reasons, there should still be a limitations period in such cases. First, the notion of time limits has become sufficiently entrenched such that a reform proposal that contemplates permitting some capital cases to proceed without time limits is probably politically unworkable. Second, time limits, when employed properly, can have a salutary effect on capital litigation. When federal habeas cases appear to stall in the federal court system, state courts often resort to the only weapon at their disposal to resuscitate proceedings: the execution date. One aspect of habeas reform that both sides of death-penalty litigation approve of is the marked reduction in last-minute execution-
date-driven death penalty litigation.\textsuperscript{404}

V. THE PROPOSED STATUTE

The proposed reform has two components: (1) the "meaningful forum" test; and (2) the Track I/Track II determination.

A. The Meaningful Forum Test

Within one month of the appointment of counsel in federal post-conviction proceedings, the state, for expedited treatment, would be required to file in the federal court a brief document in which it would have the burden of proving, by clear and convincing evidence, that each of the following eight factors had been satisfied in the pending case:

1. If the inmate wished to pursue state post-conviction remedies and was indigent, the state provided for the automatic appointment of two lawyers who satisfied or exceeded the experience and qualifications standards of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases for Post-conviction Attorneys ("ABA Guidelines").\textsuperscript{405}

2. The system under which counsel was appointed complied with ABA Guidelines 6.1 (Workload), 7.1 (Monitoring/Removal), 8.1 (Supporting Services), 9.1 (Training), and 10.1 (Compensation).

3. The state court afforded the petitioner investigative assistance necessary to thoroughly explore all potential issues.

4. The state court afforded the petitioner expert assistance necessary to thoroughly explore all potential issues.

5. The State afforded the petitioner sufficient time – in any event, not less than one full calendar year from the date of appointment of counsel – to prepare and submit the post-conviction application.

6. The state afforded the petitioner discovery of all state records relating to the capital murder conviction and any previous arrests, convictions, or incarceration.

\textsuperscript{404} See, e.g., AMER. BAR ASS'N, JUST AND EFFECTIVE, supra note 388, at 118-19 (noting consensus among judges, defense attorneys and prosecutors that the process of frenzied last-minute litigation before execution dates was "cumbersome," "ludicrous," and "mind-boggling" (footnotes omitted)). There is, of course, still some last-minute litigation before execution dates. Claims of incompetency, for instance, do not become ripe until the inmate's execution is imminent. However, the previous system often forced counsel to litigate an inmate's entire habeas case immediately before his execution. See, e.g., McFarland v. Scott, 512 U.S. 849, 852 & n.1 (1994) (describing cases in which Texas death row inmates had been forced to file skeletal initial habeas petitions in federal court directly before their executions owing to some Texas federal courts' refusal to stay executions or appoint counsel to represent death row inmates before they had filed federal habeas petitions). Due to the existence of time deadlines, which significantly reduce a state's incentive to schedule "artificial" execution dates, most last-minute litigation now occurs, if at all, only after an inmate has received a previous, reasoned adjudication of the primary claims in his case.

\textsuperscript{405} See AMER. BAR ASS'N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 5.1(III), at 9-10 (describing requirements for the assignment of lawyers to post-conviction proceedings representing indigent clients).
tions of the defendant, any co-defendants, and any witnesses and afforded the petitioner's counsel access to trial witnesses sufficient to thoroughly explore all potential issues.

7. If the case involved contested issues of material fact, such issues were resolved by a live hearing at which the petitioner was permitted a reasonable time to prepare—in any event, no fewer than sixty days—and full opportunity to subpoena and examine witnesses and to introduce evidence.

8. In resolving the petitioner's claims, the state courts refrained from all ex parte contact with either party and carefully assessed both parties' claims and arguments. At least one state court must issue an opinion or judgment that reflects a thorough, reasoned, independent judgment of all procedural issues and substantive claims. Under no circumstances may a state court definitively resolve an issue by adopting, either verbatim or without substantive alteration, a proposed finding of fact or conclusion of law submitted by one party.

The petitioner would be entitled to rebut the state's arguments that its procedures were adequate in the given case. If necessary, the court could hold a hearing and hear evidence regarding the state procedures, which is something that is already happening in opt-in litigation.406

B. Track I/Track II Determination

The federal judge would be required to decide whether the state passed the meaningful forum test within two months of submission of the briefing or any subsequent hearing. If the federal district judge finds that the state passed the test, he will not adjudicate any of the claims, but rather will immediately transfer the case to the court of appeals.407 The court of appeals will review any claims of error advanced by the petitioner under the following standards:

1. Factual findings entered by the state court would be entitled to a presumption of correctness rebuttable only by a demonstration that the state court's fact findings were unreasonable in light of the record as a whole;
2. The state court's adjudication of a federal constitutional claim would be presumed correct unless it was "unreasonable"; and
3. The federal appeals court would be obliged to resolve the petitioner's appeal within six months of submission and/or oral argument, if ordered.


407. This component of the scheme is obviously drawn from Professor Steiker's proposal. See Steiker, supra note 277, at 314-15 (proposing that role of federal district court in adjudicating non-record based constitutional claims be limited to determining whether "state court's procedures for adjudicating disputed facts were adequate and whether the state court's factfindings were adequately supported by the record" and proposing that if federal district court found both conditions satisfied, case be immediately transferred to federal appellate court for de novo review).
Track I should be thought of as modifying the AEDPA. Any aspects of the current post-AEDPA habeas scheme which do not conflict with the reform proposal would remain in effect. The current exceptions to the exhaustion requirement would be discarded because the meaningful forum test effectively displaces them. The timing and tolling provisions of the AEDPA would remain in effect, provided that they are reduced to six months and modified so that they do not conflict with the state's limitations rule. A state which could demonstrate that over 80% of its state post-conviction adjudications had qualified for Track I treatment in the previous year would become eligible for federal funding to help defray the expenses of providing a high-quality forum for the adjudication of federal claims.

If the state's post-conviction scheme failed the meaningful forum test, the case would be placed on Track II review, whose basic outlines are as follows:

4. The defendant would have eighteen months in which to prepare and file a federal habeas petition (in order to complete the full investigation and preparation which was denied him in state court);
5. The defendant would be entitled to a federal evidentiary hearing as to a particular claim provided he could show a reasonable probability that the state court proceedings were inadequate to fully and fairly litigate it;
6. The state court's adjudication of facts would be presumed correct unless the petitioner demonstrates a reasonable probability that they are incorrect, and the state court's resolution of legal questions and mixed questions of fact and law would be reviewed de novo; and
7. The prisoner would be entitled to raise unexhausted claims of federal constitutional error, or unexhausted facts in support of such claims provided he could demonstrate that he did not "deliberately bypass" a state forum for developing the facts or presenting the claims.

The background against which Track I should be viewed is the redundant scheme of federal review described by Cover and Aleinikoff (with slightly relaxed presumptions of correctness in order to strengthen the quid pro quo). Existing federal provisions for the appointment of post-conviction counsel will remain in effect under either scheme. Track I review certifies that there was a meaningful, vigorous and sufficient state post-conviction forum. Track II review provides a meaningful, vigorous, and sufficient federal habeas forum. Thus, in either case, the

408. See 28 U.S.C. §§ 2254(b)(1)(B)(i) - (ii) (2001) (excusing exhaustion requirement when petitioner can prove that state court corrective processes were either "absent" or "ineffective to protect the rights of the applicant").

409. The AEDPA provides a one-year limitations period, but does not toll the running of the statute during the preparation of the state post-conviction application. See 28 U.S.C. §2244(d)(1) (2001). This raises the possibility that, in states which permit inmates more than six months in which to file their state applications, the federal deadline would expire while the state writ was being prepared. To prevent this happening, the federal deadline should be modified so that it starts running upon the announcement of the last state court judgment denying relief. This will preserve an incentive for inmates to move their cases from state to federal court without undue delay, while also removing any possibility of inadvertent default of an inmate's claims.
following successor bar would apply:

1. A petitioner who files a second habeas application after an initial federal habeas corpus application, which qualified for Track I status, or who attempts to raise an unexhausted or procedurally defaulted claim or fact in a case which has been ruled eligible for Track I treatment, will not receive review of any such claim unless he can demonstrate by clear and convincing evidence that:
   a. the claim becomes ripe only directly before an inmate’s execution or depends on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or
   b. the factual predicate of the claim could not have been previously discovered through the exercise of due diligence; or
   c. that the facts discovered by the petitioner would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the applicant guilty of the underlying offense or eligible for the death penalty.410

C. Benefits and Potential Criticisms

1. Benefits

The components of the Track I/Track II distinction alter the aspects of federal habeas review that are most clearly tied to a careful and thorough state court adjudication. That is, if a state court has provided good process, a petitioner will need less time to plead his claims, and the results of the state court proceeding will be logically entitled to more deference. This scheme destroys diabolical federalism: inescapable procedural defaults are visited not on all inmates regardless of their ability to comply with state procedural rules, but only on those inmates who actually did have such an ability. The scheme immeasurably strengthens the incentive for states to improve post-conviction procedures by setting out a specific list of standards the states must meet and by conditioning most of the procedural

410. These exceptions are adapted from the restrictions on evidentiary hearings set up by 28 U.S.C. §§ 2254(e)(2)(A)(i)-(ii) (2001). I have made two principal changes. First, I have changed the “and” in the original statute to an “or,” thus making the standard a “cause or innocence” standard. As I argued in Part II.A.1, I believe the requirement that inmates who can demonstrate their innocence must further demonstrate that they have suffered a constitutional violation is structurally incoherent: there simply is no inevitable link between actual innocence and a constitutional violation. Often, there is no link at all and it is therefore inappropriate to force an inmate to prove such a violation before taking steps to remedy his unjust confinement.

This statutory change may obviously force some federal court, down the line, to directly address the question whether the execution of an inmate but who is demonstrably innocent of the crime violates the Constitution. The statute remains agnostic on this point. The Court has recently zealously defended its prerogative to define the substantive scope of federal rights—if that is what is involved in an inmate’s innocence claims. Proclaiming a right of innocents not to be executed might be a poor decision at this point. The statute might provide that inmates who can demonstrate their innocence “shall be released,” but even that might be risky. At this point, I believe that attempts to “overrule” the Herrera decision, even oblique ones, are a bridge too far. Herrera v. Collins, 506 U.S. 390, 398, 411-12 (1993) (rejecting new trial for claim of actual innocence because all judicial avenues had been exhausted by inmate).
advantages the AEDPA now gives to states “for free”—along with other advantages that are not now available under the AEDPA’s opt-in provisions—on the creation of a robust post-conviction forum.

The stark difference between the two schemes is intended to rapidly force states into one camp or the other. States that do not wish to consistently supply all eight factors in habeas cases will realize that there is no point in even trying to do so. Such states might abolish their state capital post-conviction forums entirely, or such states might put little effort into developing them. Given the strict interpretation federal courts have placed on the AEDPA’s comparatively looser opt-in standards, states that desire Track I status will understand that doing so is a stringent undertaking. Thus, there will be an incentive for states to “go overboard” in providing reliable and thorough post-conviction forums.

As a practical matter, a state that wants to qualify for Track II treatment will probably do what some death-penalty states have already done—namely, create centralized, adequately-funded public-defender agencies specializing in capital post-conviction representation. They may also counsel criminal judges to err consistently on the side of providing death row inmates a thorough, robust forum. After these fundamental reforms have taken root, the state can draft a simple form pleading, which the state can file at the beginning of any federal habeas proceeding, in which it can claim Track I status.

The assumption that states will eventually sort into one or the other categories is important. The current capital post-conviction process creates a process of broad, but not deep, review in some states. That is, a prisoner goes through all levels of the state post-conviction system (usually an initial fact-finding proceeding in the trial court followed by review in the state supreme court), then the prisoner goes through all levels of the federal habeas review system (federal district court, the court of appeals, and certiorari review in the United States Supreme Court). However, because of diabolical federalism and other procedural quirks, the mere fact that the process places a prisoner’s case before many different courts and generates a great deal of paperwork does not guarantee that the issues in the case have been thoroughly probed. Federal court litigation often consists primarily of

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411. The Florida Corrections Commission, responding to a request in a bill passed by the Florida Legislature, recently commissioned a study by the Florida State University School of Corrections and Criminal Justice to answer the question “whether the elimination of state post-conviction proceedings in death penalty cases will reduce delays in carrying out a sentence of death in capital cases.” Isabelle Potts & Gretchen Hirt, Report to the Commission on the Administration of Justice in Capital Cases (January 1999), at http://www.fcc.state.fl.us/fcc/reports/fsu/fsuexsum.html (last visited Jan. 19, 2002). The study concluded that the complete elimination of state post-conviction proceedings was neither achievable (because the Florida Supreme Court would likely hold that “the blanket elimination of post-conviction proceedings will probably not be permitted under the Florida constitution”) nor likely to lead to significant reductions in delay in carrying out executions (because the elimination of state post-conviction would shift the responsibility for factual development to the delay-ridden federal court system). Potts & Hirt, supra at http://www.fcc.state.fl.us/fcc/reports/fsu/fsua&c.html (last visited Jan. 19, 2002). Nevertheless, the mere fact that the question was asked indicates that the legislature in a major death-penalty state has begun to question whether state post-conviction proceedings are even worthwhile.
preliminary procedural skirmishes, and it often stops short of carefully assessing an inmate’s claims.412

The scheme seeks to implement a trade-off in that the number of forums that actually consider the inmate’s claims will be reduced such that a state content with extensive Track II federal relitigation will likely see little point in maintaining a state post-conviction forum for death row inmates.413 Also, a Track I state will be assured of truncated, deferential, and time-limited federal review. Thus, a death row inmate’s claims will be guaranteed one searching course of re-investigation and litigation in either state or federal court, but not in both (unless a state elects to maintain a complex, extensive, and expensive state post-conviction forum without going the “extra mile” to formally qualify for Track I treatment, which is a course of action that seems rather pointless). The experience with opt-in litigation indicates that an opt-in scheme will prompt an initial flurry of litigation, but that after the dust clears, states will settle fairly rapidly into groups that clearly qualify and states that clearly do not.

2. Potential Criticisms

a. The Incentive is not Strong Enough to be Enacted

Since this reform scheme would have to be passed by Congress, a state would have to feel that enacting it would serve the state’s interest, which always prominently includes enforcement of death sentences without unnecessary delay. Two questions arise. First, why would a state enact the proposed scheme at all, given that it currently enjoys all of the more potent finality-enhancing benefits of the AEDPA? Second, assuming the state would endorse the scheme with the intent to try to opt-in to Track I review, why would the state not simply try to qualify for the opt-in treatment currently offered by the law? These are close questions, but a state could reasonably feel that this reform would serve its interests better than the present scheme for several reasons.

There is no question that the current state of habeas law gives the states quite a bit. Consequently, they may be quite reluctant to release the bird in the hand for two in the bush. Nevertheless, there is something of a pro-reform mood in the air now. Congress, although showing no desire to scrap most of the AEDPA’s restrictions on review, seems to want to do something about the procedural default problem described in this Article. A proposed reform in the Innocence Protection Act,414 which is currently under consideration by both houses, limits the effect of

412. See, e.g., Hoffstadt, supra note 201 at 960-61 & nn.50-53 (2000) (observing that majority of federal habeas petitions are dismissed on procedural grounds and noting scholarly consensus that habeas procedural rules have grown too complex and cumbersome).

413. See discussion infra Part IV.3.2.a (developing argument further).

the procedural default doctrine by providing that a federal court should not “decline to consider a claim on the ground that the applicant failed to raise such claim in state court at the time and in the manner prescribed by state law” unless, at the stage of the state proceedings when the claim should have been raised, the state provided the applicant with “legal services” whose quality satisfied standards set by the Administrative Office of the United States Courts.\textsuperscript{415} As of this writing, the Act had substantial bipartisan support.\textsuperscript{416} The fact that a bill which limits procedural default—the most formidable review-denying arrow in states’ quivers—has even this much support is revealing. Moreover, many states that have not opted in have still maintained their capital post-conviction appointment statutes on the books without any realistic prospect of cashing in on a quid pro quo. Evidently, these states see some intrinsic benefit to providing counsel (even if not consistently competent counsel) to their death row inmates.

Further, the AEDPA has not actually accomplished its primary objective, which was to reduce the time death row inmates spend waiting on death row.\textsuperscript{417} Although states still obviously enjoy finality benefits from the AEDPA, these benefits do not seem to be practically translating into swifter executions. Of course, the main reason that the AEDPA has not significantly reduced delay is that it is a new and poorly drafted statute that has required almost agonizingly intense interpretation by the judiciary. In the coming years, the combination of time limits in state and federal post-conviction will certainly speed up the review process, making a departure from the current scheme less desirable.

Nevertheless, an argument can be made that the coercive quid pro quo I propose might accomplish a further reduction in delay. The AEDPA attempted to shift a significant portion of the responsibility for adjudicating federal claims to the state post-conviction process; however, it did not quite achieve that goal. Thus, instead of definitively privileging one forum over the other, the AEDPA, as a practical matter, slightly shifted the balance between state and federal courts.

However, a coercive quid pro quo should accomplish a definitive shift into one forum or the other. Even a state with no interest in Track I review might decide to vote for the coercive quid pro quo anyway. By severely limiting (or abolishing) its state post-conviction procedures in capital cases, the state could essentially and legitimately skip one level of the review process entirely. States which are unwilling to provide a robust, meaningful state post-conviction forum to all prisoners on death row should be encouraged to get rid of whatever procedure they have in place. Death row inmates would simply proceed from direct appeal straight to federal court, where they would be given appointed counsel and resources to

\textsuperscript{415} See id. § 202.


\textsuperscript{417} See Liebman, supra note 124, at 2137 n.253 (collecting sources which indicate that AEDPA’s attempt to truncate the federal post-conviction process was “largely unsuccessful”).
investigate and present their claims. The state court would have entered no post-conviction fact findings so the federal court would decide the case on a clean legal and factual slate. The state would save money because the federal court would be responsible for funding the entire post-conviction process. An eighteen-month statute of limitations would apply, which would ensure that things keep moving, and which would eliminate the need for the state to hurry the appeal along by setting execution dates. All levels of the federal court system would review the case under the Track II scheme. This is already the case under the AEDPA (which probably accounts for its failure to considerably streamline federal review).

Although the Track II statute of limitations is six months longer than the AEDPA’s, state post-conviction review in death penalty cases—which a rational state would probably severely truncate or limit altogether under the coercive quid pro quo—invariably takes longer than six months. Therefore, the amount of time between conviction and execution in a Track II state that got rid of state post-conviction would be unlikely to change significantly and it might even decline somewhat. Further, the state would be able to conserve all the considerable court time and expense its current capital post-conviction scheme costs it. Whether this cost savings would be worth permitting intrusive federal review is for each state to decide according to its own priorities.

Track I review offers states leaner federal review than the opt-in provisions. Track I retains the deferential standards of review of the current AEDPA and endorses roughly similar successor bars. However, Track I goes beyond opt-in in several respects. First, and most importantly, Track I review essentially abolishes federal district court review and funnels all federal merits review into the court of appeals setting, which is subject to stringent timing and page limits. Once a state sets up an unquestionably qualifying Track I post-conviction scheme, the amount of preliminary litigation over whether the state qualifies for Track I review will diminish or evaporate. Therefore, federal proceedings will be brisk.

Second, the funding to assist states that implement robust Track I post-conviction review schemes should be generous. Congressional funding incentives tied to state reforms have worked in the past, and there is no reason to assume they will not work now. Indeed, Congress routinely uses the carrot of federal funding to encourage reforms in the states. Notably, Congress has conditioned federal funding on improvements to state criminal justice systems in the Innocence Protection Act. Of course, Congress might not relish spending additional money

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418. See South Dakota v. Dole, 483 U.S. 203, 206 (1987) (noting Congress’ broad power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” (citations omitted)).

419. See S. 2690, H.R. 4167, supra note 414, § 201(a)-(c) (amending Byrne criminal-justice grant program to authorize federal funding to states which have “established and maintains an effective system for providing competent legal services to indigents at every phase of a State criminal prosecution in which a death sentence is sought or has been imposed, up to and including direct appellate review and post-conviction review in State court”).
on post-conviction review in death penalty cases, an outcome that might seem likely under the reform scheme. However, because additional funding would go only to states which had already reduced the costs of federal relitigation, it is not so clear that Congress would end up spending more to assist states than it saved in quicker, more streamlined federal appeals. Nevertheless, the AEDPA confers such lavish benefits on the states that the question "why should we change" will probably be the most cogent objection to the reform scheme proposed here.

b. Some States Might Improve their State post-conviction Schemes and Render more Detailed Judgments, but Maintain an Informal Policy of Consistently Denying Relief to all Inmates, no Matter what the State Court Proceeding Reveals

As argued earlier, there are wide variations in the attitudes of state courts to federal rights now, and there is no longer any justification for believing that all state courts are necessarily more hostile to federal rights than are their federal counterparts. Even so, habeas reform should be premised on a conception of death-penalty states as Holmesian "bad men," calculating just how little they need do to reap the benefits of reform schemes. This is not to say that all states will react this way, but some certainly will. Is not there a risk that these reforms may lead to the worst of all worlds: the appearance of careful and fair review coupled with the practical certainty that relief will be denied each time? This "legitimation effect" is one of the most damaging aspects of the current death penalty review scheme.\footnote{See Steiker \\& Steiker, supra note 371, at 433 (arguing that current state of death penalty regulation, which they argue generates massive litigation while securing minimal additional substantive fairness, "makes actors within the criminal justice system more comfortable with their roles by inducing an exaggerated belief in the essential rationality and fairness of the system" and "makes members of the public at large more comfortable with the use of capital punishment than they would be in the absence of such law").}

The first response to this argument is that even this state of affairs is better than the current one. What we have now in the post-conviction rogue states is many cases in which no meaningful review happens at either phase of the process. Under the current regime, if a deficient state post-conviction counsel mishandles the case and defaults most of the claims, the inmate's only hope will be federal court. Some federal courts have recently become much more cost-conscious about federal habeas appeals, and may, like the federal courts in the Martinez case, deny federal funding to pursue investigation and factual development which, will be procedurally defaulted. Therefore, the inmate will get no chance to thoroughly investigate his claims at all.

Under the proposed scheme, a Track I state would really have to sponsor a full investigation of the case by a qualified attorney. Even if the state court later denies relief when it should have granted it, there will be a thorough record for the federal court to review. Solid claims of fundamental constitutional error will prevail
despite a "bad man" state court's best efforts to distort, deny, or minimize them. Indeed, in many cases granting relief under the AEDPA's stringent "unreasonableness" requirement, there is a thorough and unambiguous factual record pointing towards relief. The coercive quid pro quo improves current practice by ensuring that every state court case will arrive in federal court with a thorough factual record that will at least give the federal habeas attorney a fighting chance to attack the state court judgment, if it is indeed vulnerable to attack.

Further, institutional memory may assist an inmate. A concerned and motivated federal habeas court will naturally develop a healthy distrust of a state court system that repeatedly generates shoddy or intellectually dishonest adjudications. These structural safeguards will not work every time. Doubtless, some state courts will be able to bury meritorious federal claims in legal arguments "just plausible" enough to claim the mantle of reasonableness. But then again, this is already happening in cases in which a federal court finds a state court's resolution of an inmate's federal claims probably incorrect but not "unreasonably" so.421

b. The Reform Scheme Doesn't Eliminate Costly and Pointless Procedural Default Litigation

By now, the argument that complex procedural default rules needlessly protract death penalty appeals while adding little to the reliability of the process is well-nigh irrefutable. Critics of procedural default standards may question their inclusion in the coercive quid pro quo. In the best of all possible worlds, death sentences should receive searching, unfettered scrutiny at both the state and federal levels. Were the political landscape to change significantly enough to recapture the vigorous scope of Warren Court-era habeas review, I would be the first to endorse such a step. Thus, although I reluctantly retain procedural default rules in my proposed reform, I justify that fact at the level of principle and practice.

First, principle will be addressed. The criticism of the Court's contemporary procedural default jurisprudence is often not that it simply limits federal review (since many habeas reformers still recognize some role for procedural default), but that it does so on an unjustified and arbitrary basis. Procedural default rules now roam the landscape like wild beasts, devouring claims without regard to the fact that the reasons for the default are often either trivial or, worse, completely beyond the inmate's control. The coercive quid pro quo harnesses these beasts and puts them to work. Defaults are visited only on those who had the practical ability to avoid them, and serve as incentives to states to strengthen their post-conviction procedures.

421. See, e.g., Neal v. Puckett, 239 F.3d 683, 694, 697 (5th Cir. 2001) (concluding that state court's finding that defendant was not prejudiced by ineffective assistance of counsel at sentencing was "erroneous" but not "unreasonable" within the meaning of the AEDPA). The Fifth Circuit recently granted en banc rehearing in this case. See Neal v. Puckett, No. 99-60511, 2001 WL 1012760 (5th Cir., Sept. 5, 2001).
As a practical matter, the scheme may also, after it gets going, reduce procedural default litigation. In states which unquestionably qualify for Track I status, federal habeas review will settle into a routine. The restrictions on federal review will have enough bite to ensure that, as a practical matter, it will be worth raising only the few issues that could conceivably have a chance under the new standards. The appeals will be comparatively brief, likely less fact-intensive, and easily disposed of. Procedural defaults will also be rarer in Track I states. A great deal of procedural default litigation is triggered by a petitioner’s lawyer’s discovery of facts which became known either during federal post-conviction or after the initial round of appeals. Usually the reason for the delayed discovery of the information is the negligence of the petitioner’s prior lawyers, or the state’s decision to withhold the information. On the other hand, if the appeal occurs in a Track II state, the state will know that fairly thorough federal merits relitigation is almost inevitable, and may not even bother trying to invoke the weak procedural defenses Track II offers.

c. The Reform is not Fundamental Enough

According to Professor Liebman, the capital defense bar's decision to concentrate its resources primarily on representing death row inmates at the post-conviction phases of death penalty proceedings is ill-considered. Such a focus “effectively” places capital defense counsel “in league with [death-penalty] overproducing state trial officials” by “leaving ill prepared and poorly compensated lawyers to hold down the fort (or, more accurately, to be overrun) at trial.” Even when post-conviction lawyers win reversals of convictions, those reversals come so long after the original trial that any tendency they might have to deter wrongdoing by state officials is attenuated. Thus, the trial system remains so practically unregulated that “a prosecutor’s decision to seek and a jury’s decision to impose death says rather little about whether it is substantively deserved.” Professor Liebman critiques those habeas reform proposals which “aim at

422. Under the Track I scheme, an inmate first presents his merits claims to the relevant federal court of appeals. Because courts of appeal enforce briefing timetables and page limitations, an inmate’s counsel will be forced to concentrate her resources on the strongest claims.

423. See, e.g., Amadeo v. Zant, 486 U.S. 214, 221 (1988) (“Where the state’s efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review.”) (quoting Amadeo v. Kemp, 816 F.2d 1502, 1513 (11th Cir. 1987) (Clark, J., dissenting)); Workman v. Bell, 227 F.3d 331, 332-33, 336 (6th Cir. 2000) (evenly-divided en banc court refuses to relax the AEDPA’s restrictions on successive habeas petitions in light of petitioner’s discovery, after first round of federal habeas proceedings, of new evidence, including an X-ray which had not been disclosed to the defense despite a prior request for it); Fierro v. Johnson, 197 F.3d 147, 149 (5th Cir. 1999) (inmate discovered previously-undiscovered police report which significantly strengthened his Fifth Amendment claim only after he had already been denied federal habeas relief three times).

424. Liebman, supra note 124, at 2129.

425. See id. at 2133.

426. Id. at 2136.
treated one or another procedural symptom at either the stern or the stem, without attacking the disease itself (the skewed incentive system) or its principal, substantive symptom (the overproduction of death). The coercive quid pro quo I propose might appear to be just one of those ineffectual reform proposals.

However, the critique does not really hit home, for several reasons. First, Professor Liebman realizes that a massive switch of the capital defense bar’s focus from the post-conviction process to the trial process is impossible, given that it would require capital defense lawyers to “abandon their thousands of current clients who were convicted and sentenced under the preexisting error-plagued regime.” Professor Liebman is obviously not suggesting that death row’s current population be abandoned. Second, Professor Liebman’s proposal draws on a model of capital representation to contrast trial-level representation, which is often unreliable and underfunded, with post-conviction representation, which Professor Liebman generally assumes is handled by wealthy civil law firms or ideologically committed death penalty foes.

Professor Liebman’s assumption is clearly true in the abstract, and is necessary, given the breadth of his critique. However, as this Article has demonstrated, the assumption sometimes does not hold. Inmates are represented at the most vital stage of post-conviction proceedings not by the competent specialists Professor Liebman (usually correctly) assumes, but routinely by the very kinds of underqualified and incompetent lawyers that often cause errors in death penalty trials. When the assumption that post-conviction appeals will be handled by sophisticated and competent lawyers does not hold, a whole host of problems beyond the scope of Professor Liebman’s critique suddenly appear. The coercive quid pro quo is designed to these current, pressing problems, and could be integrated into a scheme whose eventual purpose is to address the deeper, structural problems Professor Liebman addresses.

d. The Reform Places Too Much Trust in the Federal Courts

Partially as a result of the AEDPA, but also probably for temperamental and political reasons, the number of death penalty reversals in the federal courts varies

427. Id.
428. Id.
429. See id. at 2102-06 (characterizing trial-level capital defense lawyers as “chronically under-remunerated; often young and inexperienced, patently unqualified and incompetent, unethical, or bar-disciplined; sometimes drug-impaired, drunken, comatose, psychotic, or senile; very often grossly negligent; and nearly always out-gunned” (footnotes omitted)).
430. See, e.g., id. at 2073 (characterizing anti-death penalty bar as “small and poorly-funded” but “competent and strategic”); id. at 2133 n.246 (contrasting inadequate and underfunded trial-level assistance with post-conviction representation by well-funded law firms that expended “staggering” resources on cases (citation omitted)).
wildly, and in some circuits is quite low.431 There is no question that the various federal circuit courts differ substantially in the rate at which they grant relief in capital cases, and in the compensation and resources they offer to appointed federal habeas counsel. A federal circuit system hostile to the rights of death row petitioners could undermine the coercive quid pro quo in several ways. For instance, certifying a case for Track I review without conscientiously applying the meaningful forum test, or subtly importing a practical standard of deferential review into the purportedly de novo review scheme set up by Track II, or declining to provide inmates with the qualified lawyers and litigation resources they need to make Track II federal review meaningful could undermine the coercive quid pro quo.

This problem is probably insoluble. If an ideologically-driven federal court is bent on defeating the policies that underlie a law, not much can be done about that. However, there are reasons to believe that the problem may not be as serious as first thought. First of all, the meaningful forum test is far more stringent and articulated than a generic “full and fair” test, so it will be difficult for a federal court to dumb it down. Second, the coercive quid pro quo, as noted above, is specifically designed to channel the bulk of the post-conviction process into either a state or federal forum. It stands to reason that state court systems which are truly concerned about enforcing federal constitutional rights will try to opt into Track I review, especially as these states are likely to already have robust post-conviction forums, and therefore might not need to spend many additional resources to achieve Track I status. An example might help to clarify my argument. The United States Court of Appeals for the Fourth Circuit, which hears appeals from Virginia, Maryland, South Carolina, and North Carolina, had “by far” the lowest capital-case reversal rate of any appeals court.432

However, also relevant is the fact that three of the states in the Fourth Circuit—South Carolina, North Carolina, and Maryland—“rank fairly high on both state direct appeal and state post-conviction reversal rates.”433 Professor Liebman suggests that the explanation for this fact may be that some state courts in conservative federal circuits “have increased their level of vigilance to compensate for what they perceive (based, e.g., on past experience and (more probably) on information transmitted by lawyers) to be unusually lax error-detection by the federal courts.”434 It seems reasonable to assume that state courts that have demonstrated a willingness to reverse a significant number of death penalty convictions and sentences would also be most likely to set up robust Track

432. See Liebman, et al., supra note 279, at 75 (emphasis added).
433. Id. at 59.
434. Id. at 75.
I-qualifying post-conviction schemes. If this is the case, then the coercive quid pro quo would generally channel habeas adjudication into appropriately receptive court systems. In any event, there is little evidence that current mechanisms for the appointment of counsel and provision of resources in federal capital habeas actions are beset with widespread problems, especially when compared with review schemes in many states.

VI. CONCLUSION

As the Supreme Court has increasingly abstracted itself from the real-world situations in which its default doctrines operate, it has allowed them to become so drastically uncompromising that they permit states to deprive state death row inmates of any meaningful post-conviction review. Many states have put the doctrines to precisely this use, endangering the informal but widespread understanding that one thorough round of post-conviction review is essential to the fair administration of the death penalty, and creating a risk that an innocent or wrongfully-convicted inmate will be executed because error affecting his conviction and sentence was discovered, if at all, only in federal habeas proceedings.

The era of dialectical federalism is clearly long gone and probably cannot be recaptured. The Burger and Rehnquist Courts' procedural innovations have transformed habeas federalism from a conversation between relative equals into something like an exchange between a powerful prince and a courtier, in which the prince (the state court) dictates the terms of the conversation, and the courtier (the federal court) must think long and hard before disputing the prince's account. It often seems that the only interested parties who believe current habeas procedural law achieves the goals it claims to seek are the members of the Supreme Court who created it.

To remedy this situation, this Article has proposed a functional, pragmatic orientation to habeas reform that devotes careful attention to giving death row inmates the practical tools they need to detect any error present in their cases. Using this model, I have assayed alternate habeas reform proposals and the current landscape of habeas practice and examined them through a functional lens. Finally, I have sketched a model of habeas reform that promises enough limits on review to be palatable to the states while scrapping the procedural restrictions that have the most unjust and illogical effects under present circumstances.

The proposal is far from perfect. Although it draws heavily on the "quid pro quo" reform models that have recently gained prominence in habeas circles, it is still a political compromise, and as such does not have the doctrinal elegance of other reform proposals. However, it does ensure that inmates will have at least one searching, careful, substantive post-conviction review of their convictions and sentences before being executed—something current law emphatically does not guarantee.
APPENDIX A: COMPARATIVE ANALYSIS OF STATE LAWS GOVERNING PROVISION OF COUNSEL IN NON-CAPITAL AND CAPITAL STATE POST-CONViction PROCEEDINGS

Key to Abbreviations:

M: Mandatory. Counsel must be appointed upon request to represent a post-conviction petitioner without regard to the phase of the post-conviction proceedings or the merits of any potential claims. A scheme may impose three conditions and still be considered mandatory: it may require the petitioner to (a) affirmatively request representation; (b) be indigent; and (c) be filing an initial and timely state post-conviction petition, (as opposed to a successor). A scheme may also be considered mandatory, even if state law provides no explicit counsel guarantee, if there is evidence that, in practice, all indigent inmates (or indigent capital inmates) actually receive appointed counsel.

D: Discretionary. A scheme is considered discretionary if it attaches any conditions other than the three permitted above. The most common conditions relate either to the merits of the claims presented (usually requiring pro se petitioner to formulate claims which are then declared potentially meritorious or at least non-frivolous) or to the phase of postconviction proceedings (i.e., making appointment of counsel possible or mandatory only after the petitioner has filed a petition pro se and the judge has determined that a hearing of some sort is required). NOTE: Some schemes designated as discretionary will, in practice, actually require appointment of counsel in most cases.

N: This means either that a state has specifically denied the existence of a right or remedy, or has not addressed the question yet.

EA: This designation means that a state has recognized a right to the effective assistance of post-conviction counsel that appears to be roughly analogous to the standard of effective assistance (EA) required under the Sixth Amendment, and has created a remedy petitioners can use to take advantage of the right. Virtually all states that have recognized a right to the effective assistance of post-conviction counsel have done so on the basis of statutory interpretation rather than on state or federal constitutional grounds.

L: Limited. A state provides some remedy for ineffective performance by postconviction counsel, but that remedy is limited to certain sub-categories of ineffective representation which are substantially less inclusive than a "Sixth Amendment-like" guarantee (such as conflict of interest, complete denial of counsel, denial of counsel that results in fundamentally unfair proceeding that violates due process, etc.). This designation also applies when the status of the right to effective assistance of postconviction counsel is unclear because, for example, a statute apparently guarantees effective performance of postconviction counsel, but the state courts have yet to determine what the guarantee means or what remedy may be available for incompetent performance.
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<td>AL</td>
<td>Y</td>
<td>D / ALA. Code § 15-12-23 (2002) (judge may appoint counsel to indigents in postconviction proceedings if it is &quot;necessary in the opinion of the judge to assert or protect the right of the person&quot;).</td>
<td>N</td>
<td>N</td>
<td>I. / See Gooch v. State, 717 So.2d 50 (Ala. Crim. App. 1997) (permitting defendant to evade bar to successive petitions because his first postconviction petition had been filed by his trial attorney, thus precluding him from litigating present claim of ineffective assistance of counsel against that attorney).</td>
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<td>AK</td>
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<td>M / In Alaska, “[a]n indigent person is entitled to representation . . . for purposes of bringing a timely application for post-conviction relief.” ALASKA STAT. § 18.85.100 (Michie 1998). This statutory right applies only to the first petition. See ALASKA STAT. §18.85.100(c)(1) (Michie 1998).</td>
<td>N/A</td>
<td>N</td>
<td>EA / Grinols v. State, 10 P.3d 600, 618 (Alaska Ct. App. 2000): (holding that Alaska’s statutory guarantee of counsel to inmates necessarily implied a guarantee of competent assistance, and that “a defendant may be entitled to relief if they can later prove that their post-conviction relief attorney’s performance was not competent, and they must be allowed an opportunity to present this claim in a second petition for post-conviction relief”).</td>
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<td>AZ</td>
<td>Y</td>
<td>D / See Ariz. R. Crim. P. 32.5 commentary (West 1998) (counsel “should” be appointed to represent petitioner in all postconviction cases and “shall” be appointed when petitioner alleges ineffectiveness assistance of counsel claim).</td>
<td>M / “Any petition for post-conviction relief filed by a person under sentence of death shall result in the appointment of counsel.” Ariz. R. Crim. P. 32.5 commentary (West 1998).</td>
<td>Y / Ariz. R. Crim. P. 6.8(c). (capital only).</td>
<td>N</td>
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<td>AR</td>
<td>Y</td>
<td>D / Ark. R. Crim. Proc. Rule 37.3(b) (court may appoint counsel to assist with post-conviction hearing at its &quot;discretion&quot; if petition is not conclusively meritless).</td>
<td>M / ARK. CODE 16-91-202(a)(1)(A)(i)(ii) (1987) (&quot;If a capital conviction and sentence are affirmed on direct appeal, the circuit court in which the conviction was obtained shall . . . conduct a written order appointing counsel to represent the petitioner in a post-conviction hearing at its discretion if petition is not conclusively meritless.&quot;)</td>
<td>Y / ARK. CODE 16-91-202 (c)-(e) (1987).</td>
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<td>CA</td>
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<td>M / CAL. GOV'T CODE § 27706 (West 1988) (&quot;Upon request of the defendant or upon order of the court, the public defender shall defend... at all stages of the proceedings.&quot;)</td>
<td>M / See In re Sanders, 21 Cal. 4th 697, 718-19, 87 Cal Rptr.2d 899, 915 (Cal. 1999) (canvassing statutes and court rules guaranteeing appointment of post-conviction counsel to indigent defendants in California capital cases).</td>
<td>Y / Cal. R. Ct. 76.6.</td>
<td>EA / See, e.g., In re Sanders, 21 Cal. 4th 697 (Cal. 1999) (permitting petitioner to reinitiate habeas proceedings after abandonment by appointed postconviction counsel on the basis that statutes providing for appointment of postconviction counsel in capital cases necessarily contemplated that appointed counsel would perform adequately); see also In re Clark, 5 Cal. 4th 750, 780 (Cal. 1993) (&quot;Regardless of whether a constitutional right to counsel exists, a petitioner who is represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims.&quot;). Therefore, if a state habeas attorney failed to provide adequate representation in prior capital habeas proceedings, &quot;that failure may be offered in explanation and justification of the need to file another petition.&quot; Id.</td>
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<td>CO</td>
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<td>D / Colo. R. Crim. Proc 35(c)(3) (requiring judge to refer petitions that are not summarily denied to public defender). The Colorado Supreme Court has recognized a &quot;limited statutory right to counsel in Crim. P. 35 hearing unless [the] public defender concludes issues raised by [the] defendant have no arguable merit.&quot; People v. Breman, 939 P.2d 1348, 1350 (Colo. 1997) (citing People v. Duran, 757 P.2d 1096, 1097 (Colo. Ct. App. 1988)); see also People v. Esquivel-Alaniz, No. 97CA1272, 1999 WL 3895, at *4 (Colo. Ct. App. Jan. 7, 1999) (holding that a statutory right to counsel existed where &quot;the allegations are factually sufficient to warrant a hearing&quot;) (citing People v. Hickey, 914 P.2d 377, 379 (Colo. Ct. App. 1995)).</td>
<td>M / COLO. REV. STAT. 16-12-205(1). (&quot;if the [capital] defendant chooses to pursue postconviction review, the trial court shall enter an order appointing new postconviction counsel for the defendant if the trial court finds that the defendant is indigent and either the defendant requests and accepts such appointment or the trial court finds that the defendant is unable to competently decide whether to accept or reject the appointment.&quot;)</td>
<td>Y / COLO. REV. STAT. 16-12-205(c)-(d) (2002).</td>
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<td>CT</td>
<td>Y</td>
<td>M / [Previous statute covers all criminal cases]</td>
<td>N</td>
<td>N / COLO. REV. STAT. 16-12-205 (f)(5) (2002) (&quot;The ineffectiveness of counsel during postconviction review shall not be a basis for relief.&quot;) (capital cases).</td>
<td>EA / Lozada v. Warden, 613 A.2d 818, 821 (Conn. 1992) (holding that Connecticut's statutory guarantee of postconviction counsel implied a right to effective assistance of appointed counsel); see also Iovieno v. Com'r of Corr., 242 Conn. 689, 699 A.2d 1003, 1010 (Conn. 1997) (remarking that &quot;it would be absurd [for a defendant] to have the right to appointed [postconviction] counsel who is not required to be competent&quot; (quotation omitted)). A petitioner may file a second state post-conviction application challenging the performance of the attorney during his first post-conviction application. Lozada, 613 A.2d at 824.</td>
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<td>HI</td>
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<td>D / See Haw. R. Penal Proc. 40(i) (ordering judge to refer indigent capital post-conviction petitioners to public defender for representation unless petition is “patently frivolous” or without support from the record or other evidence).</td>
<td>N/A</td>
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<td>ID</td>
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<td>D / Until 1993, there was an absolute right to counsel in non-capital, post-conviction proceedings, but this right has now been made discretionary. See Freeman v. State, 963 P.2d 1159, 1161 (Idaho 1998); Follinus v. State, 908 P.2d 590, 595 n.1 (Idaho Ct. App. 1995).</td>
<td>M / Idaho Crim. R. 44.2 (1998) (providing for mandatory appointment of counsel after the sentence of death is pronounced to “seek any post-conviction remedy [sic] . . . that the defendant may choose to seek . . .”).</td>
<td>Y / Idaho Crim. R. 44.3.</td>
<td>EA / See Hernandez v. State, 992 P.2d 789, 794-95 (Idaho Ct. App.) (permitting consideration of otherwise time-barred successive post-conviction application upon a showing that prior post-conviction counsel had performed ineffectively “because failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process” (citation omitted)).</td>
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<td>IL</td>
<td>Y</td>
<td>D / The non-capital convict is automatically entitled to counsel only when the initial petition is not dismissed as frivolous. People v. Porter, 521 N.E.2d 1158, 1159 (Ill. 1988).</td>
<td>M / See 725 ILL. COMP. STAT. ANN. 5/122-2.1 (West 1992) (“[T]he court shall appoint counsel (in all capital cases) if satisfied that the petitioner has no means to procure counsel . . .”).</td>
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<td>IN</td>
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<td>M / See Ind. CODE ANN. § 33-1-7-2(a) (Lexis 1998) (“The state public defender shall represent any [indigent] person confined in any penal facility . . . in any post-conviction proceeding.”).</td>
<td>M / [covered under general rule]</td>
<td>N / None specific to post-conviction. Standards for Appellate Counsel can be found in Ind. R. Crim. Proc. 24(J).</td>
<td>L / There is no general right to effective assistance of counsel in state post-conviction proceedings, but a petitioner may be able to complain of complete denial of counsel. Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989). (court refuses to recognize right to effective assistance of post-conviction counsel, extent of inquiry is whether “counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court.”).</td>
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<td>IA</td>
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<td>M / See IOWA CODE ANN. § 822.5 (West 1994) (&quot;If the applicant [for post-conviction relief] is unable to pay court costs and expenses of legal representation . . . or other legal services or consultation, these costs and expenses shall be made available to the applicant in the preparation of the application . . .&quot;).</td>
<td>N/A</td>
<td>N</td>
<td>EA / See Dunbar v. State, 515 N.W.2d 12, 14-15 (Iowa 1994) (defendant may raise incompetence of post-conviction counsel on appeal from denial of relief in trial court; must demonstrate &quot;specific errors&quot; of counsel).</td>
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<td>KS</td>
<td>Y</td>
<td>D / See KAN. CRIM. PROC. CODE ANN. § 22-4506(b) (West Supp. 1998) (stating that, in non-capital cases, counsel shall be appointed where a petition has colorable claims)</td>
<td>M / See KAN. CRIM. PROC. CODE ANN. § 22-4506(d)(1)(C)(2) (West Supp. 1998) (requiring appointment of counsel to death-sentenced inmates provided that they are indigent and wish to be represented).</td>
<td>Y / KAN. CRIM. PROC. CODE ANN. § 22-4506 (West Supp. 1998) (delegating job of creating standards to state board of indigents' defense services).</td>
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<td>KY</td>
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<td>D / See KY. REV. STAT. ANN. § 31.110 (Michie 1992); &quot;A needy person . . . is entitled . . . [to] be represented in any post-conviction proceeding that the attorney and the needy person considers appropriate.&quot; Id. § 110(2)(C). &quot;However, if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel.&quot; Id.</td>
<td>M / [covered under previous statute]</td>
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<td>LA</td>
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<td>D / LA. CODE CRIM. PROC. art. 930.7(A) (West 2002) (&quot;If the petitioner is indigent and alleges a claim which, if established, would entitle him to relief, the court may appoint counsel.&quot;) Mandatory right to counsel for evidentiary hearings on merits of claims. Id. at (C).</td>
<td>M / LA. REV. STAT. § 15:149-1 (West 2002).</td>
<td>Y / LA. ST. S. C. R. 31(A)(1).</td>
<td>N</td>
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<td>ME</td>
<td>N</td>
<td>M / As long as the petitioner is indigent, he has a statutory right to counsel. See ME. REV. STAT. ANN. tit. 15. § 810 (West 1980 &amp; Supp. 1998).</td>
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<td>M / The statute in Maryland provides that “a petitioner is entitled to the assistance of counsel and a hearing on a petition filed under this section.” Md. R. Crim. Proc. Ann. Art. 7-108(a).</td>
<td>M / [included in general right] See Baker v. Corcoran, 220 F.3d 276, 285 (4th Cir. 2000) (describing Maryland scheme for providing appointed counsel to indigent capital petitioners).</td>
<td>Y / See id. (quoting Md. Rgs. Code tit. 14, § 06.02.05(B)(1) (1986)) (reproducing standards for postconviction counsel in capital cases adopted by the Maryland Office of the Public Defender).</td>
<td>EA / See State v. Flansburg, 694 A.2d 462, 465 (Md. 1997) (holding that statutory grant of counsel to indigent inmate for motion to modify or review sentence required competent counsel because “[r]egardless of the source, the right to counsel means the right to the effective assistance of counsel.” (citations omitted)).</td>
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<td>MA</td>
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<td>D / Mass. R. Crim. P. 30(c)(5) (“The judge in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under [the rule].” The commentary makes it clear that counsel is appointed in all cases, even where the claims made are totally without merit. Id.</td>
<td>N/A</td>
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<td>MI</td>
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<td>D / The court “may” appoint counsel to assist a petitioner seeking postconviction relief, but “must” appoint counsel if it decides that oral argument or an evidentiary hearing is needed. Mich. R. Crim. Proc. 6.505(A).</td>
<td>N/A</td>
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<td>MN</td>
<td>N</td>
<td>D / See MINN. STAT. ANN. § 590.05 (West Supp. 1999) (“A person financially unable to obtain counsel who desires to pursue [a post-conviction remedy] . . . may apply for representation by the state public defender” but public defender may only represent prisoners who have “not already had a direct appeal of [their] conviction”).</td>
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<td>MT</td>
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<td>D / See Mont. Code Ann. § 46-21-201(2) (1997) (requiring appointment of counsel only when court deems hearing necessary); see also State v. Peck, 865 P.2d 304, 306 (Mont. 1993).</td>
<td>M / In capital cases, the court is required to appoint counsel. See Mont. Code Ann. § 46-21-201(3)(b)(i) (1997).</td>
<td>Y / Delegated to Montana Supreme Court. Mont. Code Ann. § 46-21-201(3)(a); Mont. Const. art. VII § 2 (setting out standards adopted by Montana Supreme Court).</td>
<td>L / Mont. Const. art. VII § 2, (Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases), Part IV: “No error or omission in the procedure outlined in the trial or appellate standards shall constitute a ground for relief from a conviction or sentence unless the defendant shows that the standards were not followed in a material way and that counsel’s performance fell so far below the standard of reasonably effective counsel, and was sufficiently prejudicial to the defense of the defendant, as to constitute a denial of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution or Article II, Section 24 of the Montana Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). Pursuant to § 46-21-201(3)(f), MCA, any failure to adhere to the standards for appointment of postconviction counsel may not serve as a basis for a claim for postconviction relief.</td>
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<td>NE</td>
<td>Y</td>
<td>D / See Neb. Rev. Stat. Ann. § 23-3402(1) (Michie 1995) (“Following the sentencing of any indigent defendant represented by him or her, the public defender may take any direct, collateral, or post-conviction appeals to state or federal courts which he or she considers to be meritorious and in the interest of justice ...”); Neb. Rev. Stat. § 29-3004 (Michie 1995).</td>
<td>D / [covered under general statute]</td>
<td>N</td>
<td>L / See id. (“The attorney or attorneys shall be competent and shall provide effective counsel.”). Courts have not yet authoritatively interpreted this statute to guarantee effective assistance of postconviction counsel or to provide a remedy for ineffective assistance of post-conviction counsel.</td>
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<td>NM</td>
<td>Y</td>
<td>D / In all post-conviction cases that are not frivolous the court “shall...appoint local counsel if the prisoner is indigent.” N.M. STAT. ANN. § 31-11-6 (Michie Supp. 1991);</td>
<td>M / “In practice the Appellate Division of the New Mexico State Public Defender represents all capital defendants.” Stafford-Smith &amp; Voisin-Starns, Folly by Fiat, supra, at 111 n.277.</td>
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<td>NM</td>
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<td>D / In all post-conviction cases that are not frivolous the court &quot;shall . . . appoint local counsel if the prisoner is indigent.&quot; N.M. Stat. Ann. § 31-11-6 (Michie Supp. 1991);</td>
<td>M / &quot;In practice the Appellate Division of the New Mexico State Public Defender represents all capital defendants.&quot; Stafford-Smith &amp; Voisin-Starns, Folly by Fiat, supra, at 111 n.277.</td>
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<td>NY</td>
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<td>D / See People v. Richardson, 603 N.Y.S.2d 700, 702-03 (N.Y. Sup. Ct. 1993) (canvassing state and federal law and holding that neither state law nor state or federal constitution mandates appointment of counsel in a non-capital, collateral motion to vacate judgment, but that counsel may be appointed in a &quot;proper&quot; case).</td>
<td>M / See N.Y. Jud. L. § 30:35-b(4)(b) (McKinney Supp. 1999) (establishing statewide Office of the Capital Defender to handle death penalty cases, including capital post-conviction proceedings).</td>
<td>Y / N.Y. Jud. Law 35-b(2).</td>
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<td>NC</td>
<td>Y</td>
<td>D / See N.C. GEN. STAT. § 7A-451 (1997).</td>
<td>M / N.C. GEN. STAT. 4A-751(c) (1997). &quot;In capital cases, there is a new state center that is supported by a grant, and all counsel involved in capital post-conviction are funded at the rate of $85 per hour.&quot; See Stafford-Smith &amp; Voisin-Starns, supra, at 111 n.279.</td>
<td>N</td>
<td>N</td>
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<td>ND</td>
<td>N</td>
<td>D / See N.D. CENT. Code § 29-32.1-05(1) (1991) (&quot;If an applicant requests appointment of counsel and the court is satisfied that the applicant is unable to obtain adequate representation, the court shall appoint counsel to represent the applicant.&quot;). The Supreme Court of North Dakota has read discretion into the statute. See State v. McMorrow, 332 N.W.2d 232, 234 n.2, 237 (N.D. 1983) (holding that although appointment of counsel is discretionary, courts should generally appoint counsel in &quot;most&quot; postconviction cases that present a &quot;substantial issue of fact or law&quot;).</td>
<td>N/A</td>
<td>N</td>
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<td>OH</td>
<td>Y</td>
<td>D / See OHIO REV. CODE ANN. § 120.06(A)(3) &amp; (B) (West 1998) (Although the state public defender &quot;may provide legal representation to any person incarcerated . . . in any manner in which the person asserts the person is unlawfully imprisoned or detained,&quot; the public defender is not required to prosecute post-conviction remedies on behalf of an offender if the defender is &quot;satisfied there is no arguable merit to the proceeding&quot;).</td>
<td>M / OHIO REV. CODE ANN. § 2953.21(1)(1)(West 1998). This section was added post-AEDPA in 1996. See id. (historical and statutory notes).</td>
<td>Y / Ohio St. Super. R. 20.ii</td>
<td>N (Specifically denied) / OHIO REV. CODE ANN. 2953.21(H)(2) (West 1998) (providing that the &quot;ineffectiveness or incompetence of counsel&quot; in state capital post-conviction proceedings cannot constitute &quot;grounds for relief&quot;).</td>
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<td>OK</td>
<td>Y</td>
<td>D / See OKLA. STAT. tit. 22 § 1082 (West Supp. 1999) (counsel shall be appointed &quot;if necessary to provide a fair determination of meritorious claims&quot; presented by petition).</td>
<td>M / See OKLA. STAT. tit. 22, § 1355.6 (West Supp. 1999) (&quot;The Indigent Defense System shall . . . be appointed to perfect appeals and to provide representation in capital post-conviction cases.&quot;).</td>
<td>N</td>
<td>N / See Hatch v. State, 924 P.2d 284, 295 &amp; n.10 (Okla. Crim. App. 1996) (denying Sixth Amendment-based right to effective post-conviction counsel while reserving issue of whether Oklahoma &quot;constitutional or statutory provisions&quot; might form the basis for such a right; overruling as &quot;in error&quot; 1994 case in which court had &quot;reviewed the merits of an effective assistance of post-conviction counsel claim on a subsequent post-conviction application&quot;).</td>
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<td>OR</td>
<td>Y</td>
<td>M / See OR. REV. STAT. § 138.590 (1990) (&quot;In order to proceed as an indigent person, the circuit court shall appoint suitable counsel to represent petitioner.&quot;).</td>
<td>M / [included in general right]</td>
<td>Y Or. R. App. Counsel—Standard 3.1(D) &amp; (J).</td>
<td>N</td>
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<td>PA</td>
<td>Y</td>
<td>M / See Pa. R. Crim. P. 1500 (West 1989) (&quot;The judge shall appoint counsel to represent the indigent defendant on the defendant's first motion for post-conviction collateral relief.&quot;); see also Commonwealth v. Hampton, 718 A.2d 1250, 1252-53 (Pa. Super. Ct. 1998) (quoting Commonwealth v. Kaufman, 592 A.2d 691, 695 (Pa. Super. Ct. 1991)) (&quot;The supreme court has mandated that counsel be appointed in every case in which a defendant has filed a motion for post-conviction collateral review for the first time and is unable to afford counsel.&quot;).</td>
<td>M / [included in general right]</td>
<td>Y / 42 PA. CONS. STAT. ANN. 9572(c) (West 2002).</td>
<td>EA / In Commonwealth v. Provozos, 715 A. 2d 420, 422 (Pa. 1998) the court &quot;recognized that appointed post-conviction counsel must discharge the responsibilities under [Pennsylvania's post-conviction] rule and that a remedy may be fashioned where counsel fails to do so.&quot; If a petitioner meets the rigorous standard of proof that the assistance of his post-conviction counsel was ineffective, his case will be remanded for representation by different counsel. Id.</td>
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<td>RI</td>
<td>N</td>
<td>M / See R.I. GEN. LAWS § 10-9.1-5 (1997) (&quot;An applicant who is indigent shall be entitled to be represented by the public defender.&quot;). The denial of this right is reversible error. See State v. Roberts, 697 A.2d 1074 (R.I. 1997). However, the petitioner is not entitled to court-appointed counsel to prosecute successive post-conviction applications. State v. Louro, 740 A.2d 343 (R.I. 1999).</td>
<td>N/A</td>
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<td>SC</td>
<td>Y</td>
<td>D / In non-capital cases counsel must be appointed where the petition is not dismissed as having no merit. See S.C. R. Crim. Proc. 71.1(d) (requiring appointment of counsel whenever postconviction petition presents &quot;questions of law or fact which will require a hearing&quot;); Whitehead v. State, 426 S.E.2d 315, 317 (S.C. 1992).</td>
<td>M / See S.C. CODE ANN. § 17-27-160 (B) (Law Co-op. Supp. 1998) (“If a defendant has been sentenced to death in South Carolina he must file his application for post-conviction relief. If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner. . . .”).</td>
<td>Y / S.C. CODE ANN. 16-3-26(B) (Law Co-op Supp. 1998). [added post-AEDPA]</td>
<td>I. / The South Carolina Supreme Court has, in extraordinary circumstances, granted consideration of successive applications for post-conviction relief when the prisoner had filed a first petition with no counsel or incompetent counsel. See, e.g., Austin v. State, 409 S.E.2d 395 (S.C. 1991) (recognizing IAC of post-conviction counsel claim when prisoner had expressed desire to seek review of denial of first PCR petition but counsel did not timely comply with request); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987) (a successive application raising the issue of ineffective assistance of trial counsel was permitted where trial counsel had represented the applicant in the first PCR matter); Case v. State, 289 S.E.2d 413 (S.C. 1982) (where applicant’s first PCR application was filed without benefit of counsel and was dismissed without a hearing, his second application warranted a hearing despite its successiveness). However, mere incompetent performance by prior post-conviction counsel does not, by itself, establish cause sufficient to permit consideration of a successive application for post-conviction review. Aice v. State, 409 S.E.2d 392, 394 (S.C. 1991).</td>
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<td>SD</td>
<td>Y</td>
<td>D / Appointment of counsel is mandatory once the prisoner files a &quot;good faith&quot; petition. See S.D. CODIFIED LAWS § 21-27-4 (Michie 1987) (“If a person . . . imprisoned . . . and if upon application made in good faith . . . for a writ of habeas corpus . . . the court or judge shall appoint counsel for the indigent. . . .”).</td>
<td>D / [no specific provisions for capital cases]</td>
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<td>VT</td>
<td>N</td>
<td>M / The law provides the right of the indigent accused &quot;[t]o be represented in any other post-conviction proceeding that the attorney or the needy person considers appropriate.&quot; Vt. Stat. Ann. tit. 13, § 5233(a)(3) (1998).</td>
<td>N/A</td>
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<td>VA</td>
<td>Y</td>
<td>D / The habeas corpus statute contains no provision for the appointment of counsel in non-capital habeas proceedings. See VA. CODE ANN. § 8.01-654 (Michie 1995). However, the Virginia Supreme Court has recognized a right to appointed counsel when the complexity of the issues raised make it necessary. See generally Darnell v. Peyton, 160 S.E.2d 749, 751 (Va. 1968).</td>
<td>M / See VA. CODE ANN. § 19.2-163.7 (Michie 1995) (&quot;In any case in which an indigent defendant [death sentence is affirmed on appeal] . . . the court shall . . . appoint counsel . . . to represent an indigent prisoner under sentence of death in a state habeas proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.&quot;).</td>
<td>Y / VA. CODE ANN. § 19.2-163.8 (Michie 1995).</td>
<td>N / Specifically denied by statute: &quot;The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.&quot; VA. CODE ANN. § 19.2-163.8(D) (Michie 1995).</td>
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<td>WA</td>
<td>Y</td>
<td>D / WASH. REV. CODE § 10.73.150(4) (2002) (counsel &quot;shall&quot; be provided to noncapital prisoners wishing to collaterally attack their convictions provided their challenge has been deemed nonfrivolous by chief judge); but see Wash. Super. Ct. Crim. R. 3.1(B)(2) (appearing to establish unqualified right to counsel in all cases): &quot;A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review . . .&quot;).</td>
<td>M / WASH. REV. CODE § 10.73.15(4) (2002).</td>
<td>N</td>
<td>N</td>
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<td>WV</td>
<td>N</td>
<td>D / In West Virginia, the trial court may dismiss a petition without a hearing or the appointment of counsel if the court finds it to be without merit. However, if the petition &quot;is not frivolous, the court shall . . . appoint counsel for the petitioner.&quot; Perdue v. Coiner, 194 S.E.2d 657, 659 (W. Va. 1973) (quoting W. VA. CODE § 53-4A-4(a) (1994)).</td>
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<td>WI</td>
<td>N</td>
<td>D / WIS. STAT. § 974.06(3)(b) (2002) (petitioner may be referred to public defender for appointment of counsel if appears petitioner is not “conclusively” barred from relief and if it appears “necessary” that he be represented).</td>
<td>N/A</td>
<td>N</td>
<td>EA / In Rothering v. McCaughry, 556 N.W.2d 136, 137-38 (Wis. Ct. App. 1996), review denied, 560 N.W.2d 277 (Wis. 1997), the court found that a petitioner who had received ineffective assistance of postconviction counsel could raise that issue with the trial court.</td>
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<td>WY</td>
<td>Y</td>
<td>N / See WYO. STAT. ANN. § 7-14-104(c) (Michie 1997). (“An indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel.”).</td>
<td>N / There is only one person on Wyoming’s death row, and that person is represented by volunteer counsel. Stafford-Smith &amp; Voisin-Starns, supra, at 113 &amp; nn. 294-95.</td>
<td>N</td>
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Notes: Some of the information contained in this chart was adapted from the article by Clive A. Stafford-Smith and Rémy Voisin-Starns which is cited above. The author would also like to thank Judy Gallant of the American Bar Association’s Death Penalty Representation Project. For information about specific states, the author would like to thank Jeffrey Gamso (Ohio), Judith Borman (New Jersey), Robert E. Lee, Michele Brace and Gerald Zerkin (Virginia), Ken Rose (North Carolina), Margaret O’Donnell (Kentucky), Paul Morrow (Tennessee), Monica Foster (Indiana), Roy Greenwood (Texas), Michael Millman, Wendy Peoples and Linda Robertson (California), Nick Trenticosta (Louisiana), Jeff Rosenzweig (Arkansas), Janie Allen (Oklahoma), Teresa Norris (South Carolina), Elizabeth Carlyle (Missouri), and Terri Marroquin (Mississippi).