The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel

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ARTICLES

THE RIGHT TO EFFECTIVE ASSISTANCE OF CAPITAL POSTCONVICTION COUNSEL: CONSTITUTIONAL IMPLICATIONS OF STATUTORY GRANTS OF CAPITAL COUNSEL

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INTRODUCTION

The need for reform in the delivery of counsel to indigent capital inmates in the United States should not surprise even the most inattentive death penalty observer. Reports continuously surface chronicling problematic performances by capital defense counsel.1 Far too frequently,

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1. See, e.g., JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at ii (2000), available at http://www.justicepolicy.net/jpreport/index.html (describing a study revealing that one of “[t]he most common errors” requiring reversal during capital state postconviction review was “egregiously incompetent defense lawyers who didn’t even look for—and demonstrably missed—important evidence that the defendant was innocent or did not deserve to die”); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1862 (1994) [hereinafter Bright, Counsel for the Poor] (chronicling the deplorable state of trial and appellate counsel); Stephen B. Bright, Death Penalty Moratorium: Fairness, Integrity at Stake, Speaking Out in Favor of the ABA’s Position, 13 CRIM. JUST. 28, 30 (1998) [hereinafter Bright, Moratorium] (discussing a study of homicide cases in Philadelphia that revealed a level of incompetence among counsel “so bad that ‘even officials in charge of the system say they wouldn’t want to be represented in traffic court by some of the people appointed to defend poor people accused of murder’” (quoting Frederick N. Tulsky, Big-Time Trials, Small Time Defenses, PHILA. INQUIRER, Sept. 14, 1992, at A1)); Dirk Johnson, Lawyers Fail Clients in Murder Cases, Legal Experts Say, CLEVELAND PLAIN DEALER, Feb. 5, 2000, at 7A (discussing the “common thread” of “poorly financed, often incompetent defense lawyers who failed to uncover and present key evidence” underlying the cases of the thirteen innocent men freed from death row in Illinois); Steve Mills et al., Flawed Trials Lead to Death Chamber, Ctt. TRIB., June 11, 2000, at A1 (discussing an investigation of 131 executions in Texas under then-Governor George W. Bush that revealed, inter alia, forty-three cases in which defense counsel had been sanctioned for misconduct at some point during career, and forty cases in which defense counsel put on either no evidence or only one witness during sentencing phase); Lise Olsen, Uncertain Justice, SEATTLE POST-INTELLIGENCER, Aug. 6, 2001, at A1, available at http://seattlepi.nwsource.com/local/33820_defense06.shtml (reporting that approximately one-fifth of the inmates on death row in Washington have
appointed trial counsel lack the training or funds (or both) necessary to adequately represent capital defendants. Even more disturbing is the recent spate of cases in which capital defense counsel used the trial to catch up on some sleep. Such inadequate performances undermine the reliability of the adversary process, and heighten the risk that defendants will be convicted and sentenced to death despite innocence of the underlying crime or legal ineligibility for the death penalty.

These problems with capital trial counsel, along with the unthinkably large number of innocent prisoners exonerated and released from death row (107 since 1973, twenty-five of whom were exonerated from 1999-2002), underscore the need for the effective assistance of counsel during

been represented by attorneys who, either before or after representing these inmates, were disbarred, suspended, or arrested.

2. Bright, Counsel for the Poor, supra note 1, at 1843–44. It is not surprising, therefore, that defense lawyers often fail to conduct necessary background investigations, resulting in a failure to discover and present critical evidence about the crime or important mitigating evidence about the particular defendant. One striking example is that of capital defense lawyers failing to uncover and present evidence of their clients’ mental retardation, once a critical mitigating factor in capital cases. See Denis W. Keyes et al., Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 529 (1998) (“Recent research suggests that defense lawyers did not raise the issue of their defendants’ mental retardation as a mitigating factor in nearly one-third of the capital cases where the evidence was relevant.”). It is now unconstitutional to execute the mentally retarded. Atkins v. Virginia, 122 S. Ct. 2242, 2244 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)).


4. See James S. Liebman, Opting for Real Death Penalty Reform, 63 OHIO ST. L.J. 315, 323 (2002) (noting that the reliability of capital trials is undermined, at least in part, because “capital defense all too often falls to the worst lawyers the bar has to offer—frequently lawyers who can find no other work—while placing the highest demands on them” (footnote omitted)).

state and federal capital postconviction proceedings. During these proceedings (commonly called “collateral proceedings”) counsel assists the defendant by investigating, discovering, presenting, and preserving all relevant claims of constitutional error. With a few narrow exceptions, all postconviction claims (which at a minimum are those that could not have been raised on direct appeal) must be raised and considered on the merits during state postconviction proceedings in order to be reviewed during any subsequent federal habeas proceedings. Similarly, failure to raise all federal claims properly at the federal level results in a loss of these claims. Losing the opportunity for federal habeas review is significant, as a recent study reveals a forty percent reversal rate on federal habeas.

Despite the important role of postconviction counsel, the United States Supreme Court has held that criminal defendants seeking state postconviction relief possess no constitutional right to counsel. Although the Court has not directly addressed whether the Constitution requires counsel on federal habeas review, the Court’s reasoning in the state postconviction cases suggests the same rule would apply in the

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6. This Article uses the terms postconviction and habeas interchangeably.
7. These proceedings generally follow on the heels of direct review, allowing the defendant to continue to pursue relief from an unlawful conviction. Although most states separate direct and postconviction review, some states utilize what is called a “unitary” procedure whereby defendants pursue direct and collateral review simultaneously. See, e.g., 28 U.S.C. § 2265 (2000); COLO. REV. STAT. ANN. § 16-12-201 to -206 (West 1998); COLO. R. CRIM. P. 32.2(c)(1). References in this Article to state postconviction remedies relate to the traditional state postconviction remedies that exist separate from direct review.
8. In a recently released report on capital postconviction litigation in Texas, the Texas Defender Service, a non-profit organization dedicated to improving the quality of representation for capital defendants in Texas, stressed not only the importance of state habeas proceedings, but also the importance of competent counsel in such proceedings: “Because the initial state habeas corpus proceeding is the most crucial stage of the appellate process, it is imperative that state habeas counsel provides competent representation.” TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS 12 (Dec. 2002), available at http://www.texa$defender.org/publications.htm.
10. 28 U.S.C. § 2244(b)(2) (2000) (precluding “second or successive” petition except in narrow circumstances); id. § 2262(c) (same).
11. LIEBMAN ET AL., supra note 1, at 6 (reporting that forty percent of 599 first federal habeas petitions filed between 1973 and 1995 were granted).
federal postconviction context as well. As a result, the existence of any right to counsel in postconviction proceedings depends entirely on the federal and state legislatures.

Congress understood the need for a legislative solution. In the Anti-Drug Abuse Act of 1988, Congress provided a mandatory federal statutory right to counsel for indigent capital defendants seeking federal habeas corpus review. And in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress provided streamlined federal habeas procedures to those states that maintain mechanisms for the

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13. See Giarratano, 492 U.S. at 11 (Rehnquist, C.J., plurality opinion) (noting that case law extends right to counsel only as far as direct appeal and that “direct appeal is the primary avenue for review of capital cases as well as other sentences”); Finley, 481 U.S. at 555–57 (asserting that “[o]ur cases establish that the right to appointed counsel extends to the first appeal of right, and no further,” and distinguishing collateral review in general from direct appeal); Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 12.4, at 628 n.2 (4th ed. 2001) (noting the suggestion of the Giarratano plurality that counsel is not constitutionally required on federal habeas); Randall Coyne & Lyn Entzeroth, Report Regarding the Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions, 4 Geo. J. Fighting Poverty 3, 21 (1996) (“In all likelihood, the Court would draw upon Moffitt, Finley, and Giarratano and hold that no such constitutional right exists [on federal habeas].

A salient difference between federal and state postconviction proceedings, however, might provide a basis for requiring counsel in the federal habeas context, even though it is not required in the state context. Unlike state postconviction remedies, which are not constitutionally required, see McKane v. Durston, 153 U.S. 684, 686–87 (1894), federal habeas proceedings (of some sort) are required by the Constitution except in “Cases of Rebellion or Invasion.” U.S. Const. art. I, § 9, cl. 2; see Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas for State Prisoners?, 92 Mich. L. Rev. 862, 875 (1994) (interpreting Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), to adopt an “obligation” theory of federal habeas). Moreover, as the Court has recognized, the Great Writ of Habeas Corpus is designed as “a bulwark against convictions that violate ‘fundamental fairness.’” Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting Sykes, 433 U.S. at 97 (Stevens, J., concurring)).

Despite the possible distinction between federal and state postconviction proceedings, this Article proceeds on the assumption that the Supreme Court would apply the same rule in both contexts. The Court’s general and consistent reluctance to acknowledge a right to counsel beyond the direct appeal, its emphasis on direct appeal as the “primary avenue for review,” Giarratano, 492 U.S. at 9 (Rehnquist, C.J., plurality opinion), and its description of habeas relief as a civil remedy “even further removed from the criminal trial than . . . discretionary review,” Finley, 481 U.S. at 556–57, all provide strong evidence that the Court will one day rule that counsel is not constitutionally mandated during federal habeas review.

mandatory appointment and compensation of competent counsel during state postconviction proceedings.\textsuperscript{13}

The states have been even more active. In the last six years, as many as twenty of the thirty-eight death penalty states have addressed issues relating to postconviction counsel.\textsuperscript{16} Ten such states amended their rules to provide a mandatory right to counsel for capital defendants at the state postconviction stage, elevating to thirty-two the total number of death states providing a mandatory right to counsel for capital defendants at this stage.\textsuperscript{17}

Unfortunately, providing a right to counsel solves only part of the problem. For even if the government provides postconviction counsel as a matter of statutory grace, defendants are not entitled to the effective assistance of that counsel, thanks to the Supreme Court’s decision in \textit{Wainwright v. Torna}.\textsuperscript{18} There, the Court held that the constitutional right to effective assistance attaches only to constitutional rights to counsel.\textsuperscript{19} Making matters worse, under \textit{Coleman v. Thompson}\textsuperscript{20} only constitutionally ineffective counsel constitutes cause sufficient to excuse a procedural default.\textsuperscript{21} As a consequence, criminal defendants who receive postconviction counsel are forced to shoulder the burden of all errors made by their lawyers.\textsuperscript{22} This state of affairs is particularly troublesome

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\item \textsuperscript{15} 28 U.S.C. §§ 2261–2266 (2000).
\item \textsuperscript{16} See \textit{infra} notes 186–87 and accompanying text.
\item \textsuperscript{17} See \textit{infra} notes 187–88 and accompanying text.
\item \textsuperscript{18} 455 U.S. 586 (1982).
\item \textsuperscript{19} \textit{Id.} at 587–88.
\item \textsuperscript{20} 501 U.S. 722.
\item \textsuperscript{21} \textit{Id.} at 755.
\item \textsuperscript{22} In states where there is either no right to counsel or merely a discretionary right to counsel, many state postconviction petitioners end up proceeding \textit{pro se}. See Crystal Nix Hines, \textit{Lack of Lawyers Hinders Appeals in Capital Cases}, \textit{N.Y. Times}, July 5, 2001, at A1, available at http://deathpenaltyinfo.org/NYTimes-LackLawyers.html (reporting that approximately twenty-two percent of death row inmates in Alabama lack counsel for state collateral review and that approximately nineteen percent of capital inmates in Louisiana lack counsel for collateral review); see also Bright, \textit{Moratorium, supra} note 1 at 29 (noting that “[a]t the postconviction stages of review, many condemned inmates face death without a lawyer”); Victor E. Flango & Patricia McKenna, \textit{Federal Habeas Corpus Review of State Court Convictions}, 31 \textit{Cal. W. L. Rev.} 237, 244 (1995) (reporting that approximately seventy-five percent of petitioners were unrepresented during state postconviction proceedings); Ira P. Robbins, \textit{Toward a More Just and Effective System of Review in State Death Penalty Cases}, 40 \textit{Am. U. L. Rev.} 1, 16 (1990) [hereinafter \textit{ABA Recommendations}] (noting that “the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings”). Proceeding \textit{pro se} usually is no more helpful to the prisoner’s cause than being assisted by an ill-performing lawyer. \textit{Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Judicial Conf. of the U.S., Report on Habeas Corpus in Capital Cases, reprinted in 45 Crim. L. Rep. (BNA) 3239, 3240 (Sept. 27, 1989)} [hereinafter \textit{Powell Committee Report}] (“Prisoners acting \textit{pro se} rarely present promptly or properly exhaust their constitutional challenges in the state forum[,] which results in delayed or ineffective
for capital inmates, whose lives hang in the balance while statutorily appointed counsel navigate the complex maze of postconviction relief. Congress might have ameliorated the impact of *Torna* and *Coleman* by making ineffective assistance of postconviction counsel a violation of federal law cognizable on federal habeas review, and by allowing such ineffectiveness to serve as cause sufficient to excuse a procedural default. Instead Congress chose to codify the status quo. The AEDPA expressly prohibits defendants from challenging the effectiveness of state and federal habeas counsel during federal habeas corpus review. So even though many indigent capital defendants will receive counsel in state postconviction proceedings, and all indigent capital defendants will receive counsel in federal proceedings, all will continue to suffer the consequences of mistakes made by incompetent counsel.

This Article argues that it is time to look (again) to the courts and constitutional doctrine for a solution, and it does so by challenging the constitutional soundness of *Torna*. Specifically, this Article addresses whether, and the extent to which, the government’s decision to provide capital postconviction counsel triggers a constitutional obligation to provide *effective assistance of counsel*. This is an important inquiry, for while a good amount of scholarly attention has focused on proving the existence of a constitutional right to postconviction counsel or the basic federal collateral procedures.

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25. Many of the arguments expressed in this Article could apply equally to capital and non-capital defendants seeking postconviction review. Indeed, the problems of innocence and inadequate representation are not uniquely experienced by capital defendants. Moreover, though they are not on death row, many non-capital defendants serve significant sentences—including life without parole—underscoring the need for quality postconviction counsel. Nevertheless, for two reasons, this Article focuses solely on the right to effective assistance of statutory postconviction counsel for capital defendants. First, the nature of capital punishment—irrevocable once carried out—separates it from all other penalties and requires unique focus. Second, the legislative activity occurring since the late 1980s has predominantly focused on the right to counsel for capital defendants, not all defendants seeking postconviction review.

need for quality postconviction counsel, less attention has focused on the constitutional impact of a voluntary decision to provide counsel.

Part I of this Article discusses the relevant constitutional and legislative background. It begins with a look at the Supreme Court’s right to counsel decisions (from trial through postconviction proceedings), proceeds to an examination of the Anti-Drug Abuse Act of 1988 and the AEDPA, and ends with a brief overview of state postconviction counsel provisions. Because the AEDPA is the central piece of recent legislation in the area of capital postconviction counsel, and because it contains not only the provisions prohibiting ineffectiveness challenges but also the many complex procedural and substantive changes to federal habeas corpus practice (which inevitably impact the job of state and federal postconviction counsel), Part I dedicates the bulk of the discussion to the AEDPA.

Accepting for purposes of argument the rule that defendants have no constitutional right to counsel during state or federal postconviction proceedings, Part II explores the next logical question: What constitutional requirements exist when the government voluntarily decides to provide counsel? Relying on a series of Supreme Court decisions, Part II argues that the Court has interpreted the Due Process Clause to contain a meaningfulness requirement, which in essence means that when the government creates a right designed to protect or enhance the reliability of the criminal trial or the individual liberty of criminal defendants, the voluntarily-created statutory right must be meaningful; it must be more than a “futile gesture.” As Part II explains, a meaningful right is shaped by the purpose of the specific right and, in certain contexts, by relevant governmental sovereignty interests.

Torna’s fatal mistake was its complete failure to apply the meaningfulness requirement. Picking up where Torna left off, Part II demonstrates that, like any right to counsel, a meaningful right to


postconviction counsel must include the right to the effective assistance of counsel. It also explains that, even in the postconviction context, the right to effective assistance means actual competent assistance, not merely pre-performance certification of competence.

Part II then explores a more difficult question—the extent of the effective assistance guarantee in the postconviction context. Specifically, it analyzes whether the meaningfulness requirement covers counsel’s entire performance, requiring a post-performance opportunity to challenge counsel’s performance, or whether the meaningfulness requirement covers only a part of counsel’s performance, requiring only compliance with pre-fabricated (but rigorous) competency standards and completion of a mandatory review of counsel’s conduct during the actual postconviction proceeding. From the capital defendant’s perspective, the meaningfulness requirement should extend to counsel’s entire performance through post-performance reviews. But doctrinal realities control, and because of the postconviction context, the meaningfulness requirement balances the government’s interests in its criminal process against the defendant’s interests in competent assistance. Since mandatory post-performance reviews could seriously aggravate delay and finality concerns, the meaningfulness requirement likely would not extend to counsel’s entire performance, and hence would not require post-performance challenges.

But all is not lost, for as Part II explains, the meaningfulness requirement may be employed to regulate at least that part of counsel’s performance that can be controlled through rigorous competency standards and mandatory during-performance reviews. Though not a perfect solution for either the government or the capital defendant, the combination of competency standards and during-performance reviews represents a good balance of competing interests. Rigorous competency standards impose some burden on the government in terms of resource utilization, but ultimately help to reduce delay by increasing the likelihood of competent performance and, as a consequence, the efficient use of postconviction remedies. And mandatory during-performance reviews, while creating the possibility of delay, are less burdensome than post-performance reviews because the review—and any necessary corrective action—takes place during the actual postconviction proceeding itself.

From the defendant’s viewpoint, compliance with rigorous competency standards and completion of a mandatory during-performance review provide some protection for the right to effective assistance, making it possible to remedy at least obvious failures on counsel’s part before irreparable damage occurs. While capital defendants will continue to carry the burden of attorney error on federal habeas, the combination of rigorous competency standards and mandatory
during-performance reviews should ease this burden by reducing the likelihood of ineffective assistance.

I. THE RIGHT TO COUNSEL

A. Constitutional Protection

Criminal defendants enjoy a Sixth Amendment right to counsel at trial.\(^{30}\) While this right initially applied only to trials in federal court, in \textit{Gideon v. Wainwright}, the Supreme Court extended its reach to state court trials, reasoning that the right to counsel was fundamental and therefore incorporated into the Due Process Clause of the Fourteenth Amendment.\(^{32}\) In the Court’s view, the right to counsel “insure[s] fundamental human rights of life and liberty.”\(^{33}\) Without counsel, even an “intelligent and educated layman” would be unable to defend himself adequately, for he “lacks both the skill and knowledge . . . to prepare his defense, even though he [may] have a perfect one.”\(^{34}\)

Criminal defendants also enjoy a constitutional right to counsel during direct appeals as of right.\(^{35}\) This right to counsel is grounded not in the Sixth Amendment, but in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\(^{36}\) While a state is not obligated to provide a direct appeal procedure,\(^{37}\) should a state choose to provide a direct appeal as of right, it must also provide counsel for indigent defendants who invoke that right.\(^{38}\) In \textit{Douglas v. California}, the Court reasoned that failure to provide counsel on direct appeal as of right would constitute “discrimination against the indigent[,] [f]or there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’”\(^{39}\) The Court also relied on due process concerns and the nature of the direct appeal process, concluding that it “does not comport with fair procedure”\(^{40}\) to force an indigent defendant to

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\item U.S. Const. amend. VI; see also \textit{Gideon v. Wainwright}, 372 U.S. 335, 339–41 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942), and holding Sixth Amendment applicable against states through Fourteenth Amendment).
\item 372 U.S. 335.
\item \textit{Id.} at 342–45.
\item \textit{Id.} at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).
\item \textit{Id.} at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).
\item See \textit{id.} at 357–58 (discussing both “fair procedure” and equality concerns); see also \textit{Evitts}, 469 U.S. at 405 (recognizing due process underpinnings in case law); \textit{Ross v. Moffitt}, 417 U.S. 600, 608–09 (1974) (recognizing due process and equal protection underpinnings in case law).
\item \textit{McKane}, 153 U.S. at 687.
\item \textit{Douglas}, 372 U.S. at 358.
\item \textit{Id.} at 355 (quoting \textit{Griffin v. Illinois}, 351 U.S. 12, 19 (1956)).
\item \textit{Id.} at 357.
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go without counsel on appeal. Without counsel, indigent defendants lack a “meaningful appeal.”

These constitutional rights to counsel at trial and on direct appeal carry with them the constitutional right to the effective assistance of counsel. In the context of trial counsel, the promise of counsel means more than simple appointment of counsel; it also “prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.” And in the context of a direct appeal, effective assistance of counsel is necessary to make the right to direct appeal and the concomitant right to counsel meaningful under the Due Process Clause. As the Court explained in *Evitts v. Lucey,* effective counsel is necessary to assist the defendant in moving through an “adversary proceeding . . . governed by intricate rules that to a layperson would be hopelessly forbidding. . . . [A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”

Once the direct appeal as of right is complete, the Constitution no longer provides a right to counsel. At this point, criminal defendants must look to state and federal law for such a right. Much of the reasoning underlying this lack of constitutional protection is reflected in *Ross v. Moffitt,* a 1974 decision that declined to extend the *Douglas* right to counsel to discretionary appeals on direct review in state court and to review in the Supreme Court. As had the Court in *Douglas,* the Court in *Moffitt* examined whether counsel was necessary to “meaningful access to the appellate system.” Relying in large part on the nature of discretionary review in both state court and the Supreme Court, the Court held that counsel was unnecessary to meaningful access to the discretionary review process. As *Moffitt* explained, rather than focusing on correcting errors in the courts below, discretionary review focuses on addressing questions of significant public importance. The state courts and the Supreme Court can determine which cases merit review under their discretion.

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41. Id. at 358.
43. *Cuyler,* 446 U.S. at 344.
44. *Evitts,* 469 U.S. at 396 (“A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.”).
45. 469 U.S. 387.
46. Id. at 396.
47. 417 U.S. 600.
48. Id. at 616.
49. Id. at 611.
50. Id. at 615.
51. Id.
respective standards without formal presentations by counsel for the indigent defendants. By the time the case reaches this stage of review, there will be plenty of material to aid the state courts and the Supreme Court in determining whether to grant review, including a trial record, the appellate briefs, and perhaps a full opinion by one or more appellate courts. Moffitt rejected arguments that fundamental fairness and equal protection concerns obligate a state to provide counsel once it decides to provide a discretionary appeal. According to Moffitt, the Constitution requires only those services that allow indigent defendants “an adequate opportunity to present his claims fairly in the context of the . . . appellate process.” And while the assistance of a lawyer—“particularly one trained in the somewhat arcane art of preparing petitions for discretionary review”—would be helpful to the indigent defendant seeking discretionary review, the Court concluded that the usefulness of such assistance does not render it necessary as a constitutional matter.

In Pennsylvania v. Finley, the Supreme Court specifically addressed state postconviction proceedings, adding these to the list of proceedings at which counsel is not constitutionally required. The main issue in Finley was whether appointed postconviction counsel, once provided by the state, must follow the procedures set forth in Anders v. California. These procedures require that when counsel feels an appeal is “wholly frivolous,” she must advise the court of this belief, move to withdraw, and submit an “Anders brief” raising all arguable issues supporting an appeal. In Finley, the Court ruled that since the Anders procedures are designed to protect the constitutional right to counsel, they apply only where an underlying constitutional right to counsel exists. Relying extensively on Moffitt, the Supreme Court “decline[d]” to extend the Douglas constitutional right to counsel to postconviction proceedings.

52. Id.
53. Id. at 610–12.
54. Id. at 616.
55. Id. While this reasoning appears in the Court’s equal protection analysis, it nevertheless helps explain the Court’s due process analysis.
56. 481 U.S. 551.
57. 386 U.S. 738 (1967).
58. See id. at 744.
59. Finley, 481 U.S. at 557.
60. Id. at 555–59. Professors Hertz and Liebman argue that Finley’s discussion of the constitutional right to counsel during state postconviction proceedings represents nothing more than mere dictum, since Pennsylvania, pursuant to its own law, actually provided counsel to Ms. Finley during state postconviction proceedings. See 1 Hertz & Liebman, supra note 13, § 7.2a, at 328–33. This Article respectfully disagrees. The ultimate question in Finley was whether state-appointed counsel must follow Anders procedures during state postconviction proceedings. Finley, 481 U.S. at 554–55. The Supreme Court ruled that such procedures attach only to constitutional grants of counsel. Id. at 555. In order to determine whether Anders was necessary, therefore, the Court had
Finley explained that as with discretionary appeals and review before the Supreme Court, fundamental fairness does not obligate the states to provide counsel simply because the states have chosen to provide criminal defendants with a postconviction remedy.61 Unlike a direct appeal as of right, a postconviction challenge “attack[s] a conviction that has long since become final. . . . [Moreover,] [p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.”62 Finley also concluded that counsel was not required by the “equal protection guarantee of meaningful access.”63 Just like the defendant seeking discretionary review, the defendant seeking postconviction review possesses sufficient “tools . . . to gain meaningful access” to the courts—the trial record, the briefs on appeal, and the opinion, if any, of the appellate tribunal.64

Two years later, a plurality of the Court rejected the argument that Finley applied only in noncapital cases. In Murray v. Giarratano,65 the plurality stated that neither the Eighth Amendment nor the Due Process Clause of the Fourteenth Amendment required counsel during capital state postconviction proceedings.66 According to the plurality, the reliability requirements of the Eighth Amendment and the Due Process Clause are satisfied by the “additional safeguards” utilized during the capital trial and sentencing phases.67 Like Finley, Giarratano emphasized not only the voluntary nature of the state postconviction remedy,68 but also the difference between direct appeal and postconviction relief.69 The

to decide whether counsel was required as a constitutional matter. If it was, then counsel must follow the Anders procedures; if it was not, then counsel need not follow the Anders procedures. While the Court’s statement that it “decline[d] to . . . hold” that a right to state postconviction counsel exists, Finley, 481 U.S. at 555, might not be the most assertive language available, see 1 Hertz & Liebman, supra note 13, § 7.2a, at 332, the statement, considered in context, declares the absence of the right to counsel. In both instances, the Court declares the absence of the right. And even though only a plurality of justices in Giarratano interpreted Finley as definitively resolving the counsel issue, see 492 U.S. at 10 (Rehnquist, C.J., plurality opinion), a majority of the Court did so just two years later in Coleman v. Thompson. See Coleman, 501 U.S. at 755 (“Finley and Giarratano established that there is no right to counsel in state collateral proceedings.”).

61. Finley, 481 U.S. at 555–57.
62. Id. at 555, 556–57.
63. Id. at 557 (internal quotation marks omitted).
64. Id.
65. 492 U.S. 1 (Rehnquist, C.J., plurality opinion).
66. Id. at 10 (“We think that . . . the rule of Pennsylvania v. Finley should apply no differently in capital cases than in noncapital cases.”).
67. Id.
68. Id.
69. Id. at 9 (noting that the direct appeal, and not the state postconviction process, “is the primary avenue for review of a conviction or sentence” (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983))).
plurality accordingly ruled that counsel was not constitutionally required for capital state postconviction proceedings.\footnote{70}

Justice Kennedy, who provided the critical fifth vote in Giarratano, concurred in the judgment without directly addressing whether the Constitution required counsel during capital postconviction proceedings. He emphasized the important and complex nature of capital postconviction review, as well as the essential role an attorney plays in the postconviction process.\footnote{71} He also asserted that “meaningful access can be satisfied in various ways” and that states are to be given “‘wide discretion’” in choosing how to structure their postconviction proceedings.\footnote{72} Because “no prisoner on death row in Virginia ha[d] been unable to obtain counsel to represent him in postconviction proceedings,” Justice Kennedy concluded that Virginia’s postconviction scheme did not violate the Constitution.\footnote{73}

Whatever doubt existed regarding the existence of a right to postconviction counsel for capital defendants was erased two years later in Coleman v. Thompson,\footnote{74} when a majority of the Court affirmed the Giarratano plurality, declaring that “Finley and Giarratano established that there is no right to counsel in state collateral proceedings.”\footnote{75}

As a consequence of Moffitt, Finley, and Giarratano, after the direct appeal as of right, any right to counsel must come from state or federal law. But there is a big difference between constitutional rights to counsel and rights to counsel bestowed by legislative grace. Unlike defendants holding constitutional rights to counsel, defendants holding only statutory rights to counsel are not entitled, as a matter of constitutional law, to the effective assistance of that counsel. In Wainwright v. Torna,\footnote{76} a terse per curiam decision issued in 1982, the Court asserted, with no real analysis, that “[s]ince [the defendant] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel.”\footnote{77}

Coleman built on Torna, ruling that defendants pursuing federal habeas relief may not rely on the alleged ineffectiveness of the postconviction attorney voluntarily provided by the state as “cause” to excuse a procedural default.\footnote{78} In Coleman, the attorneys appointed to represent Roger Keith Coleman during state postconviction proceedings filed an untimely notice of appeal, causing the Virginia Supreme Court to

\footnotesize{70. \textit{Id.} at 12.}
\footnotesize{71. \textit{Id.} at 14 (Kennedy, J., concurring in the judgment).}
\footnotesize{72. \textit{Id.} (quoting Bounds v. Smith, 430 U.S. 817, 833 (1977)).}
\footnotesize{73. \textit{Id.} at 14–15.}
\footnotesize{74. 501 U.S. 722.}
\footnotesize{75. \textit{Id.} at 755. The Court left open the possibility that counsel might be required “in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction.” \textit{Id.}}
\footnotesize{76. 455 U.S. 586.}
\footnotesize{77. \textit{Id.} at 587–88.}
\footnotesize{78. \textit{Coleman}, 501 U.S. at 757.}
dismiss the appeal.\textsuperscript{79} The dismissal and attendant procedural default of Coleman’s federal claims precluded federal habeas review unless Coleman could prove cause sufficient to excuse the default.\textsuperscript{80} Pointing to his attorneys’ conduct, Coleman argued that their failure to meet the state’s filing deadline constituted such cause.\textsuperscript{81} The Court rejected that argument, reasoning that only \textit{constitutionally} ineffective assistance of counsel will constitute cause for a procedural default.\textsuperscript{82} And under \textit{Torna}, Coleman could not demonstrate constitutionally ineffective assistance because he possessed no constitutional right to counsel.\textsuperscript{83}

Together, \textit{Finley}, \textit{Giarratano}, \textit{Torna}, and Coleman create a precarious situation for capital inmates pursuing postconviction review. Recognizing the need for a legislative solution, Congress repeatedly attempted to address the problem of capital postconviction counsel. Those attempts reached fruition in 1988 with respect to counsel for capital inmates pursuing federal habeas review, and in 1996 with respect to capital inmates pursuing state postconviction review. These legislative efforts are described below.

\textbf{B. Legislative Protection}

Well before the AEDPA, habeas corpus reform was the subject of detailed study and legislative proposals.\textsuperscript{84} These studies and proposals all

\begin{itemize}
  \item \textsuperscript{79} \textit{Id.} at 727.
  \item \textsuperscript{80} \textit{Id.} at 750, 757.
  \item \textsuperscript{81} \textit{Id.} at 752.
  \item \textsuperscript{82} \textit{Id.} at 752–57.
  \item \textsuperscript{83} Roger Keith Coleman was executed in Virginia’s electric chair on May 20, 1992. \textit{See} Death Penalty Information Center, \textit{Executions in the U.S.} 1992, at http://www.deathpenaltyinfo.org/dpicexec92.html (last modified Nov. 20, 2001). As Professors Randall Coyne and Lyn Entzeroth aptly observe, “[d]eath row inmates fortunate enough to have counsel during state post-conviction proceedings are entirely at the mercy of these attorneys. In the event post-conviction attorneys render inadequate or ineffective assistance, causing irreparable harm to their clients’ cases, there is no remedy.” Coyne & Entzeroth, supra note 13, at 21.
  \item \textsuperscript{84} In 1988, Chief Justice Rehnquist appointed a sub-committee of the Judicial Conference to study the problems associated with the federal writ of habeas corpus. In September 1989, this committee, chaired by retired Supreme Court Justice Lewis F. Powell, Jr. and commonly referred to as the Powell Committee, issued a report discussing its findings and making recommendations. \textit{Powell Committee Report}, supra note 22, at 3239. For more on the Powell Committee’s findings and recommendations, see \textit{infra} notes 102–28 and accompanying text.
  \item Also in 1988, the Criminal Justice Section of the American Bar Association (ABA) formed a ten-member Task Force to study these problems. The Task Force released its report and recommendations in October 1989, which were approved with modifications by the governing Council of the Criminal Justice Section. In February 1990, the ABA adopted the recommendations as modified and approved by the Council. \textit{See ABA Recommendations}, supra note 22, at 7, 13.
\end{itemize}
identified the same problems attending habeas corpus procedures, especially capital habeas procedures: delay, lack of finality, lack of qualified legal representation, last-minute emergency litigation, and abusive filing habits. And they all consistently articulated the goals for reform: reducing delay and abuse through streamlined federal habeas procedures, providing competent counsel, and providing an opportunity for a fair and full adjudication of the merits in federal court.

Congress ultimately addressed the competent counsel issue in the Anti-Drug Abuse Act of 1988 and the AEDPA. Both pieces of legislation are discussed in detail below.

1. THE ANTI-DRUG ABUSE ACT OF 1988

Before 1988, federal law provided only a discretionary right to counsel for indigent individuals pursuing federal habeas relief. Indigent inmates (capital and noncapital) pursuing federal habeas relief could receive counsel only upon a determination by a federal magistrate or a federal court “that the interests of justice” required appointment of counsel. The discretionary nature of this right to counsel rendered it fairly weak, as the ability of a federal habeas petitioner to obtain the assistance of counsel rested entirely on the magistrate’s or court’s view of the merits of the case.

In 1988, Congress strengthened the right to counsel for capital defendants seeking federal habeas relief. The Anti-Drug Abuse Act of 1988, which also revived the federal death penalty, made the appointment of counsel mandatory for indigent capital defendants pursuing federal habeas relief. The Supreme Court has interpreted the Act to permit appointment of counsel before the filing of a federal habeas petition,
thereby enabling the capital defendant to receive assistance of counsel in the drafting and filing of the petition itself.\textsuperscript{92}

The 1988 counsel provisions were designed not only to provide a mandatory right to counsel in federal court, but also to improve the quality and performance of counsel.\textsuperscript{93} As the Supreme Court explained in \textit{McFarland v. Scott}, “Congress’ provision of a right to counsel. . . reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the ‘seriousness of the possible penalty and . . . the unique and complex nature of the litigation.’”\textsuperscript{94} Ultimately, competent counsel will benefit both capital defendants and the government; capital defendants benefit from reduced incidence of error, and the state and federal governments benefit from reduced litigation and delay between conviction and execution.\textsuperscript{95}

In order to achieve its goal of attracting and appointing qualified counsel, the 1988 Act established maximum hourly rates for in-court and out-of-court time, with permission for the Judicial Conference periodically to increase those rates.\textsuperscript{96} It also established reimbursement caps (which could be exceeded with court approval) for “investigative,

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{93} ] While the legislative history of the 1988 counsel provisions is sparse, see Lawson v. Dixon, 3 F.3d 743, 751 n.5 (4th Cir. 1993) (noting the “absence of any meaningful legislative history of 21 U.S.C. §§ 848(q)(4)(B) and (q)(9)”), it does reveal the purpose of providing counsel for capital defendants at the federal habeas stage. As Representative Conyers stated:

\begin{quote}
[Counsel provisions represent] a way to require that there be a certain level of skill for the lawyers that accept these cases for trial and on appeal. Capital cases involve a complex and highly specialized body of law and procedures, and inexperienced court appointed attorneys have often had difficulty coping with such cases.
\end{quote}

.\ldots.

So with this high rate of error being found in capital cases by the Federal judiciary and with the strong possibility that it in part is the result of the defendants having received inadequate legal representation at the trial level, this amendment is essential to reducing the amount of litigation associated with capital cases while providing maximum protection of the defendants’ constitutional rights.

134 CONG. REC. 22,996 (1988) (statement of Rep. Conyers); see id. at 22,997 (statement of Rep. Gekas) (clarifying that counsel provisions are designed “to accord the defendant all the rights which I feel are already his and to expand them to the extent that the qualifications of the counsel shall be without question”).

\item[\textsuperscript{94} ] 512 U.S. at 855 (alteration in original) (quoting 21 U.S.C. § 848(q)(7)).

\item[\textsuperscript{95} ] See 134 CONG. REC. 22,996 (1988) (statement of Rep. Conyers); cf. POWELL COMMITTEE REPORT, supra note 22, at 3242 (“The aim of [the committee’s counsel provisions] is to provide a mechanism for the post-conviction litigation of capital cases that will enhance procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the viewpoint of the jurisdiction seeking to enforce its death penalty.”).


\end{enumerate}

\end{footnotesize}
expert, or other services” as long as they are “reasonably necessary.”\textsuperscript{97} Finally, the Act set forth competency standards, requiring that at least one of the attorneys appointed to represent a federal habeas defendant “must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.”\textsuperscript{98} If necessary, a court may depart from the statutory competency standards, so long as the court finds the attorney’s “background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”\textsuperscript{99}

2. THE AEDPA

Also in 1988, and eight years before passage of the AEDPA, Chief Justice William H. Rehnquist appointed a five-member committee of the Judicial Conference to study the problems associated with the federal habeas process in death penalty cases. Of particular interest were the problems of delay between conviction and execution, and the lack of finality of state court capital convictions.\textsuperscript{100} In September 1989, this

\textsuperscript{97}.  Id. § 7001(a)(2), 21 U.S.C. § 848(q)(9).
\textsuperscript{98}.  Id. § 7001(a)(2), 21 U.S.C. § 848(q)(6). While establishing minimum competency standards certainly represents a step in the right direction, the standards set forth in the 1988 Act unfortunately are not all that demanding. The competency requirements assuredly are relevant to appellate experience in general, and appellate criminal experience in particular, but they crucially fail to address the specific and particular level of skill needed to handle capital litigation. See infra notes 325, 342–52 and accompanying text.
\textsuperscript{99}.  21 U.S.C. § 848(q)(7). In this regard, Representative Conyers stated: The additional amendment to which we have agreed provides that the court, for good cause, may appoint an attorney who does not meet the above criteria, but whose background, knowledge or experience would otherwise enable him or her to properly represent the defendant with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. In other words . . . we are creating a small opening for the court to use its discretion and waive the experience requirements set out in [the preceding] paragraphs.
\textsuperscript{100}.  See Powell Committee Report, supra note 22, at 3239. The five members of the “Ad Hoc Committee on Federal Habeas Corpus in Capital Cases” were retired Supreme Court Justice Lewis F. Powell, Jr., Chief Judge Charles Clark of the Fifth Circuit Court of Appeals, Chief Judge Paul H. Roney of the Eleventh Circuit Court of Appeals, U.S. District Judge William Terrell Hodges of Florida, and U.S. District Judge Barefoot Sanders of Texas. Id. at 3239, 3245. The Committee solicited written comments from various parties and organizations, including “state and federal prosecutors, groups urging
committee, chaired by retired Supreme Court Justice Lewis F. Powell, Jr. and called the Powell Committee, issued a report (Powell Committee Report) discussing its findings and making recommendations with respect to the problem of delay, the need for counsel, and the problem of petitions filed on the eve of execution. The Powell Committee Report, with its specific recommendations and detailed commentary, warrants examination not only because the AEDPA’s counsel provisions reflect much of the Powell Committee’s recommendations, but also because there exists very little congressional legislative history explaining the AEDPA’s counsel provisions.

a. The Powell Committee Report

The Powell Committee found a “pressing need for qualified counsel to represent inmates in collateral review.” It recognized that “[b]ecause, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems.” Capital defendants, who “almost uniformly are indigent, and often illiterate or uneducated,” generally do not perform well when they proceed pro se. As the Powell Committee recognized, pro se petitioners “rarely present promptly or properly exhaust their constitutional challenges in the state forum[,] . . . result[ing] in delayed or ineffectve federal collateral procedures,” and the potential waiver of “serious constitutional claims.”

abolition of the death penalty, state executives and legislators, and criminal defense and public defender organizations.”

101. Id. at 3239–40. At the same time that the Powell Committee studied the problems associated with death penalty habeas corpus litigation, the Criminal Justice Section of the ABA formed a ten-member Task Force on Death Penalty Habeas Corpus to study these problems. See ABA Recommendations, supra note 22, at 5. The membership of the ABA Task Force consisted of experts representing virtually all segments of the relevant legal community. Id. at 2, 58. The Task Force held three meetings and conducted three public hearings between December 1988 and October 1989. Id. at 58 & nn.121, 123. The Task Force issued a report in October 1989, which was adopted by the ABA with a modification involving the appointment and compensation of counsel. Id. at 7. In February 1990, the ABA issued a report and recommendation based on the report and recommendation of its Task Force. Id. at 7, 52. With respect to the issue of competent counsel, the ABA concluded that “the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings.” Id. at 16. Accordingly, the ABA recommended legislation requiring states to appoint, compensate, and train competent counsel for indigent capital defendants at trial, and on direct and collateral review in the state courts. Id. at 18–27. The ABA’s recommendations also include, inter alia, mandatory minimum standards of competency.

102. Powell Committee Report, supra note 22, at 3240.
103. Id.
104. Id.
105. Id.
To solve the counsel problem, the Powell Committee recommended a statutory modification designed to induce the states to provide competent counsel for capital defendants who pursue state postconviction remedies. In exchange for providing indigent capital defendants with competent and adequately compensated counsel on state habeas review, a state would obtain certain procedural benefits. These included a six-month statute of limitations for filing federal habeas petitions (with limited tolling), a rule prohibiting (except in limited circumstances) the grant of a stay of execution after the initial mandatory stay expires, and a rule prohibiting (again, except in limited circumstances) consideration of unexhausted claims.

These procedural benefits were designed both to promote fairness and to address the problems of delay and lack of finality. The statute of limitations, for example, was intended to “cause understandably reluctant state prisoners to seek postconviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence.” Experience suggested “the sole incentive for a prisoner to initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one.” Delay in filing served not only to delay the ultimate imposition of the death sentence, but also to create time-sensitive litigation that “place[d] unrealistic demands on judges,

106. Id. ("[F]or States that are concerned with delay in capital litigation, it is hoped that the procedural mechanisms we recommend will furnish an incentive to provide the counsel that are needed for fairness.").

107. As described in the commentary accompanying the Powell Committee’s statutory proposal, following the expiration of the mandatory stay, federal review in capital cases pursuant to section 2254 is extremely limited. . . . [A] stay of execution and the grant of relief in a capital case [would be permitted] only if: (1) the claim has never been raised in state or federal court previously; (2) there is a valid excuse for not discovering and raising the claim during the prisoner’s initial opportunity for state and federal post-conviction review; and (3) the facts underlying the claim raise a serious doubt about the prisoner’s guilt of the offense or offenses for which the death penalty was imposed.

Id. at 3243–44.

108. Under the Powell Committee’s recommendations, unexhausted claims will be considered on federal habeas only if the failure to exhaust was “[1] the result of state action in violation of the Constitution or laws of the United States; [2] the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or [3] based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state postconviction review.” Id. at 3245.

109. Id. at 3241–45.

110. Id. at 3242 (“The aim of this subchapter is to provide a mechanism for the post-conviction litigation of capital cases that will enhance procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the viewpoint of the jurisdiction seeking to enforce its death penalty.").

111. Id. at 3244.

112. Id.
lawyers, and the prisoner.” To provide a full opportunity for state review, the limitations period would begin running upon appointment of state postconviction counsel and would be tolled while the capital inmate pursued state postconviction review.

With respect to stays of execution, the Powell Committee sought to ensure thorough and complete postconviction review by recommending a mandatory stay of execution upon appointment of state postconviction counsel and lasting through completion of review of the first federal habeas petition. The Committee’s recommendations enhance expediency by prohibiting further stays of execution in all but a few circumstances. The Committee believed that “once [the federal] review process comes to its conclusion without a reversal of the capital sentence, . . . federal review should end.”

The Powell Committee also recommended a change in the exhaustion rules by prohibiting, except in very narrow circumstances, consideration of unexhausted claims. Moreover, the recommendations prohibit a defendant from “return[ing] to state court to exhaust” once a federal petition is filed. Concluding that “exhaustion is futile in the great majority of cases,” the Powell Committee determined that requiring exhaustion served only to aggravate the twin problems of delay and lack of finality.

To receive these procedural benefits, the state must maintain a mandatory “mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent capital prisoners.” Furthermore, the state’s mechanism for appointing such counsel must establish competency standards for appointed counsel. According to the Powell Committee, the mandatory appointment of competent counsel is necessary “to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy.” In the Committee’s view, competency standards for postconviction counsel were “[c]entral to [the] efficacy” of its recommendations given the complexity of postconviction litigation. For reasons of comity and federalism, however, the Committee provided no minimum standards, leaving each

113. *Id.* at 3243.
114. *Id.* at 3244.
115. *Id.* at 3243.
116. *Id.* at 3242–43.
117. *Id.* at 3243.
118. *Id.* at 3245.
119. *Id.*
120. *Id.*
121. *Id.* at 3241. The mechanism could be established either by a rule of the state court of last resort or by statute. *Id.*
122. *Id.* at 3242.
123. *Id.*
state to create adequate competency standards. The federal courts would evaluate the adequacy of a state’s competency standards when determining whether the state satisfies the opt-in standards.

The Powell Committee chose not to tackle the problems caused by Torna. Instead of attaching an effectiveness component to the right to counsel and making ineffective assistance of state postconviction counsel a violation of federal law cognizable on federal habeas, the Powell Committee’s recommendation explicitly prohibited ineffectiveness challenges on federal habeas. According to the Committee, its prohibition “reflects settled constitutional doctrine.” While it recognized that competence was “of the utmost importance in capital cases,” the Committee nonetheless believed that capital defendants would receive sufficient protection through compliance with state-set competency standards and through (apparently voluntary) reviews by postconviction courts of counsel’s performance during the actual postconviction proceedings.

b. The Legislation

In 1996, after more than a decade of legislative hand-wringing on the issue of habeas corpus reform, Congress passed the AEDPA. While the AEDPA responded to the problems confronting the states, it managed to make only small inroads on the problem of state postconviction counsel. Unlike prior legislative efforts, which evidenced at least an equal concern for the interests of petitioners, the AEDPA focused predominantly on

124. Id. (“The Committee believes that it is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies with subsection (b).”). For articles criticizing the failure to provide minimum standards, see, e.g., Vivian Berger, Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus, 90 COLUM. L. REV. 1665, 1689–90 (1990), and Michael Mello & Donna Duffy, Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates, 18 N.Y.U. REV. L. SOC. CHANGE 451, 458 (1990–1991).

125. POWELL COMMITTEE REPORT, supra note 22, at 3242.

126. Id.

127. Id.

128. Id. The Powell Committee described the protection as follows: The effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process. . . . If at any . . . time during state or federal post-conviction review it appears that appointed counsel is unable to discharge his obligations in a timely and competent manner, the remedy is for the court to appoint a replacement, and to permit post-conviction review to go forward.

129. The 1990 Proposals contained provisions favoring the states’ interest in finality and reduced delay, such as a statute of limitations, a restriction on successive petitions, and procedural default rules. 1990 Proposals, supra note 84, at 335–37. The 1990 Proposals also favored petitioners by, inter alia, providing automatic stays of
vindicating state interests. Thus, the bulk of the AEDPA’s provisions curtail the availability of the habeas remedy in an effort to promote finality, reduce delay, and eliminate abuse of the writ. As evidenced from the description that follows, the AEDPA (intentionally or not) has increased the complexity of postconviction procedures at the federal level, which renders the jobs of both state and federal postconviction counsel all the more difficult.

(i) Chapter 153

Among its reforms, the AEDPA amended Chapter 153 of Title 28, which contains the substantive and procedural rules generally applicable to all habeas cases, both capital and noncapital. The Chapter 153 amendments predominantly confronted the perceived problems of abuse of the writ and delay between conviction and execution. Notably, it established a one-year statute of limitations, typically running from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.”

The statute of limitations can begin running at a later date if: (1) there existed a state-created impediment to filing the state postconviction petition; (2) the Supreme Court announced a new rule and made it retroactive to cases on collateral review; or (3) the defendant discovered previously undiscoverable evidence supporting a claim or claims.

A “properly

Given execution (which expired, naturally, when federal review was complete), waiving the certificate of probable cause for capital petitioners, and requiring states to provide competent counsel at all levels of state review. Id.


131. The limitations period provided in 28 U.S.C. § 2244(d)(1) begins running upon the latest of one of the following four trigger dates:
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1).

In most cases, the completion of direct review will trigger the statute of limitations. See 1 Hertz & Liebman, supra note 13, § 5.2b, at 249. Direct review becomes final under § 2244(d)(1)(A) when certiorari review, or the time for pursuing such review, ends. See Smith v. Bowersox, 159 F.3d 345, 347–48 (8th Cir. 1998); see also 1 Hertz &
filed application for State post-conviction or other collateral review” will toll the statute.\textsuperscript{132} The AEDPA also significantly restricted the filing of a “second or successive” petition, permitting such a petition only if it meets stringent criteria relating to the substance of the claim\textsuperscript{133} and if the court of appeals issues an “order authorizing the district court to consider” such a petition\textsuperscript{134}

The Chapter 153 revisions further addressed the issues of delay and lack of finality by permitting the federal courts to deny a petition on the merits in the absence of exhaustion, making it possible to speed the postconviction process along in cases lacking merit.\textsuperscript{135} It also restricted the ability of the federal courts to grant habeas relief—at least with respect to federal claims considered by the state courts—by changing the standards of review.\textsuperscript{136} Before the AEDPA, questions of law and mixed

\textbf{LIEBMAN, supra} note 13, § 5.2b at 250; Mark Tushnet & Larry Yackle, \textit{Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act}, 47 \textit{Duke L.J.} 1, 28–29 (1997) (urging federal courts to construe statute of limitations as beginning upon conclusion of certiorari review on direct review). And as Professors Hertz and Liebman explain, a conviction can become final at an earlier stage if the defendant fails to pursue direct review in whole or in part in the state system. 1 \textit{HERTZ & LIEBMAN, supra} note 13, § 5.2b, at 254.


\textsuperscript{133} 28 U.S.C. § 2244(b)(2). A claim not presented in an earlier habeas petition must be dismissed unless it satisfies one of two criteria: (1) it “relies on a new rule of constitutional law, made retroactive to cases on collateral review,” which was not available at the time of the earlier petition; or (2) “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” \textit{Id.} § 2244(b)(2)(A), (B) (emphasis added).

\textsuperscript{134} \textit{Id.} § 2244(b)(3)(B).

\textsuperscript{135} \textit{Id.} § 2254(b)(2).

\textsuperscript{136} Section 2254(d) provides:

[An application] shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

\textit{Id.} § 2254(d)(1)–(2).

The revised standards of review apply specifically to claims that were adjudicated in the state court system, leaving open the question of whether (and how) to review federal claims that were raised but not addressed on the merits by the state courts. Courts
questions of law and fact were reviewed de novo. Moreover, federal courts entertaining habeas petitions would apply not only Supreme Court precedent, but also “federal circuit law developed in the absence of any controlling Supreme Court law on point.” The AEDPA changed these rules by limiting the application of de novo review, requiring increased deference to state court decisions, and requiring federal habeas courts to utilize only Supreme Court precedent when evaluating habeas petitions. Under the AEDPA federal courts can overturn a state court decision only if the decision is “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” A decision is “contrary to” Supreme Court precedent if it applies the wrong legal standard or if it applies the correct legal standard but reaches a different conclusion on a “set of facts that are materially indistinguishable from a decision of [the Supreme] Court.” Moreover a decision “involve[s] an unreasonable application” of Supreme Court precedent if the decision is both incorrect and objectively confronting this situation have interpreted the AEPDA to permit de novo review of the unaddressed federal claims, reasoning that federal courts “can hardly defer to the state court on an issue that the state court did not address.” Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001); see also Dibenedetto v. Hall, 272 F.3d 1, 5–7 (1st Cir. 2001) (reviewing federal claims de novo when state court failed to “consider[] either claim as a federal constitutional claim”); Hameen v. Delaware, 212 F.3d 226, 248 (3rd Cir. 2000); 2 Hertz & Liebman, supra note 13, § 32.2, at 1421–22.

137. See 2 Hertz & Liebman, supra note 13, § 32.1, at 1419.
138. Id. § 32.1, at 1420. Before the AEDPA, “federal courts could adjudicate the complaint on the basis of legal principles that had never become binding on state courts,” Id. As Professors Hertz and Liebman note, “[a] prime motivating force in Congress’s efforts to reform habeas corpus, culminating in AEDPA’s enactment in 1996, was a desire to limit federal review to legal precepts that were binding on the state courts when they ruled, and to keep federal courts from applying precepts of their own recent invention.” Id. § 32.3, at 1432 n.11 (citing 140 Cong. Rec. 5512 (1994); 140 Cong. Rec. 2416 (1994); 139 Cong. Rec. 15813 (1993)).
139. For a thorough discussion of how § 2254(d)(1) changes the nature of federal habeas review, see 2 Hertz & Liebman, supra note 13, § 32.3, at 1428–62.
140. 28 U.S.C. § 2254(d)(1) (emphasis added). The Supreme Court’s decision in Teague v. Lane restricted the federal habeas remedy by prohibiting, except in narrow circumstances, retroactive application on federal habeas review of “new constitutional rules of criminal procedure.” 489 U.S. 288, 310 (1989). Thus, under Teague, federal habeas courts could apply only those rules in existence at the time the petitioner’s conviction became final on direct review. Id. As Professors Hertz and Liebman explain, the AEDPA goes even further than Teague by “limit[ing] federal review to legal rules that actually were in effect when the state court decided the case” and by “confin[ing] review to legal rules that actually were binding on the state courts when they decided the case—i.e., rules that were ‘clearly established . . . by the Supreme Court.’” 2 Hertz & Liebman, supra note 13, § 32.3, at 1430–31 (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).
Finally, while federal courts may grant relief if the state court ruling rests upon “an unreasonable determination of the facts,” the state court’s factual findings are entitled to a presumption of correctness that can be overcome only by a showing of “clear and convincing evidence,” rather than the “convincing” evidence standard that had previously applied.

The AEDPA addressed the issue of state postconviction counsel in Chapter 153, but only in an effort to promote the states’ interests in reducing delay. Taking the Powell Committee’s lead, the AEDPA added § 2254(i) to Title 28, which specifically prohibits consideration during federal habeas proceedings of any challenge to the effectiveness of state or federal postconviction counsel, thereby ensuring that state and federal postconviction petitioners will continue to bear the consequences of mistakes made by their postconviction lawyers.

The AEDPA’s solution to the problematic lack of qualified legal representation during state postconviction proceedings in capital cases is contained in Title 28’s newly-created Chapter 154, which is discussed in the following Section.

143. Williams, 529 U.S. at 409–11. The Williams Court expressly declined to decide how federal courts must handle what it called “extension of legal principle” cases—cases in which a state court extended or refused to extend a legal principle established in Supreme Court precedent to a new context. Id. at 408–09. In such cases, there is no clearly established Supreme Court precedent directly on point, requiring the state court to look to other legal principles clearly established in Supreme Court precedent for guidance. See id; Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), cited in Williams, 529 U.S. at 374, 376, 405.

144. 28 U.S.C. § 2254(d)(2).

145. Id. § 2254(e)(1). The presumption of correctness adopted by the AEDPA is stronger than the pre-AEDPA presumption, as it applies to all factual findings. Before the AEDPA, there were eight circumstances in which the presumption did not apply, including instances when “the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing” and when “the material facts were not adequately developed at the State court hearing.” 28 U.S.C. § 2254(d) (1994).

146. Id. § 2254(d) (1994).

147. 28 U.S.C. § 2254(i) (2000) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”).

148. See, e.g., Norris v. South Carolina, 37 Fed. Appx. 71, 72 (4th Cir. 2002) (considering a challenge to effectiveness of state postconviction counsel precluded by § 2254(i)); Beazley v. Johnson, 242 F.3d 248, 271 (5th Cir. 2001) (same); Fairman v. Anderson, 188 F.3d 635, 643 (5th Cir. 1999) (finding that state postconviction counsel’s failure to file timely state petition was not cause for procedural default); Mackall v. Angelone, 131 F.3d 442, 446 (4th Cir. 1997) (finding that postconviction counsel’s failure to raise ineffectiveness of trial and appellate counsel was not cause to excuse procedural default).

Chapter 154

Chapter 154 is modeled after, though it does not completely mirror, the Powell Committee recommendations. It is a self-described “quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants.” As did the Powell Committee recommendations, Chapter 154 provides streamlined federal habeas procedures to those states maintaining mechanisms for the mandatory appointment and compensation of counsel to capital inmates who pursue state postconviction remedies.

One of the primary procedural benefits bestowed on the states by Chapter 154 is the shortened statute of limitations. Capital defendants in so-called opt-in states have six months rather than one year to file their federal habeas petitions. And, unlike the Chapter 153 limitations period, which generally begins running upon completion of certiorari review (if such review is sought), the Chapter 154 limitations period begins running upon “final State court affirmance of the conviction and sentence on direct review.” Moreover, while the six-month limitations period is tolled during direct certiorari review by the Supreme Court and during state proceedings on the first state postconviction petition, it is not tolled during the time taken to prepare for such proceedings, or the time taken to prepare and pursue certiorari review of the state’s postconviction decision. Thus, defendants could lose up to ninety of their 180 days simply preparing a petition for certiorari on direct review. They could also lose an additional chunk (if not all) of the limitations period preparing the all-important application for state postconviction relief and preparing and pursuing certiorari review of the postconviction decision.


151. 28 U.S.C. § 2263(a) (emphasis added).

152. Id. § 2263(b)(1)–(2). The statute can also be tolled for thirty additional days for “good cause.” Id. § 2263(b)(3)(B). Like Chapter 154, the Powell Committee did not recommend tolling the limitations period during certiorari review of state postconviction litigation. In the Committee’s view, certiorari review at the state postconviction stage was “not essential to fairness in the consideration of capital cases.” POWELL COMMITTEE REPORT, supra note 22, at 3244 (explaining that all issues raised at state postconviction stage can be raised again during federal habeas and considered by the Supreme Court on certiorari during that stage).

153. Petitioners have ninety days from the completion of direct review in the state courts in which to seek certiorari review, and the six-month time period is tolled only upon the filing of the certiorari petition. See 28 U.S.C. § 2263(b)(1); SUP. CT. R. 13.

154. This task requires, at a minimum, a thorough investigation of the underlying crime, the trial, and the appeal.
Obviously, the limitations period will be extremely difficult to meet without state postconviction counsel. But this is precisely the situation in which Chapter 154 defendants could find themselves. As Professors Randy Hertz and James S. Liebman point out, the AEDPA fails to state precisely "when the entry of [the] order [appointing state postconviction counsel] must occur or which court must enter it." Thus, the limitations period could begin to run, and could even expire, before a defendant seeks or obtains state postconviction counsel. Without counsel, a defendant might be unaware of the pressing need to file either a certiorari petition or a postconviction petition in order to toll the six-month statute of limitations, or the danger of seeking certiorari review at the postconviction stage. Professors Hertz and Liebman suggest the following hypotheticals to illustrate the danger of starting the limitations period before appointing counsel:

[C]onsider [a] case in which no state postconviction counsel is appointed upon the denial of direct appeal, and in which the state postconviction court waits six months before granting the prisoner’s application for the appointment of counsel to assist in preparing and filing a state postconviction petition. Or suppose that the prisoner—acting without counsel and without notice of the federal statute of limitations—simply lets six months pass before filing either a request for counsel or a state postconviction petition. In either of these latter events, the entire limitations period would run, and the prisoner’s federal habeas corpus rights would be extinguished, before he received the competent and compensated state postconviction attorney and the attorney-assisted state postconviction proceedings that are intended to supply the *quid pro quo* for subjecting the prisoner to the 180-day statute of limitations.

155. 1 Hertz & Liebman, supra note 13, § 3.3b, at 136–37 (internal quotation marks omitted) (quoting 28 U.S.C. § 2261(b)). If the AEDPA permits appointment of counsel at any point after the completion of direct review in the state courts—and hence after the start of the limitations period—then it is significantly more strict than the Powell Committee recommendations, which sensibly recommended starting the six-month limitations period upon appointment of state postconviction counsel. See Powell Committee Report, supra note 22, at 3242.


157. 1 Hertz & Liebman, supra note 13, § 3.3b, at 137.
Such scenarios unfortunately are likely if courts interpret Chapter 154 to require appointment of state postconviction counsel at some point later than the completion of direct review in the state courts.\textsuperscript{158}

In addition to a statute of limitations and the attendant tolling rules, Chapter 154 establishes a procedural default rule forbidding, except in three narrow circumstances, the federal courts from considering claims that were not “raised and decided on the merits in the State courts.”\textsuperscript{159} The three exceptions to this procedural default rule allow federal courts to consider claims that were not raised properly in state court if the failure is caused by (1) “State action in violation of the Constitution or laws of the United States;” (2) “the Supreme Court’s recognition of a new Federal right that is made retroactively applicable;” or (3) discovery of a “factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.”\textsuperscript{160} These exceptions to procedural default differ in some respects from the exceptions in place before the AEDPA.\textsuperscript{161} For example, unlike the prior exceptions, Chapter 154 does not include an exception for miscarriages of justice,\textsuperscript{162} such as probable innocence,\textsuperscript{163} and does not require a showing of prejudice to excuse a defaulted claim.\textsuperscript{164}

To the defendant’s benefit, Chapter 154 establishes a mandatory stay of execution upon proper appointment of state postconviction counsel.\textsuperscript{165}

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\textsuperscript{158} Id. § 3.3b, at 136–37.
\textsuperscript{159} 28 U.S.C. § 2264(a). Interestingly, § 2264 makes no mention of claims that the defendant properly raised in state court, yet which for unknown reasons were not addressed on the merits, suggesting that such claims are improper on federal habeas. Professors Hertz and Liebman persuasively argue against such an interpretation, explaining that it would “be inconsistent with the longstanding rule that exhaustion occurs and procedural default is avoided when claims are properly raised in state court proceedings even if the state court chose not to address the claims on the merits.” 1 Hertz & Liebman, supra note 13, § 3.3c, at 149 n.77; see also Tushnet & Yackle, supra note 131, at 40–41.
\textsuperscript{160} 28 U.S.C. § 2264(a)(1)-(3).
\textsuperscript{161} 1 Hertz & Liebman, supra note 13, § 3.3c, at 152–53.
\textsuperscript{162} Id. § 3.3c, at 153 (“The opt-in rule also appears to omit the preexisting exception for manifest miscarriages of justice.”). Professors Hertz and Liebman suggest that federal courts might invoke “miscarriage of justice” principles to prevent the execution of a person who demonstrates a constitutional error and a high likelihood of innocence. Id. § 3.3c, at 153 nn.95–96. As they assert:

It remains to be seen . . . whether the federal courts will countenance the execution of a capital petitioner who defaulted a meritorious claim in state court but can demonstrate a manifest miscarriage of justice by showing that he was unconstitutionally convicted and is more likely than not innocent, or that he was unconstitutionally condemned to death and very likely is innocent. Id. § 3.3c, at 153 (footnote omitted).
\textsuperscript{163} Id.
\textsuperscript{164} Id. Additional differences exist between the Chapter 154 exceptions and those existing before Chapter 154. Id. § 3.3c, at 151–53 & nn.79–96 (describing differences in detail).
\textsuperscript{165} 28 U.S.C. § 2262(a).
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But as Professors Hertz and Liebman emphasize, capital defendants could lose the benefit of the mandatory stay provisions if the six-month limitations period begins to run prior to the appointment of counsel.\textsuperscript{166} Furthermore, the mandatory stay expires if the capital defendant (1) fails to file a timely federal habeas corpus petition; (2) waives the right to pursue federal habeas relief; or (3) fails to receive relief at any stage of federal habeas review.\textsuperscript{167} And once a mandatory stay expires, federal courts lack authority to grant additional stays unless the defendant has received permission to file a second or successive habeas petition.\textsuperscript{168}

Once a capital defendant files a federal habeas petition, Chapter 154 restricts her ability to amend the petition. After the state answers the federal petition, the defendant may seek amendment only for claims that would be permissible in a second or successive federal petition.\textsuperscript{169} These include claims involving a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” and claims involving newly discovered (and previously undiscoverable) evidence.\textsuperscript{170} If a defendant relies on the latter type of claim, then the newly discovered evidence must “be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the [defendant] guilty of the underlying offense.”\textsuperscript{171}

In order to benefit from these streamlined procedural provisions, a state must opt-in by maintaining a mechanism that not only provides for the mandatory appointment and compensation of counsel for indigent defendants seeking state habeas relief, but also establishes competency

\textsuperscript{166} See 1 HERTZ & LIEBMAN, supra note 13, § 3.3b, at 136–38.
\textsuperscript{167} See 28 U.S.C. § 2262(b)(1)–(3).
\textsuperscript{168} 28 U.S.C. § 2262(c). Such additional stays are extremely unlikely, given the narrow grounds for granting permission to file a second or successive habeas petition. See 28 U.S.C. § 2244(b)(1)–(3). The case of Robert Alton Harris vividly demonstrates why the states likely appreciate Chapter 154’s stay provisions. In the approximately five and one-half days before his scheduled execution, Harris filed one civil rights class action challenging the use of lethal gas, two federal habeas petitions (his fourth and fifth federal petitions), and two petitions for state habeas relief (his ninth and tenth state petitions). See Daniel E. Lungren & Mark L. Krótski, Public Policy Lessons From the Robert Alton Harris Case, 40 UCLA L. REV. 295, 322–26 (1992). In the last thirteen hours before his execution, Harris received four stays of execution from the Ninth Circuit Court of Appeals. The Supreme Court subsequently vacated each stay. Id. With its order vacating the fourth stay, the Supreme Court prohibited “further stays of Robert Alton Harris’ execution . . . by the federal courts except upon order of this Court.” Vasquez v. Harris, 503 U.S. 1000 (1992) (mem.). As the Harris case demonstrates, multiple stays of execution in the absence of new and compelling information can frustrate legitimate state interests and encourage last-minute litigation.
\textsuperscript{169} 28 U.S.C. § 2266(b)(3)(B) (“No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).”).
\textsuperscript{170} Id. § 2244(b)(2)(A)–(B).
\textsuperscript{171} Id. § 2244(b)(2)(B)(ii).
standards for such counsel.\textsuperscript{172} Like the Powell Committee before it, Congress provided absolutely no guidance to the states regarding the amount of compensation\textsuperscript{173} or the substantive content of the competency standards.\textsuperscript{174} The federal courts have endeavored to fill in the blanks, and in so doing have strictly interpreted the opt-in requirements. As a result, in the last seven years only one state has managed to meet the opt-in requirements.\textsuperscript{175}

Complementing Chapter 153, Chapter 154 expressly prohibits challenges in federal habeas corpus proceedings to the competence of state or federal postconviction counsel.\textsuperscript{176} As did the Powell Committee, however, the AEDPA permits (but does not require) during-performance reviews, stating that the prohibition on effectiveness challenges “shall not preclude the appointment of different counsel, on the court’s own motion or at the request of the prisoner, at any phase of State or Federal postconviction proceedings on the basis of ineffectiveness or incompetence of counsel in such proceedings.”\textsuperscript{177}


One might naturally wonder whether states would choose to harness their financial resources and legislative efforts to opt-in to Chapter 154 when they can receive useful procedural benefits with no strings attached under Chapter 153. Indeed, one observer asserts that the AEDPA provides the states with little or no incentive to opt-in precisely because of the goodies contained in Chapter 153.\textsuperscript{178} In his view, the AEDPA undermined the balance between fairness and finality contained in the

\textsuperscript{172} Id. § 2261(b), (c). The mechanism for appointment and compensation of counsel at the state level must be created “by statute, rule of its court of last resort, or by another agency authorized by State law.” Id. § 2261(b). The standards for competency must be established state by state through “rule of court or statute.” Id.

\textsuperscript{173} See Spears v. Stewart, 283 F.3d 992, 1015 (9th Cir. 2002) (noting that AEDPA required only “mechanism” for compensation).

\textsuperscript{174} See id. at 1012–13 (“The legislative history of Chapter 154 clarifies that Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards.”).

\textsuperscript{175} See infra notes 180–81 and accompanying text.

\textsuperscript{176} See 28 U.S.C. § 2261(e) (“The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254.”). The Powell Committee’s recommended provision is virtually identical to § 2261(e). See Powell Committee Report, supra note 22, at 3242. Provisions similar to § 2261(e) were contained in the 1991 and 1994 legislative proposals. See 1994 Proposals, supra note 84; 1991 Proposals, supra note 84.

\textsuperscript{177} 28 U.S.C. § 2261(e).

\textsuperscript{178} Rundlet, supra note 27, at 695 (“The States receive the benefit of finality from the Court’s general habeas corpus reform, but death row prisoners, and implicitly society, do not receive the concomitant benefit of fairness in federal habeas review.”).
Powell Committee Report by inserting procedural benefits (such as the statute of limitations) in the general habeas reform provisions. 179

Nevertheless, an examination of the states’ opt-in attempts indicates that many states perceive the difference between Chapter 153 and Chapter 154 to be significant and worth the price of compliance. Fifteen of the thirty-eight death penalty states either have attempted to opt-in or have asserted that they meet opt-in requirements. 180 One state—Arizona—recently achieved opt-in status with newly revised postconviction rules. 181 And despite the general lack of success in the initial wave of opt-in attempts, additional states might very well successfully opt-in in the future. Consider the observation of Burke W. Kappler in this regard:

[A] second generation of states has developed or amended systems with an awareness toward the statute and its interpretations as announced in the case law. This second generation is now waiting for the first test cases to emerge from state post-conviction review to federal habeas corpus. . . . Thus, some states may presently be in compliance, and may be recognized as such by the federal courts when such cases come before them. 182

Much has happened in the state legislatures in the last six years. Time will tell if these efforts bear fruit.

In the meantime, it is worth noting that many of the states that have attempted to opt-in had the biggest incentive to do so (and have the biggest incentive to continue to do so), because they have some of the largest death row populations and the highest rates of executions. For example, the top five states in terms of the number of executions since

179. Id.
181. Spears, 283 F.3d 992 (Arizona qualifies for opt-in, but could not apply provisions to case at hand because counsel not offered in timely manner); ARIZ. R. CRIM. P. 6.8.
182. Kappler, supra note 26, at 574. But see Hammel, supra note 28, at 64 (asserting that opt-in provisions have not had much of an impact on state postconviction counsel provisions).
1976—Texas, Virginia, Missouri, Florida, and Oklahoma have all attempted to opt-in. In fact, seven of the top ten states in this category have attempted to opt-in. Of the top ten states with the largest populations on death row, six have attempted to opt-in—California, Texas, Florida, North Carolina, Ohio, and Arizona. It thus would not be surprising to see these states continue to pursue opt-in status.

3. OVERVIEW OF STATE POSTCONVICTION COUNSEL PROVISIONS

Beginning in 1996, as many as twenty of the thirty-eight death penalty states went back to the drawing board to address issues relating to postconviction counsel. Indeed, ten such states amended their rules to provide a mandatory right to counsel for capital defendants at the state postconviction stage, elevating to thirty-two the total number of death states providing a mandatory right to counsel for capital defendants at this stage.

186. In 1996 and thereafter, the following states established a mandatory right to counsel: Arkansas, Colorado, Kansas, Louisiana, Mississippi, Montana, Ohio, New Mexico, South Carolina, and Wyoming.

discretionary right to counsel, and two have no provision for postconviction counsel.

In terms of competency, twenty-seven death penalty states impose either competency standards or a basic competency requirement. Only fifteen states, however, impose standards that require both experience and either training or demonstrated knowledge of death penalty or habeas jurisprudence. Of these fifteen states, three—Idaho, Ohio and Tennessee—also require the appointing court to assess the attorney’s workload before appointing her to represent a capital inmate. One of the fifteen states—California—specifically requires that the attorney


190. These states are Georgia and New Hampshire. See ABA Postconviction Report, supra note 188, at 20, 47.

191. Thirteen states expressly require experience plus training. See Ariz. R. Crim. P. 6.8(c); Ark. R. Crim. P. 37.5(c); Ark. Code Ann. § 16-19-202; Cal. R. Ct. 76.6(e); Idaho R. Crim. P. 44.3(3)(b); Kan. Admin. Regs. § 105-3-2(a)(6); Miss. R. App. P. 22(d)–(e); Mo. R. Crim. P. 29.16(b); Mont. R. Ct. Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases Standard 3; N.Y. R. Cr. § 515.2(1), (5); Ohio Rev. Code Ann. tit. § 2953.21(I); Ohio Sup. R. 20.11(B); Or. R. Ct., Qualification Standards for Ct.-Appointed Counsel to Represent Indigent Persons at State Expense 3.1; Utah R. Crim. P. 8(e); 6 Va. Admin. Code § 30-10-10(c) (West, WESTLAW through Nov. 18, 2003). Two states require demonstrated knowledge, which this Author interprets to be a substitute for the training requirement. See N.C. R. Indigent Def. Servs. 2C.1 (App.) (“[A]n attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case . . . .”); id. (“[A]n attorney must demonstrate that he or she . . . is familiar with . . . capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina . . . .”); Tenn. Sup. Ct. R. 13, § 3(h) (requiring “working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts” (emphasis added)). Louisiana is in the process of promulgating standards for postconviction counsel. See La. Rev. Stat. Ann. § 15:151.2; see also La. Sup. Ct. R. XXXI.

192. Idaho R. Crim. P. 44.3(4); Ohio Sup. R. 20.14(B); Tenn. Sup. Ct. R. 13, § 1(g).
possess “[p]roficiency in issue identification, research, analysis, writing, investigation, and advocacy.” Six states impose experience-based standards, although some consider (but do not require) training. Washington takes an alternative approach, requiring that counsel be “learned in the law” through either experience or training. Finally, five states impose a basic, but essentially undefined, competency requirement.

The picture is pretty bleak with respect to the states’ commitment to monitoring the performance of capital postconviction counsel. While some state courts might have an informal practice or policy of monitoring the performance of capital postconviction counsel, it appears that only Florida requires such monitoring. Under Florida law, the court must “monitor the performance of assigned counsel to ensure that the capital

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193. CAL. R. CT. 76.6(e)(5).
194. COLO. REV. STAT. ANN. § 16-12-205(2) to (3) (allowing consideration, inter alia, of training, workload, and “diligence and ability”); FLA. STAT. ANN. § 27.704 (West 1998); MD. REGS. CODE tit. 14, § 06.02.05(B)(1) (2003); NEV. SUP. CT. R. 250(2)(c)–(e) (allowing consideration of training and workload); 42 PA. CONST. STAT. ANN. § 9572(c) (West 1998) (requiring state supreme court to adopt standards, and suggesting that the court take experience into consideration); S.C. CODE ANN. § 17-27-160(B) (West Supp. 2001) (requiring either prior experience in postconviction or prior trial experience plus training).
195. WASH. R. APP. P. 16.25.
196. NEB. REV. STAT. ANN. § 29-3004 (“The attorney or attorneys shall be competent and shall provide effective counsel.”); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (“The convicting court shall appoint competent counsel . . . .”); Lozada v. Warden, 613 A.2d 818, 821–22 (Conn. 1992) (finding that statutory right to counsel includes right to competent assistance of counsel); People v. Owens, 564 N.E.2d 1184, 1189 (Ill. 1990) (“[State law and court rules] provide post-conviction petitioners with a reasonable level of assistance in post-conviction proceedings, but do not guarantee that they will receive the same level of assistance that the Constitution guarantees to defendants at trial.”); cf. N.J. STAT. ANN. § 2A:158A-13 (requiring that “the Office of the Public Defender and every attorney actually engaged in the performance of the same, whether as a member of the staff or engaged on a case basis or otherwise, shall adhere at all times to the standards and level of performance established from time to time by the Supreme Court of New Jersey”).
197. Both Ohio and Louisiana, for example, expressly provide for the monitoring of capital trial and appellate counsel. LA. S. CT. R. XXXI, ch. VII, LOUISIANA STANDARDS ON INDIGENT DEFENSE Standard 7-7.3 (“[A]n attorney’s eligibility to represent an indigent client may not be reviewed, except by a court of proper jurisdiction, on the basis of conduct involving a case in which the attorney is presently actively representing the indigent client.”); OHIO SUP. CT. R. 20.V (“The appointing court should monitor the performance of assigned counsel to ensure that the defendant is receiving competent representation.”). In these states it is possible that the courts continue monitoring during the postconviction stage as well. Similarly, New York authorizes the “Court of Appeals [to] remove from its roster of attorneys any [capital postconviction] attorney who, in the Court’s judgment, has not provided competent, thorough representation.” N.Y. CT. R. § 515.2(6)(b). Although the statute does not specifically require during-performance monitoring, such monitoring could occur as a matter of practice, as it would allow the courts to determine who should remain on the attorney roster.
defendant is receiving quality representation.”198 Two additional states—Colorado and Texas—have procedures that appear to involve at least the possibility of monitoring, though monitoring is not expressly required. In Colorado, for example, both the trial court and the Colorado Supreme Court may “impose sanctions on counsel[,] including removal from representation on the case,” for failing to comply with the state’s postconviction rules.199 One such rule involves filing deadlines for appellate briefs.200 At least with respect to this rule, the Colorado courts might perform a monitoring function. Similarly, in Texas the trial court must inform both “the court of criminal appeals and . . . the attorney representing the state” of the filing of an untimely petition or the failure to file a petition. The court of criminal appeals may then ask capital counsel to explain the reason for the late filing or the failure to file, and, upon a finding of good cause, it may “appoint new counsel to represent the applicant and establish a new filing date for” the petition.201 This process at least suggests that, with respect to meeting filing deadlines, Texas courts are permitted to perform some monitoring function.

In short, the federal government and some state governments have stepped in to provide a right to capital postconviction counsel where the Constitution does not. Because of these efforts, all indigent capital defendants seeking federal habeas review, and many indigent capital defendants seeking state postconviction review, will receive the assistance of statutorily granted counsel.

Part II considers whether these rights to counsel must meet any minimum constitutional requirements. Answering that question in the affirmative, Part II demonstrates that once the government determines to provide a right to counsel, due process requires that the right be meaningful. And meaningful counsel is effective counsel. As demonstrated below, Congress failed to provide a meaningful right to counsel for capital defendants seeking federal habeas relief. Likewise, through the AEDPA, Congress encourages states to pass postconviction counsel provisions that would fail to meet the meaningfulness

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199. COLO. R. CRIM. P. 32.2(d) (“The trial court and the [Colorado] Supreme Court may impose sanctions on counsel for willful failure to comply with this rule, including but not limited to contempt sanctions, removal from representation on the case or before the court, and referral for disciplinary action.”).
200. COLO. R. CRIM. P. 32.2(c)(2).
201. TEX. CODE CRIM. PROC. ANN. art. 11.071 §§ 4(d), 4A(a), 4A(b)(3). A recent study of capital postconviction litigation in Texas conducted by the Texas Defender Service suggests that courts in Texas do not routinely monitor counsel’s actual performance. In that study, the Texas Defender Service concludes that the Texas Court of Criminal Appeals fails to “exercise any oversight” over the appointment of counsel in capital postconviction cases. As a result, “local trial judges continue to appoint the same lawyers—many of whom are known to be inexperienced, untrained or infamous for their poor work in past cases—who then file perfunctory habeas petitions.” TEXAS DEFENDER SERVICE, supra note 8, at 50.
requirement. Finally, as it stands, no state appears to meet the constitutional minimum.

II. DUE PROCESS IMPLICATIONS OF THE GOVERNMENT’S VOLUNTARY PROVISION OF COUNSEL

Taken together, *Torna*, *Finley*, and *Giarratano* would appear to foreclose the argument that a statutorily granted right to postconviction counsel in capital cases contains any sort of constitutionally imposed effectiveness component. But such is not the case. *Torna*, which is the most directly relevant to the question of effective assistance, fails to address—much less resolve—the specific question of whether the Constitution imposes due process obligations on the state and federal governments once they voluntarily decide to provide counsel.202 In a cursory and conclusory fashion, the Court ruled that in the absence of a constitutional right to counsel, the defendant lacked a constitutional right to the effective assistance of counsel.203 The Court never really analyzed, as it had in other cases, whether the state’s voluntary provision of a right triggered due process guarantees.204 And while *Finley* and *Giarratano* held that postconviction counsel was not required as a constitutional matter,205 both cases did so utilizing the very theory of due process that this Article relies upon to demonstrate the existence of an effectiveness component for statutorily granted postconviction counsel. Even if that theory of due process does not require the government to provide postconviction counsel in the first instance, it could well (and, as demonstrated below, does) impose an effectiveness guarantee once the government determines to provide such counsel.

The voluntary provision of counsel for capital defendants pursuing state and federal postconviction relief raises (at least) three specific

202. Other scholarly observers have also addressed this question, though in varying degrees of depth. See Hammel, *supra* note 28, at 60 (noting that statutory right to counsel “arguably creat[es] a Fourteenth Amendment liberty interest in reasonably competent post-conviction representation,” especially “when the state guarantees appointed counsel to all death row inmates and . . . when the state guarantees competent counsel”); Mello, *supra* note 26, at 1091–99 (noting that statutory rights may trigger constitutional obligations); Di Giulio, *supra* note 28, at 109, 113, 129–31 (arguing that due process requires effective assistance of statutorily granted counsel); Moohr, *supra* note 26, at 789 (interpreting case law as refusing to extend due process protections to non-constitutional rights).


204. The Court addressed (and rejected) a due process argument in a footnote, but it was not the precise argument raised in this Article. The Court concluded that counsel, and not the state, was responsible for any deprivation of the defendant’s right to petition for discretionary review. See *Torna*, 455 U.S. at 587 n.3. This conclusion follows naturally from the Court’s holding that the defendant is not entitled to effective assistance of counsel.

205. *See infra* notes 244–59 and accompanying text.
constitutional questions: First, does the constitutional guarantee of due process attach an effectiveness component to a statutory grant of counsel? Second, if a constitutional effectiveness component does exist, does it require only pre-performance competence (established through competency standards), or does it require actual competent performance? And third, if the effectiveness component guarantees actual competent performance, to what extent does it do so? Does it extend to counsel’s entire performance, as it does with constitutional rights to counsel, or does it extend to only some aspects of counsel’s performance?

Section II.A demonstrates that the Court consistently has interpreted the Due Process Clause to impose a meaningfulness requirement when the government voluntarily creates rights designed to protect or enhance the reliability of the criminal trial or the individual rights of criminal defendants. Section II.B discusses the substantive content of the meaningfulness requirement in the counsel context, explaining that meaningfulness requires effective assistance of counsel, which in turn requires actual competent performance, not “paper competence” demonstrated by counsel’s prior experience, knowledge or training. Finally, Section II.B concludes that, unlike traditional rights to effective assistance of counsel, the right to the effective assistance of postconviction counsel does not cover counsel’s entire performance. Instead, it covers only that much of counsel’s performance that can be improved by rigorous competency standards and mandatory reviews of counsel’s performance conducted during the actual postconviction proceeding itself.

A. The Right to Meaningful Government-Created Procedures

A line of cases within the Supreme Court’s due process jurisprudence exhibits a consistent and familiar theme: if the government provides a right it has no obligation to provide and that right is designed to protect either the fairness and reliability of the criminal trial or the individual rights of criminal defendants, then due process requires that the right be meaningful. And in general a meaningful right is one that is

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207. For articles discussing or noting the due process aspect of some or all of these cases, see Coyne & Entzeroth, supra note 13, at 20 (noting that Court has imposed constitutional requirements on statutory rights), Mello, supra note 26, at 1091–99 (discussing the Court’s due process and equal protection analyses in right to counsel cases), Millemann, supra note 26, at 472 (arguing that “the analytic framework of the access to court and procedural due process cases is the same”), and Di Giulio, supra note 28, at 128 (arguing that due process requirements attach to statutory rights, including statutory right to counsel).
designed to achieve its purpose. It is “adequate and effective”\textsuperscript{208} rather than a “meaningless ritual” or a “futile gesture.”\textsuperscript{209}

As the cases demonstrate, however, procedures necessary to make one right meaningful might not be necessary to make another right meaningful. Requirements for meaningfulness primarily depend on the extent to which the voluntarily provided right is designed to protect the fairness and reliability of the criminal trial process or a prisoner’s individual liberties.\textsuperscript{210} The less crucial the right is to protecting the reliability of the criminal trial or the individual rights of criminal defendants, the less demanding the meaningfulness requirement becomes. But the purpose of the right is not the only factor in the Court’s meaningfulness analysis. The Court also takes into account the government’s interest in maintaining its sovereign authority over the criminal process. Particularly in cases involving postconviction relief, when such sovereignty interests are quite strong, the Court interprets the meaningfulness requirement more flexibly, balancing the need to protect the criminal defendant’s constitutional rights against the need to respect the government’s sovereign authority. Thus, even where a right is crucial to ensuring the reliability of a criminal trial or to protecting a prisoner’s individual liberties, the Court will outline the procedures that would render the right meaningful, but allow the government the freedom to create and implement equally effective alternative procedures.

Beginning at least as early as 1956 the Court recognized that due process embraces a meaningfulness requirement.\textsuperscript{211} In \textit{Griffin v.\textsuperscript{208} Evitts}, 469 U.S. at 393; \textit{Griffin}, 351 U.S. at 20. Evitts, 469 U.S. at 397; \textit{Douglas}, 372 U.S. at 358. While due process protections for criminal defendants may well shrink as the criminal defendant moves away from the trial and direct appeal stages, \textit{compare Douglas}, 372 U.S. at 358 (finding due process and equal protection require counsel on direct appeal), \textit{with Finley}, 481 U.S. at 554–55 (finding neither due process nor equal protection require counsel during state postconviction proceedings because such proceedings are far removed from trial and direct appeal), these protections do not disappear completely. \textit{See Bounds}, 430 U.S. at 821–23 (applying due process principles to state postconviction review); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (“Prisoners may . . . claim the protections of the Due Process Clause.”). The Court’s decision in \textit{Ohio Adult Parole Authority v. Woodard}, 523 U.S. 272 (1998), does not hold otherwise. While a part of the plurality opinion suggested that due process requirements did not extend as far as clemency proceedings, \textit{id.} at 280–86, five Justices specifically disagreed with this suggestion, \textit{id.} at 288–89 (O’Connor, J., concurring, in which Souter, Ginsburg and Breyer, JJ., joined); \textit{id.} at 291–93 (Stevens, J., concurring).

\textsuperscript{210} The meaningfulness requirement discussed in this Article arguably could be extended beyond the criminal context to impose obligations on the state and federal governments any time they voluntarily create rights they are not otherwise obligated to create. \textit{See Maher v. Roe}, 432 U.S. 464, 469–70 (1977) (“[W]hen a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.”). This Article, however, focuses on the right to counsel for capital defendants, and does not undertake to justify such an expansion.

\textsuperscript{211} The meaningfulness requirement cases fail to explain whether the due
Illinois, the Court considered whether the Constitution requires states to provide indigent criminal defendants with free transcripts on direct appeal. Illinois law required criminal defendants pursuing a direct appeal to file a bill of exceptions explaining the errors occurring at trial. To prepare such a document, criminal defendants generally needed the trial transcript. While Illinois law provided a free transcript to capital inmates, all others had to pay for the transcripts out of their own pockets. Defendants challenged the state law, arguing that the failure to provide a transcript free of charge violated both the Due Process Clause and the Equal Protection Clause. The Court found that the refusal to provide a transcript to all indigent defendants violated both clauses, reasoning that even though a state is not required to provide direct review as a constitutional matter, once it does provide such review, it must not “discriminate[] against some convicted defendants on account of their poverty.”

Central to the Court’s analysis was its belief that the direct appeal process had become an “integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant.” Though the Court relied upon both the Equal Protection Clause and the Due Process Clause, the latter clause better explains the meaningfulness requirement. As the Court explained in a later decision, “[i]n cases like Griffin . . . , due process analysis is substantive or procedural. Some language in at least one case suggests that it is procedural. See Douglas, 372 U.S. at 357 (“When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.”). But the substantive component also could explain the Court’s decisions in this area. Unlike the procedural component, which regulates the procedures the government must follow when depriving a person of life, liberty, or property, the substantive component regulates the actual substance of governmental action. It forbids arbitrary and fundamentally unfair governmental action, as well as governmental action that substantially interferes with fundamental rights. See generally John E. Nowak & Ronald D. Rotunda, Constitutional Law chs. 11, 13 (6th ed. 2000). While application of the meaningfulness requirement might result in additional procedures for the government to follow—such as provision of a transcript or counsel for indigent criminal defendants pursuing direct appeals—these procedures are not necessarily required in order to justify the government’s deprivation of a person’s life, liberty, or property. Instead, they are necessary to make the substance of the government’s action (providing a right to appeal, for instance) fundamentally fair.

Professor Milleman endorses the procedural due process characterization with respect to the Supreme Court’s “access to court” cases, which are discussed infra notes 260–67 and accompanying text. See Milleman, supra note 26, at 472–513 (arguing that the Supreme Court’s analysis in Bounds, 430 U.S. 817, the leading “access to court” case, tracks the analysis in a typical procedural due process case, and that Bounds supports a constitutional right to capital postconviction counsel).

212. 351 U.S. 12.
213. Id. at 13–14.
214. Id. at 14.
215. Id.
216. Id. at 14–15.
217. Id. at 18.
218. Id.
process concerns were involved because the States . . . had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."

Griffin provides a perfect example of the meaningfulness requirement. As the Court points out, no state is obligated to provide a direct appeal process. The states could, if they wished, provide nothing more than a trial. But a direct appeal process, when provided, actually promotes the criminal defendant’s interest in a fair and reliable trial process. Without a transcript criminal defendants would be unable to mount an adequate appeal. For the indigent criminal defendant, the result would be a direct appeal right with no real way in which to exercise or enjoy that right. In short, without a transcript, the right to a direct appeal lacks real meaning. Griffin recognizes this simple point.

Many of the right to counsel cases openly engage in a due process-based meaningfulness analysis. In Douglas, for example, the Court held that when the government provides a right to direct appeal, it must also provide counsel for indigent defendants who wish to exercise that right. While the Court’s decision utilized both equal protection and due process principles, the latter principles appear to drive the meaningfulness analysis—as they did in Griffin. In the Court’s view, forcing a criminal defendant “to go without a champion on appeal” simply because that defendant is indigent “does not comport with fair procedure.” As the Court previously recognized in Griffin, direct appeals are “integral” to the reliability of the trial process. The assistance of counsel ensures that the direct appeal serves its designated function because counsel can scour the record for errors, conduct the necessary legal research, and present all relevant arguments. Without counsel, the Court concluded, the direct appeal process is nothing more than “the right to a meaningless ritual.”

219. Evitts, 469 U.S. at 405.
222. Douglas, 372 U.S. at 356–57; see also Mello, supra note 26, at 1092 (“[T]here is more than a hint in Griffin—and in the Douglas exposition of Griffin—that granted appeals have the power to ‘bootstrap’ the state into due process.”).
223. As the Court later explained in Evitts: “In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.” 469 U.S. at 405.
225. 351 U.S. at 18.
227. Id. The Supreme Court also has invoked the meaningfulness requirement in the jury trial context. According to the Court, if a state provides a right to a jury trial when it is not constitutionally obligated to do so, due process requires that “the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”
Like its decision in *Douglas*, the Court’s decision in *Evitts* applies the meaningfulness requirement. In *Evitts* the Court explicitly stated that “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”228 The Court also reiterated *Griffin*’s admonition that when states create procedures that are “‘integral part[s] of the . . . system for finally adjudicating the guilt or innocence of the defendant,’” those procedures must comply with the requirements of due process.229 The direct appeal process fits this bill, according to *Evitts*, since it allows defendants to challenge the lawfulness of their convictions.230 Accordingly, criminal defendants on direct appeal need not only the presence of counsel, but also the effective assistance of that counsel.231 Effective counsel is necessary not only to “obtain a favorable decision” on the merits, but also to guide the defendant through the “complex rules and procedures” so that she can “obtain a decision . . . on the merits.”232 In the Court’s estimation, a direct appeal would be a “futile gesture” without the effective assistance counsel.233

The Court’s right to counsel decision in *Moffitt* also reflects an understanding and application of the meaningfulness requirement.234 Before examining the Court’s application of the meaningfulness requirement, however, it is necessary to clarify the basis of the Court’s holding. While admitting that *Douglas* justified its decision on both due process and equal protection grounds,235 *Moffitt* distanced itself from the

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229. *Id.* at 393 (second alteration in original) (quoting *Griffin*, 351 U.S. at 18).
230. *Id.* at 396.
231. *Id.*. As the Supreme Court reasoned:
[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.

232. *Id.* at 394–95 n.6 (second emphasis added).
233. *Id.* at 397.
234. Professor Mello would appear to disagree with this assessment. After reviewing *Griffin*, Professor Mello concludes:

Thus the stage of a proceeding, even the non-required nature of a proceeding, binds the “grantor” of a right, since even created rights . . . generate reciprocal obligations. The Court has not, however, so held. In a series of non-capital cases, the Court drew the line at the first appeal as of right.

due process argument, declaring that the question of "meaningful access . . . is more profitably considered under an equal protection analysis." But this attempt to re-characterize meaningful access as predominantly or solely concerned with equal protection is not only inconsistent with prior and later precedent, it also is inconsistent with Moffitt's own analysis. According to Moffitt, the ultimate question in the meaningful access arena is whether "the indigent defendant [had] an adequate opportunity to present his claims fairly in the context of the State's appellate process." While this statement appears in the Court's equal protection discussion, it contains a real due process flavor. As the Court made clear earlier in its opinion, due process "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." This conception of fairness is reflected nicely in the Court's description of meaningful access. Thus, despite Moffitt's protestations, the meaningfulness requirement—and hence the Court's meaningfulness analysis—has firm grounding in due process.

Unlike Douglas and Evitts, Moffitt determined that meaningfulness could be achieved without counsel. The apparent difference between Douglas and Evitts on the one hand, and Moffitt on the other, is the nature of discretionary review. Unlike the direct appeal, which focuses on correcting errors occurring at trial in the particular case at hand, discretionary review focuses on deciding cases that will have a broader impact on the development of the law in general. Counsel is unnecessary to achieve the primary purpose of discretionary review because courts sitting on discretionary review can look not only to their own expertise, but also to the trial transcript, the appellate brief(s) prepared by appellate counsel, and perhaps a written decision from the lower court. And to the extent discretionary review is designed at all to enhance the reliability of the criminal process, such review is meaningful without counsel for precisely the same reasons. It did not matter that the assistance of counsel would likely inure to the defendant's benefit on

236. Id. at 611.

237. See Douglas, 372 U.S. at 356–58 (speaking in both equal protection and due process terms); see also Evitts, 469 U.S. at 405 ("In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.").

238. Moffit, 417 U.S. at 616 (emphases added).

239. Id. at 609.

240. Id. at 615–16. The Court relied heavily upon the nature of the discretionary review process in its equal protection and due process discussions. See id. at 610–11, 614–17. Accordingly, the reasoning explained in the above paragraph—which appears in the Court's equal protection discussion—also helps explain the Court's due process analysis.

241. Id. at 615.

242. Id. at 615–16.
discretionary review, because “the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required.” In other words, as the voluntarily provided right becomes less integral to the reliability of the trial process, the demands of the meaningfulness requirement become correspondingly less rigid.

This reasoning certainly explains the Court’s decisions in Finley and Giarratano. As described above, Finley ruled that the Constitution provides no right to state postconviction counsel and that, as a consequence, any counsel voluntarily provided by a state need not follow the procedures outlined in Anders v. California. The Court justified both holdings with an implicit meaningfulness analysis. For its right to counsel analysis the Court emphasized the voluntary nature of state postconviction review. Comparing postconviction review to the discretionary direct review at issue in Moffitt, the Court noted that postconviction review is not only “further removed from the criminal trial than . . . discretionary review,” but also “is not part of the criminal proceeding itself.”

Moreover, “[i]t is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.” In short, postconviction review—in the Court’s eyes at least—is not as crucial to the reliability of the criminal trial process as direct review. Like discretionary review, postconviction review can be conducted in a meaningful manner without the aid of counsel, since postconviction petitioners have the benefit of trial transcripts, appellate transcripts, and appellate opinions. Accordingly, “fundamental fairness” does not require counsel. Although one might question the Court’s ultimate conclusion, one cannot doubt that the Court applied the meaningfulness analysis to reach that conclusion.

The same is true with respect to the Anders issue—the core question in Finley. Citing Evitts, the defendant in Finley argued that the state’s decision to provide state postconviction counsel triggered application of the Anders procedures as a matter of due process. The Court rejected the argument, stating that it was “unwilling to accept [the proposition] that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume.” Instead, the “States have substantial discretion to develop and implement programs to aid prisoners seeking to

243. Id. at 616.
244. Finley, 481 U.S. at 556.
245. Id. at 557.
246. Id. at 556–57.
247. Id. at 557.
248. Id.
249. Id.
250. Id. at 557–58.
251. Id. at 559.
secure postconviction review.” Pennsylvania provided not only counsel, but also the right to “an independent review of the record by competent counsel” and an independent review by the state court. These procedures satisfied due process concerns.

This reasoning does not signal a rejection of the due process meaningfulness analysis. On the contrary, the Court embraces (though perhaps implicitly) the meaningfulness analysis by ruling that the procedures provided by Pennsylvania satisfy the commands of due process. Those procedures, which include the right to have both the state court and appointed counsel review the record for error, serve to protect the state-created right to counsel, even if they do not provide quite as much protection as *Anders*. The Court clearly *did reject*, however, the idea that due process dictates certain predefined rigid procedures once the state decides to provide counsel. In so doing, the Court balanced the need to protect trial fairness and reliability against the state’s interest in retaining sovereign authority over its criminal process. This balance tipped in favor of the government because of the Court’s prior conclusion that postconviction proceedings are not as integral to trial fairness and reliability as direct review proceedings.

The plurality’s decision in *Giarratano*, which extended *Finley’s* holding to capital inmates pursuing state postconviction proceedings, adopted *Finley’s* analysis. To reach its decision the *Giarratano* plurality emphasized that state postconviction proceedings are not constitutionally required and “serve a different and more limited purpose than either the trial or appeal.” Although the Eighth Amendment and the Due Process Clause require a heightened level of reliability in capital cases, those reliability concerns are taken care of in the trial process. Thus, postconviction proceedings are no more important for capital inmates than they are for noncapital inmates. And since such proceedings are not “the primary avenue for review of a conviction or sentence,” they can be fundamentally fair (i.e., meaningful) without the assistance counsel.

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252. *Id.*
253. *Id.* at 558–59.
254. *Id.* at 558.
255. See *id.* at 553–54, 558–59.
256. *Giarratano*, 492 U.S. at 10 (Rehnquist, C.J., plurality opinion).
257. *Id.*
258. *Id.* at 9 (quoting *Barefoot*, 463 U.S. at 887).
259. See *id.* at 8–10. Justice Kennedy’s concurrence also reflects the meaningfulness requirement. Although not deciding whether counsel was required as a constitutional matter, Justice Kennedy underscored the complex nature of postconviction review and the importance of such review to “the review process for prisoners sentenced to death.” *Id.* at 14 (Kennedy, J., concurring in the judgment). He also doubted whether a capital defendant could successfully complete postconviction review without the help of an attorney. *Id.* Because of state sovereignty concerns, however, Justice Kennedy declined to impose a “categorical remedy” on the states. Instead, states should be given “wide discretion” to select appropriate solutions.” *Id.* (quoting *Bounds*, 430 U.S. at 353).
If doubt remains about the existence of a meaningfulness requirement, then one need only examine the Court’s decision in *Bounds v. Smith.* Relying on both *Douglas* and *Moffitt,* the Court asserted that it is “beyond doubt that prisoners have a constitutional right of access to the courts.” And of course, it is not just any access, but rather, “adequate, effective, and meaningful” access. The Court underscored the “‘fundamental importance’” of postconviction proceedings and civil rights actions in protecting the constitutional rights of criminal defendants, and distinguished these proceedings from discretionary review. Unlike discretionary review petitions, which “present[] claims that have been passed on by two courts,” postconviction petitions or civil rights complaints “raise . . . unlitigated issues,” creating “[t]he need for new legal research or advice.” Accordingly, meaningful access to the courts required “adequate law libraries or adequate assistance from persons trained in the law.”

Justice Kennedy saw no problems with the solutions selected by the State of Virginia since “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and [since] Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief.” *Id.* at 14–15.

260. 430 U.S. 817. Though characterizing *Bounds* as doctrinally within the “access to courts” cases, Professor Mello agrees that *Bounds* and the *Griffin* line of cases are similar. See Mello, supra note 26, at 1098 (“The Court’s opinions [in *Bounds* and *Johnson*] relied on a logic similar to that of *Douglas* or *Griffin* in that the mere existence of the procedural avenue was used as the basis for the access right.”).

261. *Bounds,* 430 U.S. at 821. *Bounds* is commonly described as an “access to the courts” case. See, e.g., 1 HERTZ & LIEBMAN, supra note 13, § 7.2c, at 337 & n.55 (citing *Bounds* as representing “access to the courts” requirement); Mello, supra note 26, at 1096–98 (discussing “access to court” cases and relying on *Bounds* as seminal decision in area); Millemann, supra note 26, at 461–67 (discussing “access to court” cases and relying on *Bounds* as seminal decision in area). This description, combined with *Bounds’* reliance on the *Griffin* line of cases, suggests that the *Griffin* line of cases concerns only access to the courts. But such a conclusion is unwarranted. While *Bounds* itself surely recognizes a right of access to the courts, *Griffin, Douglas, Evitts,* and *Moffitt* all speak in terms of meaningful access to the particular governmental procedure at issue, not meaningful access to the courts in general. The *Griffin* line of cases unquestionably supports the decision in *Bounds,* but *Bounds’* use of them does not limit their reach. As developed in the *Griffin* line of cases, the meaningfulness requirement represents a doctrine concerned with meaningful access to all government-created procedures integral to protecting a criminal defendant’s constitutional rights, not just a doctrine myopically focused on access to the courts.

262. *Bounds,* 430 U.S. at 822.

263. *Id.* at 828 (quoting *Johnson v. Avery,* 393 U.S. 483, 485 (1969), and *Wolff,* 418 U.S. at 579).

264. *Id.* at 827–28.

265. *Id.* at 828. The * Bounds* Court also relied fairly heavily on *Johnson v. Avery* and *Wolff v. McDonnell,* both of which are consistent with the meaningfulness requirement. *Johnson* invalidated a state prison regulation prohibiting “prison ‘writ-writers,’” reasoning that the regulation interfered with the prisoners’ ability to seek federal habeas relief. 393 U.S. at 488. Consistent with the meaningfulness requirement, the Court warned that “post-conviction proceedings must be more than a formality.” *Id.* at
The Court emphasized, however, that its solution to the access issue represented only “one constitutionally acceptable method to assure meaningful access,” and encouraged the states to experiment and devise alternate means of providing such access. This aspect of Bounds demonstrates the Court’s flexible interpretation of the meaningfulness requirement, as it takes into account both the need to protect the reliability of the criminal trial and the individual rights of criminal defendants and the need to respect the sovereign authority of the states. While postconviction proceedings and civil rights actions are important to protecting the rights of criminal defendants, the states also have a significant interest in deciding for themselves which proceedings to adopt and how to structure them.

Finally, two recent decisions confirm the continued vitality of the meaningfulness requirement. The first is Martinez v. Court of Appeal of California, in which the defendant argued that due process required self-representation on direct appeal. The Court rejected the argument, reasoning that self-representation is not “a necessary component of a fair appellate proceeding.” As the Court explained, “a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.” Like the cases discussed above, Martinez focused on whether a certain procedure—self-representation—is necessary in order to render a state-created right fair and meaningful. Martinez thus confirms the Court’s continued (though perhaps implicit) recognition and utilization of the meaningfulness requirement.

486. The prison regulation was impermissible “unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief.” Id. at 490. Like Bounds, Johnson flexibly interpreted the meaningfulness requirement to enable the states to exercise their sovereign authority and devise their own programs for meaningful access to the courts. Wolff reached the same conclusion in the context of a prison regulation that limited the inmates’ ability to help one another prepare both habeas petitions and civil rights complaints. Because both habeas petitions and civil rights actions “serve to protect basic constitutional rights,” the same rule of access to prison legal assistance applies. Wolff, 418 U.S. at 579.


267. Notably, Bounds does not rely upon the voluntary nature of the government’s decision to provide a right to court process. While Bounds surely applies to voluntarily provided rights, such as state postconviction proceedings, it would also apply to federal habeas proceedings, which arguably must exist in some form or another. See Ex parte Bollman, 8 U.S. (4 Cranch) 75; Steiker, supra note 13, at 875–76. To this extent, Bounds actually espouses a rule broader than the one described in this Article. For an in-depth analysis of the Bounds rule, see Millemann, supra note 26.

268. 528 U.S. 152.

269. Id. at 161.

270. Id. (quoting John F. Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta, 6 SETON HALL CONST. L. J. 483, 598 (1996)).
The second recent case is Ohio Adult Parole Authority v. Woodard, in which the Court rejected the argument that Ohio’s clemency procedures violated due process. Although the Court rejected the idea that Evitts “create[d] a new ‘strand’ of due process analysis,” the Court described Evitts in a manner that tracks the meaningfulness requirement. It states, for example, that in determining whether effective assistance of counsel is constitutionally required on direct appeal, Evitts “evaluated the function and significance of a first appeal as of right, in light of prior cases.” The “function and significance” language is simply another way of asking whether the statutory right is “integral” to the reliability of the criminal trial. Because “[c]lemency proceedings . . . do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process,” the meaningfulness requirement did not require additional safeguards.

As the discussion above demonstrates, the precise obligations triggered by the meaningfulness requirement are shaped both by the degree to which the right serves to enhance a criminal defendant’s constitutional rights and by the strength of the government’s general interest in maintaining sovereign authority over its criminal processes. Depending on the nature of the voluntarily provided right, the meaningfulness requirement might demand very little from the government, as in Moffitt, Finley, and Giarratano, or it might demand quite a lot, as in Griffin, Douglas, and Evitts. Moreover, once the direct appeal is complete, the Court tends to apply the meaningfulness requirement more flexibly, as in Finley and Bounds, accommodating the need to protect the constitutional rights of criminal defendants and the need to respect the government’s sovereign authority over its own criminal processes.

The next Section applies the meaningfulness requirement to the voluntary provision of capital postconviction counsel.

B. The Meaningful Right to Postconviction Counsel

Postconviction proceedings generally follow on the heels of direct review, allowing the defendant to continue to pursue relief from an

271. 523 U.S. 272.
272. Id. at 284.
273. Id.; see also id. at 283 (“[I]n Griffin and Douglas, the Court] held that the Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal adequate and effective, including the right to counsel.” (emphasis added) (citing Griffin, 351 U.S. at 20; Douglas, 372 U.S. 353)).
274. Id. at 284.
275. See, e.g., Wolff, 418 U.S. at 556 (“In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.”).
unlawful conviction. At the state level, postconviction proceedings typically involve constitutional and non-constitutional claims that could not have been raised on direct appeal. At the federal level, the proceedings involve allegations that the defendant is “in custody in violation of the Constitution or laws or treaties of the United States.”

Once appointed, postconviction counsel plays a critical role navigating the capital defendant through the complex and demanding postconviction process. During the state postconviction stage, counsel assists the capital defendant by conducting a factual investigation of the underlying criminal offense, the trial, and the appellate proceedings, and by properly raising all relevant and permissible claims in the state postconviction petition. As a general matter, permissible claims are claims that could not be raised on direct appeal because evidence supporting them is outside of the record. Failure to comply with a state’s procedural rules could well result in waiver at the state level. Moreover, proper use of state postconviction remedies is critical to success at the federal habeas level. In order to obtain review on the merits at the federal level, the combined doctrines of exhaustion and procedural default demand that all relevant federal claims be raised in the appropriate state forum. Accordingly, all postconviction claims that could have been, but were not and cannot now be raised in state

276. See supra note 7.
278. 28 U.S.C. § 2254(a). See generally 1 HERTZ & LIEBMAN, supra note 13, §§ 2.1–2.6, at 5–100 (providing “General Description of Habeas Corpus”).
279. The Powell Committee recognized as much in its report, finding that “competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.” POWELL COMMITTEE REPORT, supra note 22, at 3240. And as one commentator points out, the Supreme Court itself recognized the importance of postconviction counsel in McFarland, when it held that a capital defendant need only file a motion for appointment of counsel, rather than a formal habeas petition, in order to trigger her statutory right to counsel. See Kappler, supra note 26, at 569 (noting that McFarland “affirmed the importance of post-conviction counsel to capital prisoners”). Several commentators, as well as the ABA, have also argued that postconviction counsel is crucial to reliability and fairness. See, e.g., ABA Recommendations, supra note 22, at 71–72; Kappler, supra note 26, at 577–81; Michael Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 AM. U. L. REV. 513 (1988).
280. A good many trial errors can be raised and resolved during the direct appeal process. See LARRY W. YACKLE, POSTCONVICTION REMEDIES ch. 1, §1, at 1 (1981) (“It is on appeal that most trial errors can be identified and corrected.”). State law defines which claims are appropriate for postconviction review. See id. at ch. 1. While each state has its own particular set of rules, as a general matter the postconviction process is reserved for claims that could not have been raised on appeal. See id. ch. 1, § 5, at 17; id. ch. 1, § 10, at 43.
postconviction proceedings, and all claims that were raised improperly at such proceedings and dismissed without an examination on the merits, will be procedurally defaulted in federal court. And since passage of the AEDPA, successful federal habeas review also depends on the efficiency of state habeas counsel, as the statutes of limitations (for both non-opt-in and opt-in states) continue to run while counsel prepares to file the state petition. The longer it takes state counsel to investigate the case and file the petition, the less time is available to pursue federal habeas relief.

At the federal level, postconviction counsel assists the capital defendant in pursuing federal habeas relief by searching for undiscovered claims and by properly raising all possible federal claims in the defendant’s first federal habeas petition. As explained in more detail below, the AEDPA’s statutes of limitations and severe restrictions on successive petitions complicates counsel’s job. Essentially, in the absence of equitable tolling or other relief, a petition filed after expiration of the limitations period will be dismissed. Similarly, except in a few narrow circumstances, claims not raised in a timely-filed first federal habeas petition will also be dismissed.

A recent study of reversal rates in capital cases conducted by Professor James S. Liebman, Professor Jeffrey Fagan, and Valerie West (Liebman Study) demonstrates that failure to secure review of federal claims on the merits at either the state or federal level can be extremely costly for the capital defendant. According to the Liebman Study, which examined 4,578 state capital appeals over the twenty-three-year period from 1973 to 1995, the likelihood of reversal is fairly strong, especially at the federal habeas level. Of the 599 death penalty cases reviewed at the federal habeas level during the relevant time period, forty percent were

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282. Coleman, 501 U.S. at 735 n.1 (“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 . . . 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.”); see also O’Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (finding failure to present claims on discretionary review procedurally defaulted when such review “no longer available”).


285. See id. §§ 2244(a)(2), 2244(d)(1), 2263(a). Though not mentioned in the habeas statute, some courts have applied the equitable tolling doctrine in various circumstances to permit the filing of a petition beyond the limitations period. See 1 Hertz & Liebman, supra note 13, § 5.2a, at 239–46 & nn.23–38 and accompanying text (describing case law). Professors Hertz and Liebman also suggest that, in non-opt-in states at least, petitioners should seek to have an exhausted but out-of-time petition “relate back” to a prior unexhausted but timely filed petition. Id. § 5.2b, at 270–71 & nn.91, 94.

286. 28 U.S.C. §§ 2244(b)(2), 2262(c).

287. Id. § 2244(b)(2).

288. Liebman et al., supra note 1, at 2.
reversed for “serious error,” which the Liebman Study defines as “error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial.”289 And in some states the federal habeas reversal rate is much higher than the national rate. For example, in California, which now has the most inmates on death row,290 eighty percent of the federal habeas cases reviewed during the relevant time period were reversed.291 Similarly, seventy-five and seventy-one percent of the cases reviewed in Montana and Mississippi, respectively, were reversed.292 Of course, only those capital defendants who preserve their constitutional claims at both levels can take advantage of this opportunity for success at the federal level.

With respect to capital cases reviewed at the state postconviction stage, the Liebman Study revealed a reversal rate of approximately ten percent.293 While this reversal rate admittedly is not as dramatic as the reversal rate on federal habeas review, the reversal figures become more impressive when examined on a state-by-state level.294 In Maryland, for example, fifty-two percent of cases available for postconviction review were reversed, giving capital defendants a better than average chance of success at the state level.295 In Wyoming and Indiana, the reversal rates were thirty-three percent and twenty-five percent, respectively.296 And in Florida, which ranks third in terms of its population on death row and fourth in terms of total number of executions since 1976,297 the reversal

289. Id. at 6. The study reveals that “[t]he most common errors are (1) egregiously incompetent defense lawyering . . . and (2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty.” Id.
290. See supra note 185 and accompanying text.
291. LIEBMAN ET AL., supra note 1, at 66 tbl.7.
292. Id.
293. Id. at 57 tbl.5. This figure represents an approximation because the authors of the study did not have finalized figures on the actual number of cases reviewed during the state postconviction stage. As a result, the authors “assume[d] that all death sentences that survived the direct appeal inspection and [were] not known to have been reversed during the state post-conviction inspection passed muster during that inspection.” Id. at 136 n.39 (noting also that “many capital judgments affirmed on direct appeal were pending in, but had not yet been finally decided by, state post-conviction proceedings by the end of the study period”). As the authors of the study point out, “using the class of cases available for review as a proxy for the casts that actually underwent final review [led them] systematically to overestimate the success rate and underestimate the error rate.” Id.
294. Interestingly, this comparatively low reversal rate suggests that the primary role of state postconviction counsel is securing the opportunity for federal habeas review, rather than obtaining state habeas relief. State habeas attorneys must focus their efforts on investigating and properly presenting all available claims to the state postconviction tribunals, thereby preserving for the capital defendant the opportunity of pursuing and receiving federal habeas relief.
295. LIEBMAN ET AL., supra note 1, at 57 tbl.5.
296. Id.
297. See supra notes 183–85 and accompanying text.
rate was almost twice the national average—seventeen percent. Moreover, reversal on state postconviction review is significant in light of what happens on retrial. The Liebman Study reveals that approximately eighty-two percent of the capital defendants who received reversals at the state postconviction level received a sentence “less than death, or no sentence at all.” Even more important, seven percent of those who received a reversal on state postconviction during the same time period were found “not guilty of [a] capital offense” on retrial. Again, capital defendants can take advantage of these figures only with proper use of the state postconviction remedies.

In short, when appointed, postconviction counsel represent a vital link in the chain to relief for capital defendants, and the decision to provide such counsel triggers application of the meaningfulness requirement. Rather than ending the matter, however, this conclusion gives rise to the more important—and more difficult—question regarding the substantive content of the meaningfulness requirement in this context. As Finley and Giarratano demonstrate, mere application of the meaningfulness requirement does not guarantee the most favorable procedures for the criminal defendant. And the Court’s application of the meaningfulness requirement in both cases at least suggests that the requirement might not carry much force in the context of the government’s voluntary decision to provide capital postconviction counsel. Nevertheless, as demonstrated below, the meaningfulness requirement in fact carries significant force in this context.

The following Sections explore the contours of the meaningful right to postconviction counsel. They discuss whether the right to counsel must contain an effectiveness component, whether this effectiveness component is satisfied by a showing of pre-performance competence or actual performance, and whether an actual performance guarantee extends to counsel’s entire performance or only part of her performance.

1. THE RIGHT TO EFFECTIVE ASSISTANCE

As a matter of sheer common sense, the right to counsel should equal the right to the effective assistance of counsel. Indeed, if one were to

298. Liebman et al., supra note 1, at 57 tbl.5.
299. Id. at 7.
300. Id. This figure “includes individuals as to whom murder charges either were dropped by the prosecutor, dismissed by the trial judge, or rejected by the jury.” Id. at 138 n.45.
301. Several state courts have recognized this point as a matter of state law. See, e.g., Locada, 613 A.2d at 821 (“The right to effective assistance of counsel is predicated on the statutory right to habeas counsel pursuant to [state law] . . . . It would be absurd to have the right to appointed counsel who is not required to be competent.”); McKague v. Whitley, 912 P.2d 255, 258 n.5 (Nev. 1996) (“[W]here state law entitles one to the appointment of counsel to assist with an initial collateral attack after judgment and
ask the reasonable person whether a promise of counsel included the promise of effective assistance of that counsel, odds are high that her answer would be yes. In *Torna*, however, the Supreme Court held otherwise. In the Court’s view, the proposition that “the right to counsel is the right to the effective assistance of counsel,” applies only to constitutional rights to counsel, and not to statutory rights to counsel. In so holding, the Court made the source of the right to counsel the relevant consideration in determining the existence of an effectiveness component.

Application of the meaningfulness requirement, however, confirms the view of the reasonable person and undermines the Court’s decision in *Torna*. While the source of the right to counsel is relevant to the government’s ability to eliminate the right and to the substantive content of the effectiveness component, it is irrelevant to the initial question whether an effectiveness component automatically attaches to a grant of counsel. Under the meaningfulness requirement, the triggering event for the establishment of an effectiveness component is the creation of the right to counsel itself—the decision to provide enhanced protection for the criminal defendant. Once done, the government becomes obligated to ensure that the voluntarily provided right is meaningful.

The Court’s decisions in *Griffin*, *Douglas*, *Moffitt*, and *Evitts* all teach that a meaningful right is one that is designed to achieve its purpose. And a grant of counsel, whatever the source, cannot achieve its purpose without *some* right of effective assistance. As the Court recognized in *Evitts*, “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.” Though this statement was made in connection with the due process right to counsel during direct appeal proceedings, the force of the observation is equally true with respect to a statutory grant of counsel.

The appointment of counsel is designed to protect the defendant’s constitutional rights. This is no less true for postconviction counsel than it is for trial and appellate counsel. As the Powell Committee

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303. *Torna*, 455 U.S. at 587–88 (“Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel . . . .”).
305. *See* id. (describing counsel on appeal as of right as protecting defendant’s due process rights); *Moffitt*, 417 U.S. 600 (describing counsel on appeal as of right as protecting defendant’s right to meaningful access to courts); *Gideon*, 372 U.S. 335 (describing trial counsel as protecting a defendant’s constitutional right to a fair trial).
306. A Nevada Supreme Court Rule, for example, recognizes this design:
explained in its report, the “provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.”

Postconviction counsel protects her client’s constitutional rights by properly raising all existing constitutional claims, first in state court and then in federal court. Doing so ensures that, at a minimum, the defendant will receive a decision on the merits rather than a dismissal based on exhaustion, procedural default, statute of limitations, or successiveness grounds. But the job of postconviction counsel is not easy, and the protection of the capital defendant’s constitutional rights can be achieved no more readily with ineffective counsel than with nonexistent counsel.

The Powell Committee understood this point when it recommended more than the simple appointment of counsel for capital defendants pursuing state postconviction relief. The Committee recommended the appointment of competent counsel, for with the participation of such counsel “there should be no excuse for failure to raise claims in state court.” Competent counsel will assist the capital defendant in presenting and preserving all relevant constitutional challenges to her conviction and sentence, thereby moving her speedily and successfully (at least in procedural terms) through the collateral review process.

The purposes of this rule[, which among other things appoints counsel and sets competency standards,] are: to ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases.

nev. sup. ct. r. 250.

307. Powell Committee Report, supra note 22, at 3240. The Powell Committee Report contains many similar statements, all emphasizing the important role played by competent counsel in the postconviction process. See id. at 3242 (“The purpose of [the counsel] mechanism is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy.”); id. (“The aim of this subchapter is to provide a mechanism for the postconviction litigation of capital cases that will enhance procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the viewpoint of the jurisdiction seeking to enforce its death penalty.”); id. at 3241 (“With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court.”); see also Stummer, supra note 27, at 609.

308. See Evitts, 469 U.S. at 394 n.6 (“[Direct appeal counsel serves as an] expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case.”).

309. See infra notes 319–52 and accompanying text.

310. Powell Committee Report, supra note 22, at 3242 (noting that “the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation” is “[c]entral” to its recommendation regarding counsel (emphasis added)).

311. Id. at 3241.

312. Id. at 3242 ("The aim of this subchapter is to provide a mechanism for the
Congress surely understood the point as well when it enacted legislation largely reflecting the Powell Committee’s counsel recommendations, and when it established the mandatory right to federal habeas counsel for capital defendants.\textsuperscript{313}

Thus, like the constitutional right to counsel, the statutory right to counsel is a “futile gesture” unless it also includes the right to effective assistance. To the extent there is any debate about an effectiveness component for statutory grants of counsel, that debate involves the actual content of that component. The following two Sections address that debate.

2. DEFINING EFFECTIVE ASSISTANCE IN THE POSTCONVICTION CONTEXT

The constitutional guarantee of effective assistance of counsel at trial and on direct appeal relates to the actual performance of counsel during these particular stages of the criminal proceeding.\textsuperscript{314} The question raised by the statutory grant of postconviction counsel is whether the difference in the source of the right (statutory rather than constitutional) and the context in which the right is provided (postconviction rather than trial and direct appeal) alter the substantive content of the effectiveness guarantee. Does it, for example, require only pre-performance competency, measured by compliance with designated training, knowledge, and experience standards, or does it require actual competent performance?\textsuperscript{315}

The AEDPA, with its emphasis on competency standards and its prohibition on effectiveness challenges, adopts a pre-performance measure of effectiveness.\textsuperscript{316} This measure defines competent post-conviction litigation of capital cases that will enhance procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the viewpoint of the jurisdiction seeking to enforce its death penalty.”).\textsuperscript{313}

\textsuperscript{313}. \textit{See McFarland}, 512 U.S. at 855 (“Congress’ provision of a right to counsel . . . reflects a determination that quality legal representation is necessary in capital habeas proceedings in light of the ‘seriousness of the possible penalty and . . . the unique and complex nature of the litigation.’” (alteration in original) (quoting 21 U.S.C. § 848(q)(7)); \textit{cf.} Murray v. Delo, 34 F.3d 1367, 1373 (8th Cir. 1994) (“To attribute legal effect to . . . a lawyer’s omission of claims the [federal habeas petitioner] wished to raise, would be both unfair in itself and inconsistent with the purpose of the [federal] statute making appointment of counsel mandatory.”).

\textsuperscript{314}. \textit{See Strickland}, 466 U.S. at 685. As the Court explained in \textit{Strickland}: That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. \textit{Id.}

\textsuperscript{315}. \textit{See Kappler, supra} note 26, at 591–97 (discussing advantages and disadvantages of each option, and concluding that both options need to exist simultaneously).

\textsuperscript{316}. Texas has adopted a similar measure of competence, defining the statutory requirement of “competent” counsel as counsel who complies with specified competency
performance before any performance is rendered. Counsel is competent as long as she meets pre-designated competency standards. The Powell Committee admitted as much in its report when it asserted that “[t]he effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process.”

So as long as counsel meets the governing competency standards, capital defendants have received effective assistance of counsel.

The problem with the AEDPA’s “paper competence” rule, however, is that it ignores the purpose of appointing postconviction counsel in the first place, which is to protect the defendant’s constitutional rights—to ensure a fair opportunity to raise constitutional challenges to the defendant’s conviction and sentence. To do this, counsel must navigate the important and often complex state and federal postconviction processes. Successful navigation, in turn, requires that counsel must (1) possess a respectable knowledge of the relevant procedural and standards. See Ex parte Graves, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002) (“The reference to ‘competent counsel’ in [the statute] concerns habeas counsel’s qualifications, experience, and abilities at the time of his appointment. All of these provisions concern the initial appointment of counsel and continuity of representation rather than the final product of representation.”) (footnote omitted)). According to the Texas Defender Service, the Graves decision contravenes legislative intent. Relying on statements from the statute’s sponsor, the Texas Defender Service argues that Graves “is at odds with the fundamental purpose of the statute[, which is] to streamline death row state habeas corpus by limiting inmates to one meaningful, comprehensive post-conviction proceeding . . . .” TEXAS DEFENDER SERVICE, supra note 8, at 40; see id. at xi in Texas Defender Service, supra note 8 (arguing that refusal to “measure the competence of an attorney according to what the attorney actually does during the period of habeas representation” is “[a]t odds with the fundamental purpose of the legislation”).

317. POWELL COMMITTEE REPORT, supra note 22, at 3242.

318. Id. at 3240 (“[T]he Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.”); see id. at 3242 (“The purpose of this mechanism [for counsel] is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy.”). The importance of postconviction counsel is reflected in § 2261(d)—added by the AEDPA—which prohibits trial or appellate counsel from serving as postconviction counsel unless the petitioner and the counsel both seek continued representation. 28 U.S.C. § 2261(d). “Fresh” counsel is important in that it is often easier to spot errors that occurred at trial or on appeal. See POWELL COMMITTEE REPORT, supra note 22, at 3242 (“The primary reason for the rule is that during the post-conviction review, ineffective assistance of trial and appellate counsel is frequently a major issue[, and it] would be unrealistic to expect a capital defendant’s trial or appellate counsel to raise a vigorous challenge to his own effectiveness.”).

319. As one federal district court recognized, “a convicted individual’s fortunes in post-conviction proceedings hinge on the competence and commitment of state-appointed counsel.” United States ex rel. DuQuaine v. Greer, No. 88-C-0006, 1989 WL 20830, at *2 (N.D. Ill. Mar. 7, 1989); see also McFarland, 512 U.S. at 1261, 1263 (Blackmun, J., dissenting from denial of certiorari) (“State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in state court . . . [to avoid denial as] procedurally defaulted or waived.”).

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substantive law; (2) conduct a thorough factual investigation regarding the underlying offense, as well as what happened at trial and on direct appeal; and (3) properly present all relevant federal claims in the appropriate state and federal fora. Each requirement will be discussed in turn.

The threshold requirement for postconviction counsel is a healthy knowledge of the substantive rules governing the death penalty and the procedural rules governing state and federal habeas corpus. Before undertaking any sort of investigation, state and federal counsel must understand the relevant substantive law so that they can unearth and identify all possible claims of error. And in order to raise these claims properly, counsel must have a thorough understanding of both state and federal procedural requirements. For example, state postconviction counsel must know when and how to raise all known and relevant federal claims in the state system, and must understand that what happens (or does not happen) at the state level controls the availability of relief at the federal level. State counsel must understand, for instance, the federal doctrines of exhaustion and procedural default, as these doctrines require that all known federal claims be raised properly in state court before they can be reviewed on the merits in federal court. Similarly, state counsel must be sure to develop the factual basis for all known claims in state court, as the rules regarding evidentiary hearings in federal court are, thanks to the AEDPA, fairly restrictive. Also thanks to the AEDPA, state counsel must keep an eye on the statute of limitations for filing federal petitions, being sure to initiate state proceedings quickly so as to toll the federal limitations period.

Federal postconviction counsel, for their part, must understand substantive death penalty law, as well as the increasingly complex federal

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320. The ABA also supports the idea that “effective” counsel in capital cases must not only possess the proper training, but they must also perform adequately. *ABA Recommendations, supra* note 22, at 62 (“[Competent counsel addresses] the need for the specialized expertise that is required to ensure that all of the facts are properly developed and all of the issues are properly raised.”); *see also* Daniels v. State, 741 N.E.2d 1177, 1194 (Ind. 2001) (Boehm, J., dissenting) (commending “capital postconviction counsel,” who “in recent years conduct[ed] a very thorough factual investigation and appear[ed] to raise every conceivable issue as grounds for postconviction relief”).

321. As Professor Mello has noted, “[i]f the Court’s capital jurisprudence is opaque, its habeas corpus jurisprudence is Byzantine.” Mello, *supra* note 279, at 534; *see also* Millemann, *supra* note 26, at 487 (“To investigate and plead post-conviction claims, a capital post-conviction petitioner must understand some of the most complicated, dynamic, and at times inconsistent bodies of law that exist.”).

322. *See* 28 U.S.C. §§ 2254(b)(1), 2264(a)–(b); *see also, e.g.*, Coleman, 501 U.S. at 729–32 (describing exhaustion and procedural default doctrines). *See generally 2 Hertz & Liebman, supra* note 13, at chs. 23, 26 (same).

323. *See* 28 U.S.C. § 2254(e)(2) (stating that evidentiary hearings are available for claims involving new, and previously unavailable, rules of constitutional law, and for previously undiscoverable claims demonstrating defendant’s actual innocence).

habeas rules. As the discussion of the AEDPA demonstrates, the habeas rules govern not only the filing procedures for federal petitions, but also the review procedures. The “must know” list of rules for federal counsel is long, and has grown longer and more complicated since the passage of the AEDPA. Just for starters, counsel must fully grasp the relevant statute of limitations, understanding when the statute begins to run, when (and if) it begins to re-run, and when it tolls. Exhaustion is also a critical issue, and counsel must know not only how to exhaust a claim, but also that lack of exhaustion generally prevents federal habeas review. Even if exhaustion is not a problem, procedural default might be. Counsel therefore must be able to recognize such a default and know the rules for excusing it. And in the event previously unavailable or undiscoverable claims arise, counsel must understand when and how to file a successive petition. More importantly, counsel must appreciate how the severe restrictions on filing successive petitions render the first federal petition likely the last federal petition.325 With respect to the actual review of the claims in a petition, counsel must understand the circumstances warranting an evidentiary hearing in federal court. Finally, counsel must know the standards of review for state court legal and factual determinations—which the AEDPA changed—and how those standards apply to the particular claims in her client’s petition.

To its credit, the pre-performance standard recognizes the importance of the knowledge requirement and endeavors to satisfy it through competency standards. But the knowledge requirement is all that the pre-performance standard recognizes and protects. And even rigorous competency standards do not ensure proper investigation or preservation of the defendant’s claims. Thus, competency standards, standing alone, are insufficient to achieve the purpose of appointing counsel.326 Counsel cannot raise all existing federal claims unless she knows what those claims are. So in addition to possessing the requisite knowledge of the law, state and federal counsel must conduct a thorough investigation, seeking to unearth critical information about the crime and the performance of trial and appellate counsel.327 This is an important and difficult task. As Professor Michael Mello vividly explains:

326. The Texas Defender Service reached a similar conclusion in its recent study. See TEXAS DEFENDER SERVICE, supra note 8, at 43 (concluding that Texas court’s determination that the right to “competent” counsel means nothing more than compliance with competency standards “has rendered the statute’s guarantee of ‘competent’ counsel meaningless”).
327. As one commentator noted, state postconviction review involves the dissection of the capital trial. “It is the first opportunity to pursue claims such as ineffective assistance of counsel and the last opportunity to investigate fact-intensive claims such as actual innocence and prosecutorial misconduct.” Snyder, supra note 26, at 2233; see also TEXAS DEFENDER SERVICE, supra note 8, at 12 (describing importance of conducting thorough investigation that goes beyond the trial record); Millemann, supra
Reading the transcript is only the first step in the process of constructing a proper post-conviction litigation. Post-trial investigation almost always discloses important factual information not discovered by trial attorneys, who often work with extremely limited resources. Sometimes new evidence of innocence is found. Sometimes factors beyond the inmate’s control, such as mental illness, or a childhood of extreme abuse or neglect, may explain the crime.

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 investigated and why? The trial transcript provides clues, but those clues mark only the beginning of the post-conviction litigator’s task. Counsel’s investigative efforts are likely to bear fruit, as the Liebman Study revealed that “egregiously incompetent” lawyering at the trial level was one of the most common reasons for reversal at the state postconviction level. According to the Liebman Study, the “defense lawyers . . . didn’t even look for—and demonstrably missed—important evidence that the defendant was innocent or did not deserve to die.”

Take, for example, the case of Michael Wayne Jennings, who was convicted and sentenced to death for first-degree murder. His trial

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note 26, at 478–81, 487–500 (describing the complexity of capital postconviction litigation).
328. Mello, supra note 279, at 544–45 (second emphasis added); see also Mello & Duffy, supra note 124, at 490.
329. See LIEBMAN ET AL., supra note 1, at ii.
330. Id.  The ABA Task Force made similar observations:
When a competent lawyer prepares a petition for post-conviction review, he or she relies not on imagination, but rather on knowledge of constitutional law and an understanding of the facts. That lawyer directs a thorough investigation based on an understanding of the legal significance of certain facts that might be developed.

. . . .

An incompetent lawyer may fail to conduct the investigation that is necessary to raise relevant issues. . . . Many lawyers appointed to cases on post-conviction review are totally ignorant of habeas corpus law and procedure and make little or no attempt to learn. They thus make serious mistakes that will either complicate or delay post-conviction review or deprive their clients of meaningful review.

ABA Recommendations, supra note 22, at 71–72 (emphasis added) (footnote omitted).
331. Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3319 (U.S. Oct. 16, 2002) (No. 02-597). The jury found that Jennings “intentionally committed the murder during the commission of [a] rape, burglary and robbery,” which finding constituted a special circumstance permitting imposition of the death penalty. Id. at 1007.
lawyer completely failed to investigate and discover “vast and easily obtainable information about [his] fragile and failing mental health,” choosing instead to focus on an (ultimately feeble) alibi defense. Luckily for Mr. Jennings, his state postconviction counsel performed the necessary investigation and discovered the mental health evidence. Although unsuccessful during state postconviction review, Mr. Jennings ultimately obtained relief on his ineffective assistance claim before the Ninth Circuit during federal habeas review. The Ninth Circuit vacated Mr. Jennings’ conviction, reasoning that the mental health evidence, had it been discovered and presented at trial, “would have negated the mental state necessary for a first degree murder conviction.” Obviously, the investigatory assistance of state postconviction counsel enabled Mr. Jennings to raise and win his ineffectiveness claim.

While the investigatory burden falls on both state and federal postconviction counsel, the exhaustion and procedural default requirements, coupled with the AEDPA’s statute of limitations and successiveness rules, place most of the pressure on state postconviction counsel to uncover all claims of error and raise them properly in state court in the shortest amount of time possible. Once the case reaches the federal level, there will be little time to conduct an investigation and exhaust any necessary claims before filing the first (and likely last) federal petition.

After completing a proper investigation and discovering all possible claims, postconviction attorneys must lead their clients through the postconviction maze without losing any federal claims on procedural grounds. At the state level this means investigating and filing a complete state petition in the appropriate forum and within any existing state time limits. To preserve the opportunity for federal review on the merits, state counsel must be particularly careful to discover and raise all possible

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332. Id. at 1008.
333. Id. at 1020.
334. Demetrie Ladon Mayfield, a California death row inmate, has a similar success story. The Ninth Circuit, sitting en banc, granted Mr. Mayfield’s request for habeas relief on the ground his trial lawyer performed ineffectively by failing to conduct a thorough investigation for mitigating evidence, despite indications that such evidence existed. Mayfield v. Woodford, 270 F.3d 915, 927–32 (9th Cir. 2001) (en banc). State postconviction counsel discovered, raised, and developed the ineffectiveness claim in state court. Id. at 930. Federal postconviction counsel continued the good work by raising and pursuing the claim in federal court, choosing not to give up after the district court and the court of appeals both rejected the claim. Also, see Brown v. Sternes, 304 F.3d 677, 699 (7th Cir. 2002), where, after losing an ineffectiveness claim in state postconviction proceedings, a capital defendant received federal habeas relief from the court of appeals.
335. This is extremely arduous, given that “the median state postconviction case requires about 600 hours of legal work.” Snyder, supra note 26, at 2233 (citing Brief of the American Bar Association at 34, Murray v. Giarratano, 492 U.S. 1 (1989) (No. 88-411); Richard J. Wilson & Robert L. Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 JUDICATURE 331, 336 (1989)).
claims in the first state petition, because the federal statute of limitations will continue to run—and may perhaps expire—during the time spent preparing any subsequent state habeas petitions necessary for exhaustion purposes. This is especially true in opt-in states, since only the first state habeas petition tolls the limitations period. Moreover, state counsel must perform her investigatory and filing duties within the shortest possible amount of time since the federal statute of limitations continues to run until the filing of the state habeas petition. Counsel in opt-in states must be especially efficient, since the statutory period is six months shorter than the non-opt-in period and begins running at the end of state court direct review, rather than at the end of certiorari review. Finally, in both non-opt-in and opt-in states, state postconviction counsel must seriously consider whether to seek certiorari review of the state court postconviction decision, as both the six-month and one-year limitation periods continue running during such review.

At the federal level, counsel must conduct an investigation and confirm exhaustion of all existing federal claims in state court. If all claims are exhausted, then federal counsel must file the first (and likely last) federal petition within the remaining limitations period, which begins re-running upon completion of state court proceedings on postconviction.

336. The Texas Defender Service emphasized this point in its recent study: “[A] [state] habeas attorney must err on the side of thoroughness. Given the current restrictions on bringing post-conviction claims, every possible shred of evidence must be compiled and every possible legal argument made in the state habeas proceeding; otherwise, the claims may as well not exist.” Texas Defender Service, supra note 8, at 12–13.

337. See 1 Hertz & Liebman, supra note 13, § 5.2b, at 270. Professors Hertz and Liebman express concern that the statute of limitations might expire while the defendant tries to exhaust her claims:

This might happen, for example, if the petitioner filed her original federal petition when only a short amount of time remained before the one-year limitations period expired and then spent more than that amount of time preparing to file the state petition needed to exhaust her state remedies, or is later held to have pursued state proceedings in a manner that did not toll the federal statute of limitations.

Id.; see also Richards v. Workman, 42 Fed. Appx. 103, 104 (10th Cir. 2002) (holding that state habeas petition did not toll federal statute of limitations as it was filed nearly four years too late).

338. See 28 U.S.C. § 2263(b)(2). Thus, in opt-in states, the clock will continue to run while counsel prepares for and pursues additional state postconviction relief.

339. See id. §§ 2244(d)(2), 2263(b)(2).


341. Section 2263(b)(2), which governs in opt-in states, by its terms does not extend the tolling period to certiorari review of the state postconviction decision. Id. § 2263(b)(2). The federal courts have interpreted the non-opt-in tolling provisions to similarly preclude tolling during such review. See Gutierrez v. Schomig, 233 F.3d 490, 491 (7th Cir. 2000); Isham v. Randle, 226 F.3d 691, 695 (6th Cir. 2000); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999).

statutes of limitations are quite short, likely leaving little time to pursue the federal habeas remedy. \(^{343}\)

Things become more complicated if claims remain to be exhausted. Federal counsel first must determine whether sufficient time remains in the limitations period to pursue those claims in state court. If the limitations period likely would be substantially or completely spent in an attempt to exhaust claims, \(^{344}\) then federal counsel essentially is forced to file an unexhausted federal habeas petition within the limitations period. \(^{345}\) This course of action is not without risk, for as Professors Hertz and Liebman explain, the federal district court might well dismiss the petition pending exhaustion in state court. \(^{346}\) To avoid dismissal, Hertz and Liebman recommend requesting a stay of the federal proceedings pending exhaustion. \(^{347}\) If the court denies the stay and

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\(^{343}\) Indeed, federal counsel might be forced to file the petition within the six-month statute of limitations if she is unsure whether her state qualifies for opt-in status.

\(^{344}\) In opt-in states, the remaining time must be sufficient to cover both the preparation for such proceedings and the actual proceedings themselves, since the limitations period is tolled only during the first state postconviction petition. See 28 U.S.C. § 2263(b)(2). In non-opt-in states, there must be sufficient time remaining to at least prepare and file a state petition. See id. § 2244(d)(2). For continuity, federal habeas counsel can request appointment in state court for purposes of exhaustion. See, e.g., Cal. R. Ct. 76.6(k) (permitting appointment of federal habeas counsel to represent capital defendant in state court for purposes of exhausting state remedies).

\(^{345}\) 1 Hertz & Liebman, supra note 13, § 5.2b, at 272–74.

\(^{346}\) Id. § 5.2b, at 272–74. At least four circuits have endorsed the granting of a stay in these circumstances. Kelly v. Small, 315 F.3d 1063, 1070 (9th Cir. 2003) (“The exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA].”); Hill v. Anderson, 300 F.3d 679, 683 (6th Cir. 2002) (finding the stay of exhausted claims appropriate when dismissal would jeopardize opportunity for federal review of potentially meritorious claim); Zarvela v. Artuz, 254 F.3d 374, 382–83 (2d Cir. 2001) (finding that stay of federal proceedings is “the only appropriate course in cases . . . where an outright dismissal ‘could jeopardize the timeliness of a collateral attack’” (quoting Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000))); Freeman, 208 F.3d at 577 (“[D]ismissal [of the
dismisses the mixed petition, and a properly exhausted petition cannot be filed within the limitations period, then Professors Hertz and Liebman suggest that federal counsel argue that the new (and exhausted) petition relates back to the prior dismissed petition or, alternatively, request application of equitable tolling principles. Unfortunately, the latter option likely will not work in opt-in states, as the opt-in provisions contain a narrow and specific tolling provision—permitting tolling for no more than thirty days upon a showing of good cause. A court arguably could interpret this provision as a limit on, or substitute for, application of equitable tolling principles.

Of course, once a petition is filed and accepted, counsel still faces procedural default obstacles. If the state court rejected a federal claim on procedural grounds, or if the state court would reject the claim on procedural grounds were the defendant ever to present the claim, then the claim will not be reviewed on the merits in federal court unless counsel can make a showing sufficient to excuse the default.

As the above discussion demonstrates, actually assisting capital defendants move through the complex maze of state and federal postconviction processes is the primary responsibility of appointed counsel and the substance of effective assistance. Once counsel is appointed, the defendant understandably relies on counsel to perform the work necessary to obtain a decision on the merits, whether favorable or unfavorable, rendered after considered judgment and based upon all relevant facts and circumstances. Actual competent performance is therefore more than a welcome benefit; it is a necessary ingredient to the fair presentation of a defendant’s constitutional claims. And just because counsel possesses the requisite amount of relevant experience [federal petition] is not proper when that step could jeopardize the timeliness of a collateral attack.”

348. As Professors Hertz and Liebman note, the limitations period might well expire while the judge determines whether the petition in fact contains unexhausted claims. 1 HERTZ & LIEBMAN, supra note 13, § 5.2b, at 271–72.

349. Id.

350. 28 U.S.C. § 2263(b)(3); 1 HERTZ & LIEBMAN, supra note 13, at § 5.2c, at 276 & n.112.

351. 1 HERTZ & LIEBMAN, supra note 13, § 5.2c, at 276 & n.112 (explaining that the thirty-day extension period represents the opt-in defendant’s only real ability to “extend[] the filing deadline beyond the conclusion of Supreme Court certiorari review and state court postconviction review”).

352. See, e.g., 28 U.S.C. §§ 2254(e)(2), 2264(a); Coleman, 501 U.S. at 735 n.*.

353. As the Texas Defender Service concluded in its recent study of capital postconviction cases in Texas, the “promise of competent counsel rings hollow if appointed counsel does not actually provide competent assistance.” TEXAS DEFENDER SERVICE, supra note 8, at 45.

354. See Evitts, 469 U.S. at 394 n.6.

355. See Moffitt, 417 U.S. at 616 (finding meaningful right to discretionary review to require “adequate opportunity to present [defendant’s] claims fairly in the context of the State’s appellate process”).
and knowledge does not mean that she will conduct the necessary investigation, discover all claims, and raise them in the proper place at the proper time.

The Supreme Court recognized this “counsel as sherpa” aspect of effectiveness in *Evitts* with respect to the constitutional right to counsel on appeal, and it is no less applicable with respect to the statutory right to postconviction counsel. Like direct appeal counsel, state and federal postconviction counsel act as “expert professional[s],” guiding the capital litigant through the postconviction maze for the simple purpose of obtaining a fair and reasoned decision on the merits of her claims. Thus, if the goal in supplying a lawyer is to prevent missed opportunities for review of constitutional claims, then the statutory grant of counsel, to be meaningful, must be accompanied by an effectiveness component measured by actual performance.

One might argue in favor of a pre-performance standard by emphasizing the limited nature of the right actually granted by statutory counsel provisions. Statutory grants of counsel, the argument would go, create a right to the assistance of an attorney who satisfies relevant competency standards, but not the corresponding right to the assistance of an attorney who actually performs competently. In other words, statutory grants of counsel create nothing more than an expectation that appointed counsel will comply with designated competency standards. If counsel does so comply, then the government has provided all that it promised to provide. In fact, this argument is supported by commentary in the *Powell Committee Report* indicating that the Committee did not intend to create “any potential claim of ineffective assistance of counsel in collateral review” and that “[t]he effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process.”

But such an argument fails for two reasons. First, the argument ignores the true purpose of appointing competent postconviction counsel, which is to provide a lawyer who actually assists the capital defendant in the postconviction process, not to provide a lawyer who is merely capable of doing so. As stated in the *Powell Committee Report*: “The purpose of this mechanism [for counsel] is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy.”

Second, even if the government really only intended to grant a right to the assistance of an attorney who satisfied pre-existing competency standards, this “intent” cannot reduce the demands of due process. The government

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358. *Id.; see also id.* at 3240 (“[T]he Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.”).
cannot escape or limit due process requirements by defining the substance of a right in terms of the procedures used to protect or enforce that right.\textsuperscript{359} The government could not avoid, for example, the\textit{Griffin} obligation to provide transcripts to indigent defendants on direct appeal simply by declaring that it has created a right to direct appeal without the corresponding right to transcripts. The transcript requirement arises as a matter of constitutional law, not statutory grace. The same rule applies to postconviction counsel. Once the government determines to provide postconviction counsel, it is constitutionally obligated to provide effective counsel. The government cannot limit its obligation in this regard by declaring that its right to counsel contains an effectiveness component measured in pre-performance terms. As long as the government’s purpose is to provide competent counsel to capital defendants pursuing postconviction review,\textsuperscript{360} the meaningfulness requirement demands effective assistance measured by actual performance.

3. THE EXTENT OF THE ACTUAL EFFECTIVE ASSISTANCE GUARANTEE

The effectiveness guarantees attached to constitutional rights to counsel extend to counsel’s entire performance, necessitating a backward-looking examination of counsel’s performance.\textsuperscript{361} The question addressed in this Section is whether the effectiveness guarantee is somehow different because of the postconviction context. Does the effectiveness guarantee extend to counsel’s entire performance, or does it extend to something less than the entire performance? Stated differently, must the government adopt procedures that simply increase the likelihood of competent performance, or must the government adopt procedures that remedy any and all instances of incompetent performance?

Defining the extent to which the meaningfulness requirement guarantees actual competent performance is a delicate matter, as it requires balancing the capital defendant’s interests against the government’s interests. A good way to determine the proper balance—and thus the extent of the actual performance guarantee—is to examine the various methods of protecting effective assistance rights and to weigh the impact of the various methods on the relevant competing interests.

\textsuperscript{359} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539–41 (1985) (explaining that state cannot define property right by procedures used to deprive individual of the right).

\textsuperscript{360} This emphasis on legislative purpose invites the argument that the statutory rights to counsel are\textit{not} designed to provide competent assistance. There are two responses to such an argument. First, if not to provide competent assistance, then why would the government incur the burden and expense of appointing counsel—to provide company to the courthouse? Second, and related to the first point, the purpose of providing\textit{competent} counsel is implied in the appointment of counsel itself.

\textsuperscript{361} See generally Strickland, 466 U.S. 668.
Whichever method, or combination of methods, produces the proper balance will dictate the scope of the actual performance guarantee.

Three basic methods of protection exist: enforcing rigorous competency standards, conducting a review of counsel’s performance during the postconviction proceeding (a so-called during-performance review), and conducting a Strickland-like backward-looking review of counsel’s qualifications or conduct (a so-called post-performance review). Each will be discussed below, first from the capital defendant’s perspective and then from a doctrinal perspective.

a. The Capital Defendant’s Perspective

From the capital defendant’s perspective, the actual performance guarantee of the meaningfulness requirement should extend to counsel’s entire performance, and it should be enforced through all three of the above methods of protection. With this broad scope, the effectiveness guarantee will ensure that the government, and not the capital defendant, will bear the burden of incompetent postconviction counsel.

As many observers have argued, competency standards can play an important role in providing effective assistance of counsel. To do so, however, the standards must be substantively rigorous. Thus, competency standards cannot focus solely on years of experience, for as Professor Stephen Bright explains, “many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.”

Moreover, Bright reveals:

[Standards focusing only on experience] can actually be counterproductive because they may provide a basis for denying

362. E.g., Powell Committee Report, supra note 22, at 3241–42 (asserting that competency standards for postconviction counsel are “[c]entral to [the] efficacy” of its recommendations); ABA Recommendations, supra note 22, at 18–22, 258–61 (recommending competency standards for capital trial, appellate and postconviction counsel); Kappler, supra note 26, at 591–93 (recommending “[t]ougher qualification standards” for state postconviction counsel); Liebman, supra note 4, at 328 (arguing for “minimum lawyer qualifications” for capital trial counsel); Michael D. Moore, Note, Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants, 37 WM. & MARY L. REV. 1617, 1655 (1996) (arguing for more rigorous competency standards for capital trial counsel); see id. at 1641 (noting that “experienced and competent” trial counsel make fewer errors, thus decreasing the “number of ineffective assistance of counsel claims granted during habeas review” and reducing delay).

363. E.g., ABA Recommendations, supra note 22, at 219 (Minority Report of Stephen B. Bright); Moore, supra note 362, at 1655.


365. Bright, Counsel for the Poor, supra note 1, at 1871 n.209; see also Moore, supra note 362, at 1655 (making similar point) (citing Bright, Counsel for the Poor, supra note 1, at 1871 n.209).
appointment to some of the most gifted and committed lawyers who lack the number of prior trials but would do a far better job in providing representation than the usual court-appointed hacks with years of experience providing deficient representation.\textsuperscript{366}

Accordingly, whether through testing, mandatory training sessions or otherwise, competency standards must address counsel’s knowledge not only of death penalty law, but also of state and federal postconviction law. While the state and federal governments certainly possess flexibility in defining the standards, the standards nonetheless must ensure that counsel appreciates the need to conduct an appropriate investigation, knows what claims and errors to look for during that investigation, and understands how to raise these claims in a timely and proper manner in the appropriate court.

The competency standards recommended by the ABA in 1990 (\textit{ABA Recommendations})\textsuperscript{367} provide an excellent example of substantive rigor. While the ABA’s standards require a minimum level of experience with criminal litigation, they also demand a “demonstrated proficiency and commitment that exemplify the quality of representation appropriate to capital cases,”\textsuperscript{368} thus addressing Professor Bright’s concerns about experienced but unqualified attorneys. The standards also require “familiarity with the practice and procedure of the appellate courts of the jurisdiction” and “successful completion, within one year of appointment, of a training or educational program on criminal advocacy that focused” either on death penalty trials or criminal postconviction litigation.\textsuperscript{369} The training program requirement really represents the heart of the ABA’s competency standards, as it ensures that capital counsel will keep abreast of changes in the law.\textsuperscript{370}

In order for even substantively rigorous competency standards to have any impact on actual competent performance, however, the competency standards must be enforced.\textsuperscript{371} There must be a mechanism in place to check compliance with the designated competency standards in each and every case in which capital postconviction counsel is appointed. The \textit{ABA Recommendations}, for example, enforce the competency standards in two ways—through the creation and review by a designated appointing authority of a roster of attorneys who meet the competency standards,\textsuperscript{372} and through the elimination on federal habeas review of

\begin{thebibliography}{9}
\bibitem{366} Bright, \textit{Counsel for the Poor}, supra note 1, at 1871 n.209.
\bibitem{367} See supra note 101.
\bibitem{368} \textit{ABA Recommendations}, supra note 22, at 258–59.
\bibitem{369} \textit{Id.} at 258.
\bibitem{370} Fifteen death penalty states have standards that require experience \textit{plus} training or demonstrated knowledge. See supra note 191.
\bibitem{371} See, e.g., \textit{ABA Recommendations}, supra note 22, at 219 (Minority Report of Stephen B. Bright); \textit{Moore}, supra note 362, at 1655.
\bibitem{372} \textit{ABA Recommendations}, supra note 22, at 254–55. The appointing authority
\end{thebibliography}
certain procedural hurdles in cases where state postconviction counsel failed to meet competency standards.\textsuperscript{373} While the \textit{ABA Recommendations} certainly provide a desirable model, they do not represent the entire universe of enforcement options. The state and federal governments remain free to create their own enforcement mechanisms. As long as the chosen mechanism ensures that the competency standards do what they are supposed to do—provide capital inmates with a lawyer adequately trained in the complex procedural and substantive rules of death penalty and habeas litigation—it would be acceptable.\textsuperscript{374}

But even rigorous and enforced competency standards are insufficient standing alone. As Mr. Kappler recognized in his examination of the issue, “[w]hile ex ante qualification-based standards do ensure that prisoners are represented by arguably better and more skilled attorneys,” they do not “fully protect prisoners against attorney errors in the course of a proceeding.”\textsuperscript{375} Even a well-trained lawyer can miss a deadline, fail to conduct an adequate investigation, fail to hire necessary expert assistance, or fail to recognize a viable claim for relief. Prefabricated standards will not prevent these things from happening.\textsuperscript{376}

During-performance reviews pick up where competency standards leave off by identifying lawyers who, despite compliance with rigorous competency standards, nevertheless perform ineffectively. The ABA recommends monitoring as an improvement to capital postconviction procedures in both its 1989 \textit{American Bar Association Guidelines for the}

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Appointment and Performance of Counsel in Death Penalty Cases, and its 1990 ABA Recommendations. And both the Powell Committee recommendations and the AEDPA allow (though do not require) such review, expressly permitting the postconviction court to remove and replace counsel during the state and federal postconviction proceedings if counsel performs ineffectively. Florida takes a more active posture, requiring during-performance monitoring “to ensure that the capital defendant is receiving quality representation.”

During-performance reviews could be performed by the postconviction court, as apparently contemplated by the AEDPA, or by an independent authority charged with monitoring capital counsel’s performance, as suggested by the ABA. Either way, such reviews surely would catch at least obvious problems, such as the failure to meet deadlines, the failure to conduct any investigation or utilize any expert assistance, and the failure to raise known claims. If the reviewing body

377. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 7.1 (Feb. 1989), available at http://www.abanet.org/legalservices/publications/home.html (“The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation.”). Although not explicitly stated in Guideline 7.1, it appears to cover all attorneys appointed to represent capital defendants, from trial through postconviction proceedings. See id. The ABA Guidelines are currently under revision. Kristie Kennedy, Section News: Guidelines for Counsel in Death Cases to Be Revised, ABA CRIM. JUST., Summer 2002, at 70.

378. ABA Recommendations, supra note 22, at 260–61 (permitting removal and replacement of ineffective postconviction counsel); id. at 255 (requiring appointing authority to “periodically . . . monitor the performance of all attorneys appointed,” and remove from the roster of qualified attorneys any attorney who, inter alia, “fails to meet high performance standards in a case to which the attorney is appointed”).

In the 107th Congress, bills under consideration in both houses proposed the use of the spending power to induce the states to create systems for appointing capital counsel that would have included, inter alia, competency standards and some type of monitoring requirement. See Innocence Protection Act of 2002, H.R. 912, 107th Cong. § 201 (2001); Innocence Protection Act of 2002, S. 486, 107th Cong. § 201 (2001).

379. See 28 U.S.C. § 2261(e); POWELL COMMITTEE REPORT, supra note 22, at 3242 (permitting removal and replacement of ineffective counsel).

380. FLA. STAT. ANN. § 27.711(12) (West Supp. 2003) (emphasis added); see also supra notes 197–201 and accompanying text.

381. Although the AEDPA does not explicitly designate the postconviction court as the monitoring entity, the statutory language suggests that the court performs a monitoring function. See 28 U.S.C. § 2261(e) (“[T]he prohibition on effectiveness challenges shall not preclude the appointment of different counsel, on the court’s own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.”).

(either the court or an independent authority) suspects or finds incompetent performance, counsel should be removed and replaced by new counsel. And while not specifically authorized by the AEDPA or recommended by the Powell Committee, the postconviction court should allow the capital defendant, through new counsel, to correct the mistakes made by the outgoing attorney. For example, if the attorney failed to conduct an investigation or failed to file the petition in a timely manner, the court should allow the capital defendant additional time to conduct the investigation or file the petition. 383 By discovering and remedying the incompetence before the completion of the postconviction proceedings, the capital defendant can avoid suffering the consequences of counsel’s mistakes.

Like competency standards, however, even thorough during-performance reviews do not fully protect the capital defendant. Because the reviewing bodies realistically cannot scrutinize each and every decision made by counsel, during-performance reviews will not catch all errors in all cases. While a during-performance review should catch a complete failure to conduct an investigation, it might not catch a poor investigation—one that fails to uncover a viable constitutional claim. To distinguish between an adequate investigation and a poor investigation the reviewing body essentially would have to conduct the investigation itself. As a matter of sheer resources, this simply will not happen. Unless the defendant knows of the counsel’s failings and can inform the postconviction court, errors likely will slip by unnoticed—and unremedied.

This is where the post-performance review enters the picture. As the phrase suggests, a post-performance review is a backward-looking examination—in a separate proceeding—of counsel’s qualifications or conduct. For state postconviction counsel, the review could take place in state court following the initial state postconviction proceedings, and possibly in federal court during federal habeas review. 384 For federal postconviction counsel, the review necessarily would take place during subsequent federal habeas proceedings.

Substantively, the reviewing court could check for compliance with the designated competency standards, and use noncompliance as a justification for excusing any errors committed by counsel during the postconviction proceeding. The ABA Recommendations embraced this

383. The ABA Recommendations suggest a waiver of “time requirements . . . where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner’s ineligibility for the death penalty.” ABA Recommendations, supra note 22, at 265. Texas allows the postconviction court to appoint a new attorney and set a new filing deadline if the original postconviction attorney filed an untimely petition or failed to file any petition. TEX. CODE CRIM. PROC. ANN. art. 11.071(4A)(b)(3) (Vernon Supp. 2003).

384. See infra note 399.
approach with respect to state postconviction counsel. If state postconviction counsel failed to comply with state competency standards, then the ABA recommends that the rules governing exhaustion and procedural default, and the presumption of correctness for state court fact-findings, should not apply on federal habeas.\textsuperscript{385} Or the reviewing court could be more aggressive, examining counsel’s actual performance during those proceedings regardless of compliance with competency standards, and excusing the errors resulting from ineffective assistance.\textsuperscript{386} As is evident, the basic purpose of a post-performance review is to remove (at least to some degree) the burden of ineffective assistance from the shoulders of capital defendants and place it on the shoulders of the government.

In short, viewed solely from the capital defendant’s standpoint the ideal enforcement package would consist of a combination of all three methods of protection.\textsuperscript{387}

\textit{b. The Doctrinal Reality}

Unfortunately, however, this normative vision does not square up with the doctrinal reality. As evidenced by \textit{Finley} and \textit{Giarratano}, the Court remains unpersuaded that postconviction review is absolutely central to ensuring the reliability and fairness of the criminal trial, making it unlikely that the Court would endorse as an element of the meaningfulness requirement any procedure that imposed more than a moderate burden on the government, especially in terms of delay and lack of finality. And even if the Court were to change its mind about the importance of postconviction review, its strong commitment to federalism

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  \item The ABA Recommendations require the state appointing authority to review for compliance with competency standards, and to remove from the roster of certified attorneys any attorney who fails to comply with the standards. \textit{Id.} at 255. It is unclear whether, under the ABA Recommendations, the federal habeas court must conduct its own compliance review or whether it must rely on the review performed by the state appointing authority. Either way, however, the ABA Recommendations provide a post-performance remedy for noncompliance.
  \item The ABA Recommendations do not go this far. See \textit{id.} at 260–61.
  \item In his thorough examination of the current provisions for state postconviction counsel, Burke W. Kappler argues for a constitutional right to state postconviction counsel accompanied by a combination of enforcement mechanisms designed to protect that right. Mr. Kappler argues for both “ex ante qualification-based systems, which require attorneys to meet certain requirements” and “ex post mistake-based systems, . . . which evaluate an attorney’s performance after the proceeding to determine if the attorneys committed any prejudicial errors.” Kappler, \textit{supra} note 26, at 591–97. According to Mr. Kappler, neither enforcement mechanism is sufficient standing alone. \textit{Id.} Ex post reviews, governed as they are by the standard announced in \textit{Strickland v. Washington}, fail to catch all attorney errors. \textit{Id.} at 592. Moreover, they are “inherently procedurally intensive.” \textit{Id.} And ex ante systems—even rigorous ones—fail to guarantee effective performance. See \textit{id.} at 584, 592.
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and comity principles in the postconviction context strongly suggest that the Court will scrutinize—and rule against—any procedure that unduly aggravates the states’ interests in avoiding delay and achieving finality. In the words of Professors Louis D. Bilionis and Richard A. Rosen, proposals that complicate or prolong the capital postconviction process “face stiff winds of hostility.”

Even with these considerations in mind, however, the meaningfulness requirement should be interpreted to require the first two protection mechanisms—rigorous and enforced competency standards and guaranteed during-performance reviews. As demonstrated above, rigorous and enforced competency standards can play a key role in the delivery of effective assistance. At the same time, however, such standards do not impose too great a burden on the state or federal governments. Critical to this conclusion is the fact that creating and enforcing rigorous standards, while requiring some expenditure of government resources, will not undermine the twin goals of avoiding delay and achieving finality. Indeed, compliance with rigorous competency standards can actually promote these goals, since a well-trained attorney is more likely to correctly and efficiently utilize the postconviction process. Moreover, consistent with Finley and Bounds, the state and federal governments would be free to structure their competency standards as they see fit, provided of course that the standards are both rigorous and enforced. So although the ABA’s recommended standards and enforcement mechanisms are desirable, the state and federal governments would not be required to adopt them, and instead would remain free to construct a system more suited to their liking.

By their nature, during-performance reviews have the potential to aggravate delay and finality concerns. As long as the reviewing body discovers no ineffectiveness problems with counsel, during-performance reviews should not delay the postconviction process. In cases where the

390. The Powell Committee recognized as much in its report. See Powell Committee Report, supra note 22, at 3242; see also Moore, supra note 362, at 1641 (making similar point regarding “experienced and competent” trial counsel).
reviewing body finds ineffective performance, however, such reviews inevitably will cause at least some delay. The removal and replacement of counsel, along with the opportunity to mitigate any damage caused by the incompetent performance, will prolong the proceedings. Nevertheless, any delay resulting from the discovery of ineffective counsel should not weigh against requiring during-performance review procedures as part of the meaningful right to counsel. Any actual delay might be quite short, depending on how quickly the reviewing body discovers the incompetence and whether counsel’s ineffectiveness caused any damage. And unlike post-performance reviews, during-performance reviews do not involve a separate proceeding, and instead take place within the existing postconviction proceeding. Thus, the delay almost surely will be shorter than that caused by post-performance reviews.

Moreover, such reviews strike a nice balance between the interests of the states on the one hand and the interests of the capital defendants on the other. First, delay is a necessary byproduct of allowing at least some examination of counsel’s actual performance. Given that the meaningfulness requirement demands actual effective performance, actual review of that performance—at least to some degree—would appear critical to protecting the right to effective assistance. Second, during-performance reviews impose burdens on capital defendants as well as the states. Because during-performance reviews cannot catch all instances of ineffective performance, they do not guarantee error-free counsel.

So while the states might suffer some delay, capital defendants will continue to carry the burden of attorney errors on federal habeas with respect to errors not discovered and corrected in the during-performance review process.

Problems of delay would arise, of course, if claims involving the failure to comply with explicit competency standards and the failure to conduct an adequate during-performance review (or any such review at all) were raised for the first time on federal habeas (in the first petition for challenges to state postconviction counsel, and in a successive petition for challenges to federal habeas counsel). But this does not mean that competency standards and during-performance reviews ought not be part of the meaningfulness requirement. Instead, it means that any problems with these mechanisms must be addressed earlier in the process, preferably before the completion of the existing postconviction proceeding. In other words, the state and federal governments can reduce the likelihood of delay by requiring capital defendants to raise issues involving competency standards and monitoring before the postconviction process has ended. The question whether such issues ought to be cognizable on federal habeas need not be resolved here, for even if such claims were cognizable on federal habeas, most (if not all) problems involving compliance with competency standards and during-performance reviews could be resolved without having to seek federal habeas relief.

To be sure, important questions regarding the substance of the during-performance review requirement remain to be addressed, such as what the monitoring entity ought to look for when reviewing counsel’s performance, and what failures would be sufficient to justify removal of counsel. These questions arise naturally from the conclusions reached in this Article. Because they deserve separate focus and extended consideration, they are not explored here.
Post-performance challenges aggravate delay and finality concerns to a much greater degree than during-performance reviews, making it unlikely that the Court would interpret the meaningfulness requirement to require them. As mentioned above, post-performance challenges necessarily take place in a proceeding separate from the initial postconviction proceeding. At a minimum, post-performance reviews delay execution of the state’s judgment by the amount of time necessary to conduct the review. And in the event the post-performance review results in a finding of ineffectiveness, execution of the judgment is further delayed by the time it takes to consider any claims that were defaulted as a result of counsel’s ineffectiveness. Of course, if this review leads to reversal, then the state is back at square one, starring down the barrel of another trial, followed by direct review, state postconviction review, and federal habeas review.

But that is not all. These scenarios do not consider the delay that would result if the government provides counsel to assist the capital defendant during the post-performance review. If the meaningfulness requirement includes post-performance review of counsel supplied during the first round of postconviction review, then it arguably includes postperformance review of post-performance review counsel. Theoretically, the cycle of ineffectiveness claims would be endless. As one Texas court put it, if “the appointment of ‘competent counsel’ means that the counsel appointed must render constitutionally effective assistance of counsel in the particular case,” then the postconviction statute would become “a perpetual motion machine.”

The scenario would look like this:

393. Andrew Hammel believes that “[i]t is . . . 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.” Hammel, supra note 28, at 59. He also believes that, “[e]ven if the Court did so, it would feel immediate pressure to limit the right.” Id.

394. If the effectiveness guarantee extends to counsel’s entire performance, then ineffective assistance of postconviction counsel naturally would constitute cause sufficient to excuse procedural default under Coleman and Wainwright.

395. Burke Kappler recognized this problem in the context of a constitutional right to postconviction counsel. He explains:

On a simple level, creating a right to post-conviction counsel creates yet another claim that a petitioner can raise to delay final adjudication. On a more complex level, there is a fear that, like an Escher drawing, the right to post-conviction counsel would always permit another layer of review and would prevent any ability to finalize a petitioner’s sentence. This fear emerges from the fact that rights to effective counsel can only be enforced through a subsequent proceeding. Therefore, to effectively enforce a right to post-conviction counsel, courts will have to develop multiple levels of post-conviction proceedings solely to address counsel claims.

Kappler, supra note 26, at 582.

396. Ex parte Graves, 70 S.W.3d at 114.
[A] person sentenced to death would be appointed “competent counsel,” paid by the state, to investigate and raise all potential claims in an original writ. But if that original writ is rejected and the applicant later contends that counsel could have and should have raised additional facts or legal claims, he may file a subsequent writ to determine whether the original habeas counsel was ineffective for failing to bring those claims. Then, if that second writ is rejected, he may file a third writ contending that the second habeas counsel was ineffective for failing to investigate other new claims or facts that he now asserts are meritorious. And so forth. A claim of ineffective assistance of the prior habeas counsel would simply be the gateway through which endless and repetitious writs would resurrect.  

The problem of delay exists whether the post-performance review process looks only for compliance with competency standards, as proposed by the ABA, or whether it looks for ineffective assistance regardless of compliance with competency standards. Under either format, a finding of ineffective assistance increases the claims considered during postconviction review. Moreover, these delay problems exist whether the post-performance review occurs at the state level (for state postconviction counsel) or the federal level (for either state or federal postconviction counsel). But obviously the impact will be much greater if the case progresses all the way to federal habeas review, only to be reversed because of an error discovered during the post-performance review process.

Congress (and the Powell Committee) very likely envisioned these problems when it prohibited federal habeas petitioners from challenging on federal habeas the effectiveness of state or federal postconviction counsel. There is little doubt that the Court will see these same

397.  Id. at 114–15.
398.  Andrew Hammel disagrees that ineffectiveness claims on federal habeas would impact the states. In his view:

[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.

Hammel, supra note 28, at 60. But as explained above, even as a gateway claim it causes delay and finality problems. In addition to the time spent considering defaulted claims on the merits, there is also the time consumed in both state and federal courts following any remand.
difficulties, and rule that post-performance reviews are not part of the meaningfulness requirement. 399

One might take issue with this conclusion given that some states permit capital defendants to challenge the effectiveness of state postconviction counsel as a matter of state law. In his thorough examination of the problems currently plaguing capital postconviction litigation, Andrew Hammel points out that several death penalty states have “recognized a right to effective post-conviction counsel without, apparently, watching their criminal justice systems grind to a halt.” 400 Mr. Hammel further asserts that “[n]othing prevents a state from declaring that an indigent inmate may challenge the work of former post-conviction counsel only once, and then only if the inmate can plausibly identify meritorious issues overlooked by previous counsel.” 401 But many death penalty states have made the exact opposite policy decision—specifically prohibiting effectiveness challenges to state postconviction counsel. 402 For these states the risk of delay apparently is just too great. Moreover, there is a significant difference between a state determining on its own to provide a limited post-performance review right and a constitutional rule requiring the state and federal governments to provide such review whenever they provide a statutory right to counsel. The former situation involves a more limited delay, and one the state might be willing to suffer in the hope that effective assistance at the state postconviction level will reduce delay in federal court. And if the state ultimately determines that

399. As the discussion demonstrates, delay and finality concerns standing alone prevent post-performance reviews from being part of the meaningfulness package. But another, perhaps thornier, issue exists that would call into question the propriety of requiring post-performance challenges. That issue is whether the Constitution really requires that ineffectiveness claims be entertained on federal habeas review given that the scope of such review is up to Congress. See Ex Parte Bollman, 8 U.S. (4 Cranch) 75. For a long time constitutional claims by state prisoners were not cognizable on federal habeas.

400. Hammel, supra note 28, at 59. Hammel lists nine such states—Alaska, California, Connecticut, Idaho, Iowa, Maryland, New Jersey, Pennsylvania, and Wisconsin. Id. But only six of these are death penalty states, and states appear to be more concerned with delay and finality in the death penalty context than the non-death penalty context.

401. Id. at 59–60.

its review procedure creates too much delay, it is free to stop. The latter situation, however, locks the states into post-performance reviews not only for state counsel, but for federal counsel as well. Finally, a constitutional rule requiring post-performance challenges ultimately might convince the states to repeal their statutory provisions for counsel, concluding that the burdens associated with providing counsel outweigh any associated benefits. Such a result is unlikely to happen with a rule requiring rigorous competency standards and during-performance review procedures. In increasing numbers the states appear to appreciate the need for at least some type of standards to regulate attorney competence.

All in all, the combination of competency standards and during-performance reviews best balances the capital defendant’s interest in reliability and fairness with the state’s interests in avoiding delay and achieving finality. Together these procedures will improve effectiveness and reduce (though not eliminate) the likelihood that capital defendants will suffer the burden of incompetent counsel. At the same time, these procedures do not unduly burden the states. Indeed, improving the competence of counsel inures to the states’ benefit, as competent counsel increases the efficiency of the postconviction review process.


Congress appears to understand the need for competent counsel to represent our capital inmates. And it was on the right track in both 1988 and 1996 when it stepped in to address the need for postconviction counsel. Unfortunately, however, both of Congress’ attempts to provide counsel to capital postconviction inmates fall short of the constitutional mark.

The Anti-Drug Abuse Act, which provided a mandatory right to capital counsel during federal habeas proceedings, lacks rigorous competency standards. While Congress correctly appreciated the need to set minimum competency standards, it chose to impose only experience-based standards rather than ones that contain a requirement for training. And the experience-based standards themselves are lacking in the sense that they fail to address the specific and particularized level of skill necessary to handle capital litigation. Moreover, while federal law permits during-performance reviews and allows removal and replacement of federal counsel in the event she performs ineffectively, federal law does not require such reviews. Such reviews are vital to protecting the right to effective assistance and must be conducted in each case.

And the AEDPA, which provides streamlined procedural benefits on federal habeas corpus for all states willing to provide mandatory rights to state postconviction counsel, establishes minimum requirements that do

403. See supra notes 95, 307.
not satisfy the meaningfulness requirement. Although states must establish competency standards in order to receive the procedural benefits of Chapter 154, Congress failed to provide any guidance whatever regarding the substantive content of those standards. Relying too heavily on federalism and comity concerns, Congress failed to set even minimum standards or provide a rough description of what “competent counsel” should look like.\footnote{404}{Given the voluntary nature of the opt-in provisions, commandeering concerns should not have prevented Congress from setting minimum standards or providing guidelines.} Although a federal court might require rigorous competency standards—i.e., those going to counsel’s level of substantive and procedural knowledge—nothing in the statute requires it to do so. Indeed, one federal court recently stated that “Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards.”\footnote{405}{Spears, 283 F.3d at 1013.} Likewise, nothing in the statute requires a state to have in place an apparatus designed to monitor counsel’s actual performance while that performance is taking place. Thus, a state could opt-in to Chapter 154 without rigorous competency standards and without any sort of during-performance review procedure designed to monitor counsel’s conduct. In other words, it could opt-in without having to provide a meaningful right to counsel.

Finally, no state appears close to providing a constitutionally meaningful right to postconviction counsel. While more and more states see the wisdom in providing counsel to all indigent capital defendants seeking post-conviction review, not as many states understand the need for competency standards that demand both relevant experience and relevant training (or at least demonstrated knowledge of the relevant law). Moreover, the states also fail to appreciate the need to monitor actual performance in each case.

In short, change is necessary in order to bring existing statutory rights to counsel in line with the constitutional minimum.

\section*{III. Conclusion}

It is settled—though far from accepted—that defendants seeking postconviction relief are not constitutionally entitled to the assistance of an attorney. Capital defendants are seriously impacted by this lack of counsel, given both the complexity of death penalty jurisprudence and the irrevocable nature of the penalty itself. Recognizing this problem, the federal government and many of the state governments voluntarily provide a right to counsel for capital defendants pursuing postconviction remedies. But these legislative efforts have not gone far enough because
capital defendants continue to suffer the effects of incompetent postconviction counsel.

The time has come to look to constitutional law for a solution. Doing precisely that, this Article demonstrates that the decision to provide postconviction counsel triggers the constitutional obligation to provide a meaningful right to counsel. Even in the postconviction context, which the Court views as less important than direct review, any right to counsel must contain an effectiveness component in order for the right to be meaningful. For as the Court stated in *Evitts*, “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”

The more difficult question, of course, involves defining the content of the effectiveness component in the postconviction context. Governmental interests in avoiding delay and achieving finality necessarily factor into the meaningfulness analysis, counterbalancing the defendant’s interest in the reliability of the criminal trial. As a consequence, the constitutional effectiveness component attached to statutory rights to postconviction counsel is not as strong as the component attached to constitutional rights to counsel. So while the meaningful right to postconviction counsel includes the right to actual competent performance, it does not guarantee the competence of counsel’s *entire* performance. Instead, it guarantees competence only with respect to that part of counsel’s performance that can be controlled through compliance with rigorous competency standards and through a mandatory during-performance evaluation of counsel’s conduct.

While not ideal from the capital defendant’s perspective, the combination of competency standards and during-performance examinations should measurably improve the competent performance of postconviction counsel, thus reducing the instances in which the capital defendant must shoulder the burden of counsel’s ineffectiveness. At a minimum, capital defendants will be better off than they are now. And though the states will have to utilize some resources to provide effective postconviction counsel, they can continue to refuse to provide post-performance challenges, a result that undoubtedly will sit well with many states.

406. 469 U.S. at 396.