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ENFORCING THE ABA GUIDELINES IN CAPITAL STATE POST-CONVICTION PROCEEDINGS AFTER *MARTINEZ AND PINHOLSTER*

*Eric M. Freedman**

I. INTRODUCTION: THE LONG ARC TOWARDS JUSTICE

The American Bar Association (“ABA”) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases¹ (“Guidelines”) mandate “high quality legal representation in accordance with these Guidelines” from the moment of arrest until the prosecution is no longer entitled to seek the death penalty.² Commentators have long urged the Supreme Court to translate this sound policy—one that would benefit the states as well as prisoners³—into an explicit rule of constitutional law requiring the states to provide effective counsel in capital state post-conviction proceedings.⁴

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I serve as Reporter for the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). The opinions expressed herein, however, are mine alone. I have provided professional assistance to the defense teams in a number of the cases cited in this Article.

This Article has benefited from thoughtful input during its drafting by Ty Alper, Justin F. Marceau, and Giovanna Shay.

1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES].

2. See *id.* Guideline 1.1(B), at 919, Guideline 10.2, at 965.

3. See Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183, 185-87 (2006) [hereinafter Freedman, *Fewer Risks*].

4. See, e.g., Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1099-1101 (2006) [hereinafter Freedman, *Giarratano Is a Scarecrow*].

In a line of cases reaching its nadir in *Coleman v. Thompson*,⁵ the Supreme Court has refused.⁶ More recently in *Martinez v. Ryan*,⁷ a 2012 non-capital case, the Court declined to modify its constitutional views.⁸ But it ruled for the prisoner, in an opinion that Justice Antonin Scalia described in dissent as having “essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required” in capital and non-capital cases alike.⁹ Justice Scalia may well be right, at least to the extent that the states will decide that their only reasonable choice is to provide effective counsel for every indigent capital petitioner pursuing state post-conviction relief. But if so, this welcome development will result not just from the pressure that the states experience from the defendant’s victory in *Martinez* but also from the converging pressure created by the state’s victory the previous year in *Cullen v. Pinholster*.¹⁰

In combination, “[t]he confluence of pressures now centered on state post-conviction proceedings could yield genuine benefits to the entire criminal justice system and all of its stakeholders.”¹¹ Read together the two decisions encourage “the state and national governments [to] each discharge their duties responsibly,” with the result that “the federal system will be working as it should: efficiency will be furthered while at the same time ‘a double security arises to the rights of the people.’”¹²

II. *MARTINEZ*: PROCEDURAL AND SUBSTANTIVE IMPLICATIONS

The defendant’s legal argument in *Martinez* was straightforward. The state unquestionably had the duty to provide him with the effective assistance of counsel at trial.¹³ But if under state law he could assert a

5. 501 U.S. 722 (1991).

6. See *id.* at 756-57; *Murray v. Giarratano*, 492 U.S. 1, 12-13 (1989). The Guidelines encourage counsel to challenge this position. See ABA GUIDELINES, *supra* note 1, Guideline 1.1 cmt., at 932 n.47, Guideline 10.15.1 cmt., at 1081 n.333.

7. 132 S. Ct. 1309 (2012).

8. *Id.* at 1319-20.

9. *Id.* at 1322.

10. 131 S. Ct. 1388, 1398 (2011).

11. Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT’G REP. 298, 299 (2012) [hereinafter Freedman, *State Post-Conviction Remedies*].

12. *Id.* (quoting THE FEDERALIST NO. 51, at 295 (James Madison) (Am. Bar Ass’n 2009) (1788)).

13. See *Martinez*, 132 S. Ct. at 1313-14 (majority opinion) (stating that on “federal habeas review . . . petitioner sought to argue he had received ineffective assistance of counsel at trial . . .”); *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (holding that “in federal courts

claim of ineffective assistance of trial counsel only in post-conviction proceedings, and if he had no right to the effective assistance of counsel to bring that claim in those proceedings, then the state could effectively nullify its duty both practically, by failing to provide a lawyer to litigate the claim properly, and legally, by triggering a procedural default that would preclude federal habeas review of the claim.¹⁴ In response, the *Martinez* Court eschewed recognition of a constitutional right to the effective assistance of counsel in state post-conviction proceedings but instead held by a seven to two vote that, where state post-conviction is the mandatory initial opportunity¹⁵ to raise a substantial claim of ineffective assistance of trial counsel¹⁶ and the federal habeas court

counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived”).

14. For this reason, the Court had explicitly carved out ineffective assistance of trial counsel claims from its decision in *Coleman v. Thompson*, that there is no constitutional right to counsel on state collateral review and the appropriate “allocation of costs” between the state and the petitioner is to require “petitioner [to] bear the burden of a failure to follow state procedural rules,” even if the burden in question is that he is executed with potentially meritorious claims unreviewed by any state or federal court. *Coleman v. Thompson*, 501 U.S. 722, 754-55 (1991); see Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT’L L.J., Aug. 19, 1991, at S6 (objecting that under *Coleman*, where the capital petitioner forfeited all federal claims because state post-conviction counsel filed papers three days late, “the system works only one way: A lawyer may default on claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so”).

15. The Court subsequently clarified this element of the rule. See *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (holding that where the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies”).

16. In explicating this standard the Court wrote:

To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” Cf. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, 132 S. Ct. at 1318-19.

This passage is of central importance because the *Miller-El* standard is whether “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further,” rather than whether the court believes that the petitioner will ultimately “demonstrate an entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 327, 337 (2003). The rationale for the Court’s adoption of the standard was evidently that in the *Martinez* context, as in that of *Miller-El*, the issue for decision is the threshold one of whether the petitioner will be allowed to litigate on the merits.

Thus, a court applying *Martinez* must decide whether the underlying claim of trial counsel ineffectiveness is fairly debatable among jurists of reason, rather than whether it is meritorious under *Strickland v. Washington*, 466 U.S. 668 (1984). See *Barnett v. Roper*, No. 4:03CV00614, 2013 WL 1721205, at *10 & n.16 (E.D. Mo. Apr. 22, 2013); see also *Sheppard v. Robinson*, No. 1:00-CV-493, 2013 WL 146342, at *13 (S.D. Oh. Jan. 14, 2013), *certificate of appealability granted on other grounds*, No. 1:00-CV-493, 2013 WL 1346138 (Apr. 2, 2013). If

would otherwise be unable to reach that claim because of a procedural default during state post-conviction proceedings, the federal habeas court may exercise its equitable discretion to forgive the procedural default if the state failed to appoint effective (or any) post-conviction counsel for the prisoner.¹⁷

As Justice Scalia accurately pointed out in dissent, the logical boundaries of this decision are fuzzy.¹⁸ On the procedural front, there seems no apparent reason why the ruling should be limited to situations in which the ineffectiveness of post-conviction counsel causes the claim of ineffectiveness of trial counsel to be defaulted in federal court. Suppose instead that the claim is barred there because of counsel's failure to meet the statute of limitations for the filing of a federal habeas petition.¹⁹ The Court has already held that statute to be subject to equitable tolling, and has specifically ruled that abandonment by one's state post-conviction attorney is a circumstance causing a federal court to exercise its equitable discretion in a petitioner's favor.²⁰ Surely the

the rule were otherwise, *Martinez* would—contrary to the views of all nine Justices—have not changed the pre-existing law in a way having real-world significance. As noted *infra* text accompanying note 27, to adjudicate the ultimate claim on the very record being attacked as having been flawed by the incompetence of post-conviction counsel would be to “palter with us in a double sense; . . . keep the word of promise to our ear, [a]nd break it to our hope.” WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 5, sc. 8; see *Mann v. Moore*, No. 13-11322-P, slip op. at 19-20 (11th Cir. Apr. 9, 2013) (Martin, J., dissenting).

17. See *Martinez*, 132 S. Ct. at 1317-18. The Association of the Bar of the City of New York proposed substantially this rule in a 1989 report of which I was the principal drafter. See Comm. on Civil Rights, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 848, 854-55 (1989); Freedman, *Fewer Risks*, *supra* note 3, at 189 (predicting that the City Bar's “suggestion[] that the ineffectiveness of post-conviction counsel should preclude states in federal habeas proceedings from reliance upon procedural defaults[] may well find judicial acceptance soon”).

18. See *Martinez*, 132 S. Ct. at 1321 & n.1, (Scalia, J., dissenting) (asserting that the Court “insults the reader's intelligence” by suggesting that there is “a dime's worth of difference” between the fact pattern before it and a number of others that might be covered by the ruling). Various situations to which *Martinez* may apply are considered in Nancy J. King, *Preview: A Preliminary Survey of Issues Raised by Martinez v. Ryan* 2-16 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 12-34), available at <http://ssrn.com/abstract=2147164>.

The statutory landscape of habeas corpus is currently dominated by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214, 1217-26 [hereinafter AEDPA], whose results insofar as relevant to this Article are now codified in 28 U.S.C. §§ 2241-55 (2006 & Supp. II 2009) (containing statutes relevant to federal habeas corpus petitions). See ABA GUIDELINES, *supra* note 1, Guideline 1.1 cmt., at 929 & n.34, 930, 936, Guideline 10.15.1 cmt., at 1083-87 (describing statutory changes in 1996, noting that federal habeas corpus proceedings are “governed by a complex set of procedural rules” that “[c]ounsel must master . . . thoroughly,” and describing “The Labyrinth of Post-conviction Litigation”).

19. Cf. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-34 (2013) (holding that showing of actual innocence, previously held to be effectual to overcome a procedural default, would also serve as equitable exception overcoming a federal filing deadline).

20. See *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012); *Holland v. Florida*, 130 S. Ct. 2549,

ineffectiveness of state post-conviction counsel must be another, particularly in circumstances where the petitioner has exercised due diligence and the underlying claim is strong. Similarly, suppose the ineffectiveness of post-conviction counsel causes the claim to come to federal court unexhausted, a circumstance which, because the statute of limitations has subsequently run, threatens to bar the claim forever. Even before *Martinez*, there was very visible authority for the proposition that the ineffective assistance of state post-conviction counsel in creating that circumstance would excuse the failure to exhaust. On remand from *Rhines v. Weber*,²¹ the District Court, whose ruling had been affirmed by the Supreme Court, squarely held that ineffectiveness of state post-conviction counsel constituted “good cause” for petitioner’s failure to exhaust, thereby entitling him to the benefits of the equitable stay and abatement procedure the Court had just created.²² That result, correct under *Rhines*, would be equally so under *Martinez*. So too, in light of the policy-driven reading that the Court has given to the statutory restrictions on “second or successive” habeas petitions—self-consciously refusing to attribute a literal meaning to the language of 28 U.S.C. § 2244(b)²³—there may well be circumstances under which the ineffectiveness of state post-conviction counsel should cause a federal court to conclude that the second-in time petition before it is not “second or successive.”²⁴

Ineffective state post-conviction counsel might also “fail[] to develop the factual basis of a claim” of trial counsel ineffectiveness, with the result that 28 U.S.C. § 2254(e)(2) barred the federal habeas court from considering the evidence.²⁵ In that case, the federal court should in equity consider the evidence that post-conviction counsel

2560 (2010); Adam Liptak, *Lawyers Stumble, and Clients Take Fall*, N.Y. TIMES, Jan. 8, 2013, at A12 (identifying “the larger question that runs through these cases: why is it morally permissible to blame clients for their lawyers’ mistakes?”).

21. 544 U.S. 269 (2005).

22. *Rhines v. Weber*, 408 F. Supp. 2d 844, 846-47 (D.S.D. 2005). See Freedman, *Fewer Risks*, *supra* note 3, at 187-89 (discussing the excuse for non-exhaustion adopted in *Rhines*).

23. See *Panetti v. Quarterman*, 551 U.S. 930, 943-47 (2007).

24. The Supreme Court has reached this conclusion not only in *Panetti*, but also in *Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000) (holding, “[a] habeas petition filed in the district court after an initial habeas petition was adjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition”); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (refusing to count prematurely-asserted claim); see also, e.g., *Phillips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999) (involving earlier application filed in wrong district dismissed for lack of jurisdiction); *Benton v. Washington*, 106 F.3d 162, 164-65 (7th Cir. 1996) (involving earlier application dismissed for failure to pay filing fee).

25. See *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (holding that “a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel”).

ought to have presented. Not only is it axiomatic that “[e]quity looks upon that as done that ought to have been done,”²⁶ but, more practically, *Martinez* will do nothing to help the federal habeas petitioner if the District Court considers his underlying claim of trial court ineffectiveness on the very record that he asserts was flawed by the ineffective assistance of state post-conviction counsel.²⁷

On the substantive front, the equitable rationale of *Martinez* should apply to a number of claims other than ineffective assistance of trial counsel.²⁸ The state’s duty to provide effective assistance is, of course, well established and fundamental to justice.²⁹ But there are other basic trial rights in that category, which by their very nature can only be effectively enforced in post-conviction proceedings.³⁰ Consider, for example, situations involving the prosecution’s failure to disclose exculpatory evidence³¹ or deals with witnesses,³² its use of perjured testimony,³³ or its suppression of evidence by the use of threats.³⁴ Is it equitable for a state to be able to evade federal review of such claims by contriving that the petitioner never has effective counsel to pursue them?

These and other open questions surrounding *Martinez* might certainly encourage a state that did not previously provide effective post-conviction counsel to do so, at least in capital cases, as a safeguard against having convictions overturned on federal habeas corpus review.³⁵

26. See 3 ROSCOE POUND, JURISPRUDENCE 553 (1959) (internal quotation marks omitted) (describing history of maxim).

27. See *Mann v. Moore*, No. 13-11322-P, slip op. at 19-20 (11th Cir. Apr. 9, 2013) (Martin, J., dissenting).

28. This assertion finds support both in legal logic and in the Court’s explicit statement of the importance of the ongoing application of the equitable principles traditionally guiding habeas corpus, see Eric M. Freedman, *Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 607 n.85 (2011), to the habeas regime created by AEDPA. See *Holland v. Florida*, 130 S. Ct. 2549, 2560-61 (2010).

29. See *Martinez*, 132 S. Ct. at 1317 (majority opinion).

30. There are also situations in which the right (e.g., not to be executed if mentally retarded) might be vindicated as part of the trial or in some sort of collateral proceeding, depending on how the state chooses to arrange its criminal justice system. In such situations the state should—as a constitutional, not an equitable, matter—be held to the standard that would apply at a criminal trial regardless of how the proceedings are organized. See *Hooks v. Workman*, 689 F.3d 1148, 1183-85 (10th Cir. 2012) (holding that capital petitioner was constitutionally entitled to effective assistance of counsel at mental retardation hearing notwithstanding that state conducted it post-conviction).

31. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

32. See *Giglio v. United States*, 405 U.S. 150, 152, 154-55 (1972).

33. See *Mooney v. Holohan*, 294 U.S. 103, 110 (1935).

34. See *Pyle v. Kansas*, 317 U.S. 213, 214, 216 (1942).

35. Most death penalty states already provide counsel in capital cases, although the requirements for—and realities of—effective performance vary widely. See *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012) (reporting that Alabama is “[n]early alone” in failing to provide counsel to indigent defendants in capital cases); ABA GUIDELINES, *supra* note 1, Guideline 2.1 & cmt., at 939, 941 (requiring that states create a plan for conforming to Guidelines and observing that “[t]he

But that would not be the only consideration bearing upon the decision. Surveying the current legal terrain, a state would appropriately take into consideration not just the threat of loss represented by *Martinez* but also the hope of gain offered by *Pinholster*.

III. PINHOLSTER: DUE PROCESS AS THE PRICE OF DEFERENCE

Nothing in the federal Constitution requires the states to provide for post-conviction proceedings in criminal cases. But they have long done so, with two salient legal consequences:

1. State post-conviction systems must provide due process. As the Court has recently reiterated, their failure to do so is subject to attack under 42 U.S.C. § 1983.³⁶

2. Where a state post-conviction system exists, a state prisoner must invoke it as a pre-condition to the grant of federal habeas relief unless it is unavailable or “ineffective to protect the rights of the applicant.”³⁷

AEDPA contains various limitations on the courts’ authority to grant the writ to state prisoners, including the provision of 28 U.S.C. § 2254(d)(1) that “with respect to any claim that was adjudicated on the merits in State court proceedings”³⁸ the writ shall not be granted unless

critical element is that the plan be judicially enforceable in full against the jurisdiction”); Freedman, Giarratano *Is a Scarecrow*, *supra* note 4, at 1086-88 (noting that only fourteen states recognize a state statutory or constitutional right to effective counsel at post-conviction proceedings and that there are a “disturbingly large number of instances” in which counsel, when appointed, is ineffective). As Professor Ty Alper points out, the pressure that *Martinez* puts on the state is less in noncapital cases than in capital ones. See Ty Alper, *Towards a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 842, 874-76 (2013) (noting that *Martinez* applies only when a state prisoner files a federal habeas petition alleging ineffectiveness of counsel and that noncapital defendants typically have no habeas counsel in federal court). Cf. *Collazo v. Curley*, No. 11-6, 2012 WL 2026830, at *5-6 (W.D. Pa. June 5, 2012) (appointing counsel for a non-capital habeas petitioner to pursue a *Martinez* issue).

36. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1296, 1298 (2011); Dist. Att’y’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 70, 73-75 (2009).

37. 28 U.S.C. § 2254(b)(1) (2006); cf. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (refusing to defer to state courts’ factual finding that petitioner was mentally competent because their fact-finding process was inadequate); Freedman, *Fewer Risks*, *supra* note 3, at 189 (observing that a state post-conviction system that “cannot be effectually employed without the aid of a competent attorney” should meet § 2254(b)(1)’s description).

38. 28 U.S.C. § 2254(d)(1). If this pre-condition does not apply, neither does the remainder of the section. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-99, 1401 (2011); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (*per curiam*) (“Because the state court did not decide whether [petitioner’s] counsel was deficient, we review this element of [petitioner’s] *Strickland* claim *de novo*.”); *Cone v. Bell*, 556 U.S. 449, 472 (2009) (“Because the Tennessee courts did not reach the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard . . . [and instead], the claim is reviewed *de novo*.”); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (“Because the state courts found the representation adequate, they never reached the issue of prejudice . . . and so we examine this element of the *Strickland* claim *de novo*.”) (citations omitted) (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)).

that adjudication “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.”³⁹ Construing this provision as a threshold barrier to fact-finding by the District Court, *Pinholster* held that in determining whether petitioner has met the standard the federal habeas court must confine itself at the outset to a consideration of the record that the state courts had before them.⁴⁰

In performing this task, the District Court is ordinarily to presume the truth of the facts found by the state courts, as 28 U.S.C. § 2254(e)(1) requires.⁴¹ To the extent that the state courts have not made factual determinations but instead summarily dismissed a claim, the federal court must accept the movant’s factual allegations in the state court petition as true—just as the state courts were required to do under basic due process norms.⁴²

Even where the state courts have found facts, however, the presumption of correctness has a critical exception for situations where the petitioner has not been given a full and fair opportunity to develop his claim in the state post-conviction proceedings that are to form the basis for the federal court’s determination.⁴³ Scott Lynn Pinholster did not invoke this exception.⁴⁴ Had he done so and succeeded, the Court would have ordered the District Court to determine the facts de novo. The stated basis for that order would most likely have been a construction of AEDPA⁴⁵—one that the Court would have been strongly driven to adopt by its powerful rule of reading statutes to avoid a serious

39. 28 U.S.C. § 2254(d)(1).

40. See *Pinholster*, 131 S. Ct. at 1398.

41. The next paragraph of text parses the “ordinarily.”

42. See *Pinholster*, 131 S. Ct. at 1402 n.12; *Herman v. Claudy*, 350 U.S. 116, 123 (1956) (reversing state Supreme Court for summarily denying habeas petition on merits simply based on respondent’s denial and without providing evidentiary hearing). Thus, where there has been no fact-finding in state court, the question on federal habeas becomes whether, assuming the truth of all of the facts the petitioner proffered to the state courts, those courts’ legal determination that the petitioner failed to state a claim for relief was “contrary to” or involved an “unreasonable application of” clearly established federal law. See *Morris v. Thaler*, 425 Fed. App’x 415, 418, 420 (5th Cir. 2011) (reversing District Court for failing to grant petitioner’s allegations required presumption of truth).

43. See 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.1[b] (6th ed. 2011). There is an exhaustive discussion describing the effects of deficient state post-conviction processes on federal habeas corpus adjudication as well as an extended argument that the states are constitutionally required to provide competent post-conviction counsel in capital cases, in *id.* at ch. 7.

44. On the contrary, his position was that the record compiled in state court fully supported his position. See *Pinholster*, 131 S. Ct. at 1402 n.11.

45. The details have been lucidly set forth in Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 *HASTINGS L.J.* 1, 57-64 (2011).

constitutional question.⁴⁶ Here, the rub is that it would be unconstitutional to deny a state prisoner one full and fair opportunity to demonstrate the federal invalidity of his conviction.⁴⁷ “Due process forbids the substantive deference announced in § 2254 where a prisoner has not received a full and fair review of his constitutional claims, either in state or federal court.”⁴⁸

IV. CONCLUSION: FEDERALISM AS A PROTECTOR OF LIBERTY

In refusing to hold that the Constitution required the states to provide counsel to state post-conviction petitioners, the Supreme Court began its *Coleman* opinion with the noxious sentence: “This is a case about federalism.”⁴⁹ Federalism, Justice Harold Blackmun correctly retorted, “has no inherent normative value” but rather is a device that

46. See, e.g., *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299-301 (2001) (construing statute to permit habeas relief, thereby avoiding substantial constitutional question under Suspension Clause); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (applying rule that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions since “[w]e do not assume that Congress, in passing laws, intended [arguably unconstitutional] results”); *Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465-67 (1989) (applying rule as decisive consideration where other interpretive factors resulted in a close question); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This cardinal principle has its roots in Chief Justice Marshall’s [1804] opinion for the Court in *Murray v. The Charming Betsy* . . . and has for so long been applied by this Court that it is beyond debate”) (citations omitted) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)); *United States ex rel. Att’y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (stating that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1585-87 (1998).

47. See *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (holding that state post-conviction processes were not “sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself”). Petitioner’s brief had explicitly sought to distinguish the seemingly adverse precedent of *Frank v. Mangum*, 237 U.S. 309 (1915) by arguing that the state post-conviction proceedings in *Frank* had taken place before a dispassionate tribunal that had the authority to find the facts, while in *Moore* the facts were determined on a motion for a new trial by the very judge whose conduct was in question and whose decision could only be reviewed for legal error. *Moore*, 261 U.S. at 90-92; see ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 80-81 (2001) (discussing *Moore* and *Frank*).

48. Marceau, *supra* note 45, at 7. For a convincing argument under the Suspension Clause coming to the same conclusion see Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L.REV. 953, 992-99 (2012).

49. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); see Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION* 553, 567 (James R. Acker et al. eds., 2d ed. 2003) (calling this statement “a dictum that will live in infamy”).

“secures to citizens the liberties that derive from the diffusion of sovereign power.”⁵⁰ To take maximum advantage of that device, “[a]mbition must be made to counteract ambition.”⁵¹

In the aftermath of *Martinez* and *Pinholster*, both the state and federal governments have strong self-interests in strengthening state post-conviction systems, specifically through the appointment of effective counsel for capital petitioners. If the states create robust processes for post-conviction review, the federal courts will under *Pinholster* treat their individual outcomes with greater respect than before. But if the states fail to do so, they are now vulnerable not only to structural assaults for failing to provide due process⁵² but also to case-specific challenges based on the equitable rule of *Martinez*. Providing competent counsel in state post-conviction proceedings, in capital cases first of all, is an easy way for the states to push back on both fronts.

Because the law regarding effective assistance of counsel is distinctly government-friendly,⁵³ this reform is likely under current conditions to insulate most state post-conviction systems from successful structural attacks, while any attempt by the states to meet their due process obligation without providing lawyers seems increasingly unlikely to succeed.⁵⁴ “It is easy to see how a state might provide lawyers and still maintain an unfair post-conviction system (e.g., by denying discovery), but it is hard to see how a state might maintain a fair post-conviction system and not provide lawyers.”⁵⁵

But even if the states fend off systemic lawsuits, each individual petitioner who was not given an effective post-conviction counsel will still be able to mount a *Martinez* attack. Even on a reasonably narrow reading of the case many such claims will be meritorious.⁵⁶

50. *Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting).

51. THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 294.

52. See Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 92 (2012); *supra* text accompanying note 36.

53. See ABA GUIDELINES, *supra* note 1, Guideline 1.1 cmt., at 930 (observing that, “[u]nder the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel, even seriously deficient performance all too rarely leads to reversal”) (footnote omitted).

54. The states’ situation in this respect was already vulnerable even before the most recent cases. See Freedman, *Fewer Risks*, *supra* note 3, at 190.

55. Freedman, *State Post-Conviction Remedies*, *supra* note 11, at 299.

56. For example, in *Gallow v. Cooper*, No. 12-7516, 2013 WL 3213609, at *1 (U.S. June 27, 2013) (respecting denial of petition for certiorari) Justices Stephen Breyer and Sonia Sotomayor observed that “[a] claim without any evidence to support it might as well be no claim at all.” Therefore, they continued, if state post-conviction counsel’s ineffectiveness in failing to produce evidence of trial counsel’s ineffectiveness led to an adverse finding of fact in state court (rather than a default), there exists “a strong argument” that *Martinez* should apply to preclude application of *Pinholster*. *Id.*

A similarly forceful argument could be made with respect to the substantive claims canvassed, *supra* text accompanying notes 31-34, and an even more forceful one in the specifically

The interests of the federal government, for its part, lie in the direction of insisting that the states provide fully effective systems of post-conviction review.⁵⁷ Because a state is not entitled to benefit in federal court from prior proceedings that fall below constitutional minima,⁵⁸ a federal court cannot rely upon such proceedings and therefore must do the work itself.⁵⁹ For example, while a federal court may in many circumstances rely upon the results of a fairly conducted state evidentiary hearing, it must find the facts for itself if a hearing that should have been held was not.⁶⁰ Similarly, the less legal analysis a state post-conviction court does, the more a federal habeas court must do.⁶¹

Moreover, there is an inverse relationship between the states' costs in providing post-conviction counsel and the federal government's costs in providing counsel for federal habeas corpus proceedings.⁶² Federal law provides for the appointment of qualified counsel in habeas corpus proceedings that challenge state capital convictions.⁶³ Under the Guidelines, one of such counsel's key duties is to recognize and attempt to overcome any procedural blunders committed by state post-conviction attorneys—a duty whose competent discharge involves significant expense.⁶⁴ If appointed federal habeas counsel fails to do this job effectively, a petitioner may be able to assert rights flowing from the federal statutory mandate for qualified federal habeas counsel,⁶⁵ even

capital context of a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Not only is that claim deeply rooted in traditional common law equitable notions, *see id.* at 406-09, but the Court has made quite clear that state procedures for its adjudication will receive close scrutiny. *See Panetti v. Quarterman*, 551 U.S. 930, 948-54 (2007) (giving no deference to a finding of *Ford* competency that state courts reached by a process inadequate for reaching reasonably correct results).

57. *See Case v. Nebraska*, 381 U.S. 336, 345-46 (1965) (Brennan, J., concurring) (*per curiam*).

58. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 584-86 (1988) (holding the state is not entitled to rely in capital sentencing on conviction that had been vacated for failure to provide defendant with counsel).

59. *See supra* text accompanying notes 47-48.

60. *See supra* text accompanying note 48.

61. *See* ABA GUIDELINES, *supra* note 1, Guideline 1.1 cmt., at 929-30; *see also supra* note 38.

62. The remainder of this paragraph is drawn from Freedman, *Fewer Risks*, *supra* note 3, at 190-91.

63. *See* 21 U.S.C. § 848(q)(4)(B) (2000); *see also* *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (noting the importance of this entitlement for “promoting fundamental fairness in the imposition of the death penalty”).

64. *See* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 341-43 (2003) (discussing ABA GUIDELINE 10.7).

65. *See* *Cooley v. Bradshaw*, 216 F.R.D. 408, 415-17 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under 21 U.S.C § 848), *motion to vacate stay denied*, 338 F.3d 615, 616 (6th Cir. 2003), *cert. denied*, 539 U.S. 974 (2003).

though he could not predicate a habeas corpus claim directly on the ineffective assistance of state post-conviction counsel.⁶⁶ Thus, whether appointed federal habeas counsel performs well or badly in cleaning up the mess left behind by ineffective lawyers in state capital post-conviction proceedings, the federal government bears significant costs caused by the states' failure to provide competent counsel in the first place.

The longstanding policy of the ABA has been to take no position on the desirability of the death penalty, provided that it is not inflicted on mentally retarded persons, juveniles, or those not represented throughout the process in accordance with its Guidelines.⁶⁷ The ABA has already achieved the first two of these goals through Supreme Court decisions.⁶⁸ If lawyers and judges make appropriate use of *Martinez* and *Pinholster*, ten years from now we may be able to say the same about the third.

Richard Cooley was executed on October 14, 2008. See Tom Beyerlein, *Ohio Executes Coeds' Killer*, DAYTON DAILY NEWS, Oct. 15, 2008, at A1.

66. See 28 U.S.C. § 2254(i) (2006) ("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 § 2254.").

67. See *Death Penalty Moratorium Implementation Project*, ABA, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/policy.html (last visited July 18, 2013) (containing ABA resolution of Feb. 3, 1997 embodying this position, with links to relevant policies).

68. See *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005), *overruling* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (barring imposition of death penalty on juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), *overruling* *Penry v. Lynaugh*, 492 U.S. 302 (1989) (barring imposition of death penalty on mentally retarded persons). The ABA believes that the logic of these two cases requires that an exemption from capital punishment also be extended to certain classes of mentally ill offenders. See ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES ET AL., RECOMMENDATION 122A, at 7-9 (2006), available at <http://www.deathpenaltyinfo.org/documents/122AReport.pdf> (exempting those with severe mental illness from the death penalty).