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The New State Postconviction

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THE NEW STATE POSTCONVICTION

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I. Some Background 476
A. No Right to Counsel=No Claim for IAC=No "Cause" to Overcome Procedural Default 476
B. A New Role for State Courts After AEDPA Restricts Federal Habeas 477
II. The Cases 481
A. *Maples v. Thomas* 481
B. *Martinez v. Ryan* 484
III. The New State Postconviction 486

In its October 2011 Term, the Supreme Court decided two cases—*Maples* v. *Thomas*[1] and *Martinez* v. *Ryan*[2]—that have a significant impact on the provision of counsel in state postconviction proceedings. Typically, a prisoner must litigate federal law challenges to his conviction first in state court before bringing them to federal court.[3] Missteps in the litigation of state court claims, such as missing deadlines in state court or failing to raise claims there, can bar a prisoner from litigating those claims later in federal habeas, a doctrine known as "procedural default."[4] In *Maples* and *Martinez* the Court expanded the

∗ Professor of Law, Western New England University School of Law. Thanks to Chris Lasch for helping to shape my thinking on both state postconviction and the effects of AEDPA, and for his contributions to our article *Initiating a New Constitutional Dialogue*, which forms the starting point of my argument here. Chris also provided thoughtful feedback on an earlier draft of this article, particularly about the relationship between AEDPA and *Teague* anti-retroactivity doctrine. Thanks too to Ty Alper, Eric Freedman, and Lee Kovarsky for providing helpful comments, and to Ty and Eric for sharing manuscripts of their own forthcoming essays on these cases.

1. 132 S. Ct. 912 (2012).

2. 132 S. Ct. 1309 (2012).

3. Coleman v. Thompson, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.").

4. *Id.* at 729 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question

circumstances in which deficient performance by state postconviction counsel can overcome procedural default, to permit the prisoner to litigate defaulted claims on the merits in federal habeas. Others have ably described how those cases represent an important expansion of access to counsel in state postconviction.[5] My aim in this short Symposium contribution is to argue that, given the increased significance of state postconviction under the Anti-Terrorism and Effective Death Penalty Act (AEDPA),[6] *Maples* and *Martinez* could have a salutary effect on the development of the federal constitutional criminal procedure litigated in those proceedings.

At a minimum, *Maples* and *Martinez* reflect concern that individual litigants receive adequate representation to ensure that their federal law claims have a day in court. Indeed, the two cases have been hailed by Professor Lee Kovarsky as "*Gideon* for state postconviction."[7] Justice Ginsburg's opinion for the Court in *Maples* includes what Justice Scalia describes as a "lengthy indictment of Alabama's general procedures for providing representation to capital defendants,"[8] noting that Alabama is "nearly alone among the states" in failing to "guarantee representation to

and adequate to support the judgment.").

5. *See, e.g.*, Lee Kovarsky, *Maples and Martinez: Gideon for State Postconviction*, PRAWFSBLAWG (Oct. 2, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/10/maples-v-thomas-and-martinez-v-ryan-gideon-in-the-state-post-conviction-era.html; Ty Alper, *Towards a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. __ (forthcoming May 2013) (arguing that the *Martinez* rule will be much more useful for capital defendants who are routinely appointed counsel in federal habeas; "for non-capital defendants who have no counsel in federal court, there will be no federal habeas claims to default in the first place"); Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 101 (forthcoming 2013); Nancy J. King, *Preview: A Preliminary Survey of Issues Raised by* Martinez v. Ryan, *in* LAFAVE, ISRAEL, KING & KERR, CRIMINAL PROCEDURE (3d ed.), *2012-13 Supplement* (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147164; Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan: *Focusing on the Adequacy of State Procedures*, YALE L.J. (forthcoming), *available at* http://ssrn.com/abstract=2203391 (predicting that the next area of litigation will be the adequacy of state procedures for raising ineffective assistance claims). *See also* Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in* Maples *and* Martinez *to Restore It*, 45 CREIGHTON L. REV. 185, 187 (2011) ("the decisions in both cases promise to have a lasting effect on access to habeas relief."); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1279 (2012) ("In the past year, the Supreme Court has signaled a receptivity to providing equitable relief from procedural default strictures based on ineffective assistance of post-conviction counsel.").

6. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241 to 2254 (2006)).

7. Kovarsky, *supra* note 5.

8. Maples v. Thomas, 132 S. Ct. 912, 934 (2012) (Scalia, J., dissenting).

indigent capital defendants in postconviction proceedings."[9]

As Chris Lasch and I have explained elsewhere,[10] after AEDPA, state postconviction is the best opportunity for certain federal law claims to be litigated, the vehicle that will provide lower courts, and ultimately the Supreme Court, with the most unfettered opportunity to decide open questions in federal constitutional criminal procedure.[11] This is because AEDPA erects many procedural obstacles to merits review of state prisoners' federal habeas claims,[12] including a standard for winning merits relief that essentially precludes federal courts from resolving open constitutional questions in federal habeas.[13] Justices of the Supreme Court have acknowledged the increasing importance of state postconviction in the post-AEDPA world. In her dissent in *Lawrence v. Florida*,[14] Justice Ginsburg wrote, "since AEDPA . . . our consideration of state habeas petitions has become more pressing."[15]

I argue in this paper that, because *Maples* and *Martinez* coincide with other important developments that make state postconviction more important, they could have critical synergistic effects. *Maples* and *Martinez* create incentive for states to provide effective counsel in state postconviction at a moment when these proceedings are being forced to assume a new role in the development of federal constitutional criminal procedure.[16] The confluence of these events could produce a new era in

9. *Id.* at 918 (majority opinion). Although Justice Alito joined the Court's opinion, he wrote a separate concurrence to voice his view that Mr. Maples' situation was the product of a "perfect storm of misfortune," and not the fault of the State of Alabama's system of appointed counsel. *Id.* at 928-29 (Alito, J., concurring).

10. Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008).

11. *Id.* at 228, 236 (describing how AEPDA "freezes the development of doctrine by forbidding lower courts from relying on and developing Supreme Court teaching," and how "state prisoners' certiorari petitions seeking review of direct appeals and state postconviction decisions will present increasingly important opportunities for the Court to develop its criminal constitutional doctrine.").

12. *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 806 (2009) ("AEDPA restricted habeas by creating a series of new procedural obstacles: a first-ever time limit for filing a first habeas petition; stricter barriers to review of second and successive petitions; and a new, tougher standard of review that precludes habeas courts from granting relief unless the state court's prior decision was 'contrary to, or involved an unreasonable application of, clearly established federal law' as declared by the Court.").

13. Shay & Lasch, *supra* note 10, at 228, 236.

14. 549 U.S. 327 (2007).

15. *Id.* at 343 n.7 (Ginsburg, J., dissenting).

16. Some commentators have even suggested that federal habeas review has become so meaningless after AEDPA that it should be drastically restricted and the resources redirected to support the provision of counsel in state proceedings. *See* JOSEPH L. HOFFMANN & NANCY J. KING, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT

state postconviction.

I. SOME BACKGROUND

A. No Right to Counsel=No Claim for IAC=No "Cause" to Overcome Procedural Default

In order to understand the significance of *Maples* and *Martinez* it is first necessary to know that the Supreme Court decided in the late 1980s that there is no federal constitutional right to the appointment of counsel in state postconviction.[17] Following from that, the Court concluded in *Coleman* v. *Thompson*[18] in 1991 that there was no federal constitutional right to the effective assistance of counsel in state postconviction: no right to counsel, ergo, no right to the effective assistance of counsel.[19] (Although *Coleman* did leave open an important question about state postconviction proceedings that are the first opportunity to raise claims of ineffective assistance of trial counsel,[20] as we shall see in *Martinez*).[21]

This has important implications for state prisoners' ability to bring federal constitutional claims in federal habeas. For state prisoners seeking federal habeas relief, a claim of ineffective assistance of counsel is a major means of overcoming procedural default in state court. The Supreme Court said in *Wainwright v. Sykes*[22] that state prisoners must

87-107 (2011) (arguing that in non-capital state prisoners' cases, federal habeas review should be available only for new rules of federal constitutional criminal procedure made retroactive and for claims of actual innocence); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009). *But see* Lee Kovarsky, *Habeas Verite*, 47 TULSA L. REV. 13, 18 (2011) (discussing and taking issue with Hoffmann and King's recommendation to reform federal habeas). In this paper, I take no position on that issue, focusing instead on the apparent trends in the Supreme Court's decisions.

17. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Murray v. Giarrantano, 492 U.S. 1 (1989). *But see* Eric Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089 (2006) (arguing that "[c]ontrary to much loose talk, *Giarratano* did not decide that there is no right to counsel in state postconviction proceedings in capital cases. Rather, *Giarratano* only rejected the claim of constitutional entitlement in that particular instance, and implicitly held that other facts would lead to other results.").

18. 501 U.S. 722 (1991)

19. *Id*. at 752 ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.").

20. 501 U.S. at 722. *See also* Martinez v. Ryan, 132 S. Ct. 1309, 1314 (2012) ("whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial.")

21. *See infra* note 87 and accompanying text.

22. 433 U.S. 72, (1977).

demonstrate "cause-and-prejudice" to overcome a procedural default,[23] and ineffective assistance of counsel meets that standard.[24] With *Coleman*'s bar on claims of ineffective assistance of counsel in state postconviction proceedings, state prisoners were left without an important means of overcoming defaults in state postconviction to obtain review on the merits of federal claims in federal habeas.

Maples and *Martinez* provide avenues for state prisoners to bring their federal claims arising from state postconviction in federal habeas. *Maples* identifies an end-run around the *Coleman* conundrum in extreme circumstances by expanding on the notion of "abandonment" by counsel. If counsel "abandoned" the client, the procedural misstep cannot be attributed to the client. *Martinez* stops short of declaring a federal constitutional right to the appointment of counsel in state postconviction, but it does offer a systemic "fix." It provides that, when state postconviction is the first opportunity for a state prisoner to litigate a claim, states will not be able to assert procedural default when they fail to appoint state postconviction counsel or that lawyer is ineffective. This creates incentives for states to appoint competent counsel in state postconviction matters, which is why Lee Kovarsky described these cases as "*Gideon* for state postconviction."[25]

B. A New Role for State Courts After AEDPA Restricts Federal Habeas

The second important thing to understand in order to appreciate the significance of *Maples* and *Martinez* is that, after the passage of AEDPA, state courts have an increasingly important role to play in the development of federal constitutional criminal procedure. AEDPA restricts the circumstances in which federal courts may grant habeas relief to state prisoners.[26] For example, it provides in part that a federal court cannot grant a state prisoner's habeas merely because the state court was wrong about the federal law. Rather, in order to merit federal

23. *Id.* at 88-90.

24. *Coleman*, 501 U.S. at 752 ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.") (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

25. Kovarsky, *supra* note 5.

26. *See generally*, JAMES S. LIEBMAN & RANDY HERTZ, 1 FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE 343 (6th ed. 2011); Kovarsky, *supra* note 16, at 17 (summarizing AEDPA provisions). *But see* Nancy J. King, *Lafler v. Cooper and AEDPA*, 122 YALE L.J. ONLINE 29 (2012) (discussing implications of *Lafler* for federal habeas review of state court judgments under AEDPA).

habeas relief, the state court's adjudication of the claim must have "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,"[27] or was based on an "unreasonable determination of the facts."[28] Justice Kennedy has written of this standard, "if [it] is difficult to meet, that is because it was meant to be."[29]

As Chris Lasch and I explained in our 2008 article, *Initiating a New Constitutional Dialogue*, this provision heightens the importance of state proceedings as vehicles for litigating federal constitutional claims.[30] After AEDPA, in most circumstances, state court proceedings are the only vehicle through which state prisoners will receive unfettered review of the federal constitutional claims.[31] In a state prisoner's federal habeas case, the Court is not able to resolve conflicts or develop the law, just correct decisions that are "contrary to or an unreasonable application of clearly established Federal law."[32] As a result of AEDPA, the Supreme Court typically (with some exceptions) can decide open federal law questions in state prisoners' cases only when it grants certiorari from the judgment of a state court.[33]

For example, in *Carey v. Musladin*,[34] which Chris and I discussed in our article,[35] a California prisoner challenged his murder conviction in federal habeas, claiming that buttons worn by spectators depicting the murder victim deprived him of a fair trial.[36] The Ninth Circuit granted Musladin federal habeas relief,[37] extending Supreme Court doctrine

27. 28 U.S.C. § 2254(d)(1) (2012).

28. 28 U.S.C. § 2254(d)(2).

29. Harrington v. Richter, 131 S.Ct. 770, 784, 786 (2011) (concluding that "where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

30. Shay & Lasch, *supra* note 10, at 215.

31. There are some exceptions, such as when a prisoner raised the federal law claim in state court, but the state court did not decide it on the merits. *See, e.g.*, 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 that applies under AEDPA to 'any claim that was adjudicated on the merits in State Court proceedings.'"). *But see* Johnson v. Williams, ___S. Ct.___, 2013 WL 610199 at *7 (2013) (concluding that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits," although that presumption sometimes can be rebutted).

32. 28 U.S.C. § 2254(d)(1).

33. Shay & Lasch, *supra* note 10, at 215.

34. 549 U.S. 70 (2006).

35. Shay & Lasch, *supra* note 10, at 225.

36. *Musladin*, 549 U.S. at 73.

37. *Id.*

concerning courtroom conduct by state actors to cases involving courtroom spectators.[38] The Supreme Court granted certiorari and reversed.[39] Justice Thomas, writing for the Court in *Musladin*, pointed out that the Court had not yet addressed whether spectator conduct could create the "inherent prejudice" necessary to constitute a due process violation.[40] Despite the fact that "lower courts ha[d] diverged widely" on the issue, the Court did not decide this open question.[41] Because Musladin's case was in federal habeas, the Court explained, under AEDPA, all the Ninth Circuit should have considered was whether the California court's decision affirming his conviction was "contrary to or an unreasonable application of clearly established federal law."[42] If Musladin's case had come up from state proceedings, however, the High Court could have resolved the issue regarding spectator conduct, providing guidance to the lower courts.[43]

In a more recent case, *Renico v. Lett*,[44] a Michigan state prisoner challenged his conviction for second-degree murder, arguing that it violated double jeopardy.[45] The defendant claimed that the trial court should not have declared a mistrial at his first trial, because there was no "manifest necessity" to do so as required by Supreme Court precedents.[46] As a result, he asserted, his conviction at his second trial violated double jeopardy.[47] The Michigan Court of Appeals initially accepted this claim, but the Michigan Supreme Court reinstated the conviction, despite the fact that the appellate prosecutor had confessed error.[48] The Supreme Court, in a decision by Chief Justice Roberts,

38. *Id.* at 75.
39. *Id.* at 74.
40. *Id.* at 76.
41. *Id.*
42. *Id.* at 77.
43. Of course, even if new rules of constitutional criminal procedure are announced in cases in which the Supreme Court grants certiorari from state postconviction proceedings, they may not have retroactive effect in jurisdictions that are bound by or that follow federal anti-retroactivity doctrine under *Teague* v. *Lane*, 489 U.S. 288 (1989). *See Chaidez* v. *United States*, ___ S. Ct. ___, 2013 WL 610201 (2013) (concluding in the context of a federal prisoner's *coram nobis* petition that the rule announced in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), did not apply retroactively to prisoners whose convictions were final when *Padilla* was decided). *But see Danforth* v. *Minnesota*, 552 U.S. 264 (2008) (concluding that state courts are not constrained by *Teague* because *Teague* was designed to address the comity concerns present in federal habeas review of state prisoners' convictions).
44. 130 S. Ct. 1855 (2010).
45. *Id.* at 1860-61.
46. *Id.* at 1861.
47. *Id.*
48. *Id.* at 1861, 1865 n.3.

rejected Mr. Lett's claim, explaining that, since the case was in federal habeas, the issue was not whether the decision of the Michigan state courts "was right or wrong,"[49] but that the only question was whether the state court decision reinstating Mr. Lett's conviction was clearly unreasonable.[50] If Lett's case had gone to the U.S. Supreme Court on certiorari from Michigan state courts, the Supreme Court would not have had to apply this "deferential" AEDPA standard.[51]

An exchange between the majority and dissenting opinions in the 2007 case *Lawrence v. Florida*,[52] acknowledges the increasing importance of certiorari grants from state postconviction. In *Lawrence*, the Court considered whether the tolling provision of the one-year AEDPA statute of limitations for state prisoners' federal habeas petitions, which stops the clock while "an application for state postconviction or other collateral review . . . is pending,"[53] included the time for filing certiorari petitions from state postconviction proceedings. In a 5-4 decision written by Justice Thomas, the Court concluded that the statute of limitations was not tolled during this period.[54] The habeas petitioner had argued that failing to include the period of time for seeking certiorari from state postconviction in the AEDPA tolling provision would create procedural complications, including the filing of protective federal habeas petitions.[55] The *Lawrence* majority rejected this argument, reasoning that its decision would cause "few practical problems."[56] In support of its conclusion, it cited Justice Stevens' concurrence in *Kyles v. Whitley*,[57] a pre-AEDPA opinion which had noted that the Court seldom granted review from state postconviction proceedings, waiting instead to consider state prisoners' federal claims on certiorari from federal habeas.[58]

In dissent, Justice Ginsburg countered, "[t]he majority regards the practical problems [with this conclusion] as inconsequential for we rarely grant certiorari in state habeas proceedings."[59] However, she noted that *Kyles* was a pre-AEDPA decision.[60] She explained that

49. *Id.* at 1865 n.3.
50. *Id.* at 1866.
51. *Id.* at 1860.
52. 549 U.S. 327 (2007).
53. *Id.* at 331-32; 28 U.S.C. § 2244 (d)(2) (West 2013).
54. *Lawrence*, 549 U.S. at 329.
55. *Id.* at 334.
56. *Id.* at 335.
57. *Id.* at 335 (quoting Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).
58. *Id.* (quoting *Kyles*, 498 U.S. at 932 (Stevens, J., concurring).
59. *Id.* at 342 n.7 (2007) (Ginsburg, J., dissenting).
60. *Id.*

AEDPA had changed the certiorari calculus, and that, "since AEDPA . . . our consideration of state habeas petitions has become more pressing."[61]

There is another reason why state postconviction proceedings are increasingly important after AEDPA. Professor Lee Kovarsky, in a very lucid pre-decision post regarding *Maples* and *Martinez*, pointed out that the Court's decision in *Cullen v. Pinholster*[62] the preceding term limits federal habeas courts reviewing claims "adjudicated on the merits in State court proceedings" to considering the facts as developed in state postconviction.[63] Professor Kovarsky concludes that after *Cullen*, "the state habeas proceeding is now the ball game."[64] Thus, state postconviction is doubly important: cutting-edge federal constitutional claims can be resolved only on certiorari from state proceedings,[65] and a federal habeas court's determination of whether a state court decision is unreasonable is limited to the factual record developed in the state court.[66]

Against this backdrop, *Maples* and *Martinez* focus renewed attention on the role of counsel in state postconviction matters. *Maples* emphasizes the need for adequate counsel in these important proceedings, and *Martinez* creates powerful incentives for the states to appoint state postconviction lawyers and to ensure that they have the resources and skills to provide effective representation.

II. THE CASES

A. Maples v. Thomas

Maples represents the development of the doctrine of "abandonment" by counsel to permit a state postconviction client to

61. *Id.*

62. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

63. Kovarsky, supra note 5.

64. *Id. See also* Freedman, *supra* note 5, at 102, 108 (describing how the result in *Martinez*, when combined with "pressure created" by *Cullen v. Pinholster*, might create a situation in which states "decide that their only reasonable choice is to provide effective counsel for every indigent capital petitioner pursuing state postconviction relief." Freedman explains: "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 process but also to case-specific challenges based on the equitable rule of *Martinez*.").

65. Lasch & Shay, *supra* note 10.

66. Kovarsky, supra note 5.

overcome procedural default in federal habeas.[67] Cory Maples was a convicted Alabama prisoner sentenced to death.[68] Because Alabama does not provide appointed counsel on state postconviction, he was represented in that proceeding by pro bono attorneys from a New York firm, Sullivan & Cromwell.[69] Those attorneys were working with local counsel who had moved their admission pro hac vice.[70]

During the time that Mr. Maples' case was in state postconviction proceedings, his pro bono attorneys left their firm.[71] Regrettably, they failed to notify their client, the court, or their local counsel.[72] No one from their firm sought to substitute as counsel for Mr. Maples.[73] As a result, when the Alabama postconviction court denied Mr. Maples' petition, it sent a notice addressed to the two departed attorneys to the New York office of Sullivan & Cromwell.[74] The New York firm returned that notice unopened to the Alabama clerk's office marked "returned to sender,"[75] and the court clerk did nothing further.[76] No appeal was taken from the Alabama state postconviction proceedings, and the forty-two day period in which to appeal to the Alabama Court of Criminal Appeals expired. Mr. Maples' federal constitutional challenges to his conviction and death sentence were defaulted.[77] Cory Maples learned of his situation when the Assistant Attorney General for the State of Alabama sent him a letter telling him that he had missed the deadline to appeal to the Alabama appeals court, and that he had only four weeks left in which to file his federal habeas petition.[78]

Facing the *Coleman* conundrum that there can be no ineffective assistance of counsel if there is no federal right to counsel—and thus potentially no cause-and-prejudice to overcome a procedural default—Mr. Maples was left to argue that his New York attorneys had

67. Maples v. Thomas, 132 S. Ct. 912, 924 (2012) ("[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. . . . We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the 'extraordinary circumstances beyond his control,' necessary to lift the state procedural bar to his federal petition.").

68. *Id.* at 916.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 916-17.

73. *Id.*

74. *Id.* at 917.

75. *Id.*

76. *Id.*

77. *Id.* at 920.

78. *Id.*

abandoned him and were no longer acting as his agents. This was the claim that the Supreme Court considered in *Maples*.

Writing for the Court, Justice Ginsburg concluded that Mr. Maples' lawyers had abandoned him, and that this constituted "cause" to excuse the procedural default.[79] The Court reasoned that "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."[80] The court continued: "Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him."[81] Specifically, the Court noted that the two New York attorneys had failed to file motions to withdraw in the Alabama court, and that they had left the firm before the default had occurred, accepting jobs with a federal judge and the European Commission that would have precluded them from continuing to represent Mr. Maples.[82] Nor had local counsel been acting as Maples' agent, the Court concluded, because he admitted that he had offered no substantive assistance in the case, a conception of his role that failed to comply with the Alabama rules.[83] Because the New York attorneys had been listed as his counsel, however, Mr. Maples did not receive the notice himself.[84] "[D]isarmed by extraordinary circumstances quite beyond his control," the Court held, Maples "has shown ample cause . . . to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning."[85]

Maples represents an extreme fact situation. However, it provides an "out" for state postconviction clients whose lawyers essentially cease to function as their representatives. More broadly, it makes a statement regarding the Court's willingness to find avenues for relief when states have failed to provide appointed counsel or other systems for reliable representation.[86] *Maples* sends a message to the states that postconviction counsel have an important role to play in litigating federal constitutional claims in their courts.

79. *Id.* at 924.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 926.
84. *Id.* at 927.
85. *Id.*
86. *See* Kovarsky, supra note 5 (pointing out that the Court's 2010 decision in Holland v. Florida, 130 S.Ct. 2549 (2010), which recognized equitable tolling for the one-year AEDPA statute of limitations, demonstrated the Robert Court's willingness to provide court access to prisoners who received terrible postconviction representation.).

B. Martinez v. Ryan

While the *Maples* opinion indicated that prisoners in state postconviction might have some recourse for complete nonfeasance by counsel, *Martinez* provided a more systemic solution, addressing an issue left open in *Coleman*. *Coleman* reserved the question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."[87] The *Martinez* Court was careful to specify that it need not decide this question as a constitutional matter,[88] but only "whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default."[89]

In Mr. Martinez's case, Arizona law precluded him from filing a claim of ineffective assistance of counsel on direct appeal—such claims could be brought for the first time only in state proceedings for collateral relief.[90] Rather than raise such a claim, his lawyer in state postconviction proceedings filed a pleading claiming that she could find no colorable grounds for relief.[91] Mr. Martinez disagreed, alleging numerous claims of ineffective assistance of trial counsel in subsequent state collateral proceedings.[92] Arizona courts declined to consider these claims because they were not raised in the first state postconviction proceeding.[93] When Mr. Martinez sought federal habeas relief, the district court concluded that he was procedurally defaulted.[94] Both the federal district court and the Ninth Circuit cited *Coleman* for the proposition that a state prisoner could not overcome procedural default in state postconviction by alleging ineffective assistance of postconviction counsel.[95]

By this logic, the Supreme Court in *Martinez* explained, "when an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."[96] Moreover, the Court continued, "[t]his Court on direct review of the state proceeding

87. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (citing Coleman v. Thompson, 501 U.S. 722, 755 (1991)).
88. *Id.* at 1315.
89. *Id.*
90. *Id.* at 1314.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1314-15.
96. *Id.* at 1316.

could not consider or adjudicate the claim."[97] As a result, the *Martinez* Court concluded, "no court will review the prisoner's claim."[98]

To remedy this situation, the Supreme Court, in a 7-2 decision authored by Justice Kennedy, recognized two situations in which a state prisoner might overcome a procedural default in state postconviction proceedings that provide a first opportunity for review.[99] If the state does not appoint effective postconviction counsel in an "initial-review collateral proceeding," the prisoner will not be deemed to have defaulted the claim.[100] Nor will procedural default bar federal review of a claim if appointed state postconviction counsel was ineffective.[101]

The Court was careful to point out that its opinion did not recognize a free-standing constitutional right to the appointment of counsel in state postconviction proceedings.[102] Rather, it established an equitable doctrine for overcoming procedural default under certain circumstances.[103] The benefit of the equitable holding, the Court explained, was that it did not require the same system for provision of state postconviction counsel in each jurisdiction.[104] Rather, a state could choose between appointing counsel in initial-review state collateral proceedings, or raising a defense on the merits to claims brought later in federal habeas.[105]

Martinez ensures that if a state fails to appoint counsel in initial-review state postconviction proceedings, or appointed counsel is ineffective, a prisoner's federal law claim will be heard on the merits in federal habeas. In addition, *Martinez* places the choice before the states: provide adequate counsel in state postconviction and receive the benefit of restricted federal habeas review under AEDPA, or risk defending convictions on the merits in federal habeas.[106] *Martinez* creates powerful incentives for states to ensure competent counsel in state postconviction.[107]

97. *Id.*
98. *Id.*
99. *Id.* at 1318.
100. *Id.*
101. *Id.* at 1320.
102. *Id.* at 1319.
103. *Id.*
104. *Id.*
105. *Id.* at 1320. Professor Steven Vladeck has described this solution as "a new remedy, but no right." Steve Vladeck, *Opinion Analysis: A New Remedy, But No Right*, SCOTUSBLOG (Mar. 21, 2012), http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/.
106. Vladeck, *supra* note 105.
107. In his dissent, Justice Scalia argued that the Court's decision in *Martinez* would have even broader effect than the majority acknowledged. He warned that "whoever advises the State

III. THE NEW STATE POSTCONVICTION

I began this Symposium piece by quoting from the Court's opinions in its 2007 decision in *Lawrence v. Florida*, acknowledging the new importance of certiorari grants from state postconviction proceedings. The same term as *Maples* and *Martinez*, in *Greene v. Fisher*,[108] the Court pointed out once again the importance after AEDPA of pursuing federal law claims through state postconviction.[109] In *Greene*, the defendant appealed his conviction in the Pennsylvania courts, alleging that it was error under *Bruton v. United States*[110] to introduce his non-testifying co-defendants' confessions that had been redacted to remove proper names, but revealed obvious deletions.[111] His conviction was affirmed by the Pennsylvania Superior Court and he filed a petition for allowance of appeal to the Pennsylvania Supreme Court.[112] While that petition was pending, the Supreme Court issued its opinion in *Gray v. Maryland*,[113] a decision that arguably would have entitled him to relief.[114] Nonetheless, the Pennsylvania Supreme Court dismissed Greene's petition as improvidently granted.[115] The defendant then sought relief through federal habeas, ultimately litigating the case to the U.S. Supreme Court.[116] The Court denied relief, explaining that the Pennsylvania intermediate appellate court's decision was not "contrary to or an unreasonable application of clearly established federal law" at the time it was issued, because it preceded the Supreme Court's opinion in *Gray* by three months.[117] Writing for the Court, Justice Scalia pointed out that the defendant had "missed two opportunities to obtain relief under *Gray*"—he could have filed a petition for certiorari from the Pennsylvania Supreme Court decision denying his petition, or he could have sought state postconviction relief.[118] He did neither, instead pursuing federal habeas, and so, because of his choice of vehicle, his

would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases—lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas . . . ." *Martinez*, 132 S. Ct. at 1322 (Scalia, J., dissenting).

108. 132 S. Ct. 38 (2011).
109. *Id.* at 45.
110. 391 U.S. 123 (1968).
111. *Fisher*, 132 S. Ct. at 42.
112. *Id.* at 43.
113. 523 U.S. 185 (1998).
114. *Fisher*, 132 S. Ct. at 43.
115. *Id.*
116. *Id.*
117. *Id.* at 45.
118. *Id.*

claim failed.

Other developments in state postconviction reinforce its potential for comparative advantage as a vehicle for relief. For example, the Court recognized in *Danforth v. Minnesota*[119] that the anti-retroactivity doctrine of *Teague v. Lane*[120] does not apply to state postconviction as a matter of federal constitutional law. States may adopt *Teague*, but they are not required to do so, because the comity and federalism rationales present in federal habeas do not apply to state postconviction.[121] In other words, states can choose to give more litigants the benefit of new constitutional rules that do not apply in federal habeas courts.[122]

In addition to being a relatively advantageous path to relief for individual litigants, state postconviction cases are now the prime vehicle in which the Supreme Court can develop certain areas of federal constitutional law. This is particularly true of ineffective assistance of counsel doctrine in the types of criminal cases generally prosecuted in state court. The blockbuster case *Padilla v. Kentucky*,[123] in which the Court concluded that it was ineffective assistance of counsel to fail to advise a client regarding the clear deportation consequence of a guilty plea, was a certiorari grant from state postconviction.[124] In another set of decisions from the October 2011 Term, this pair considering ineffective assistance of counsel claims with respect to lapsed or rejected plea offers,[125] the Court granted certiorari in one state postconviction case, *Missouri v. Frye*,[126] and one federal habeas case, *Lafler v. Cooper*,[127]

119. 552 U.S. 264, 275-82 (2008).

120. 489 U.S. 288, 310 (1989).

121. *Danforth*, 552 U.S. at 278-79. Regrettably, some states have chosen not to exercise their authority in this area. *See, e.g.*, Danforth v. Minnesota, 761 N.W.2d 493 (Minn. 2009). *See also* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability" after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 33 (2009).

122. *See, e.g.*, Lasch, *supra* note 121, at 55 (describing how Missouri and Indiana chose to apply the Sixth Amendment capital sentencing rule of *Ring v. Arizona* retroactively in state postconviction proceedings, while Florida and Idaho did not).

123. 130 S. Ct. 1473 (2010).

124. *Id. See also* King, *supra* note 26 (pointing out that *Padilla* was a cert grant from state postconviction and discussing how that procedural posture differed from a cert grant from federal habeas subject to AEDPA). *But see Chaidez* v. *United States*, ___ S. Ct. ___, 2013 WL 610201 (2012) (concluding in the context of a federal prisoner's *coram nobis* petition that *Padilla* does not apply retroactively to prisoners whose convictions were final when the case was decided). *Cf. Danforth* v. *Minnesota*, 552 U.S. 264 (2008) (concluding that state courts are not constrained by federal anti-retroactivity analysis).

125. *See* Cara H. Drinan, Lafler *and* Frye*: Good News for Public Defense Litigation*, 25 FED. SENT. REPT. 138 (Dec. 2012).

126. 132 S. Ct. 1399, 1405 (2012).

127. 132 S. Ct. 1376, 1383, 1390 (2012) (concluding that the state court decision in that case

perhaps to permit itself maximum flexibility. The dissent in *Lafler* did not agree that the defendant in that case should receive relief under AEDPA.[128]

In another decision, *Jackson v. Hobbs*, one of the two cases in which the Court invalidated mandatory life without parole (LWOP) sentences for juveniles convicted of homicide offenses, certiorari was granted from a state postconviction case.[129] Its companion case, *Miller v. Alabama*, was a grant of certiorari from a direct appeal in state court.[130]

Maples and *Martinez* create powerful incentives for the appointment of effective counsel in state postconviction proceedings.[131] In a context in which these cases are an increasingly important forum for litigating federal constitutional claims, and possibly the sole vehicle for presenting certain kinds of new claims to the U.S. Supreme Court, measures that improve the quality of counsel in state postconviction proceedings might produce important effects. In its October 2011 term, the Supreme Court has set the stage for a new state postconviction. Whether state postconviction realizes its potential depends in large part on the resources made available at the state level, and on the initiative of the local defense bars.

merited relief under AEDPA because it was "contrary to clearly established federal law.").

128. *Id*. at 1395-96 (Scalia, J., dissenting) (arguing that the claim does not merit relief under AEDPA). *But see* King, *supra*, note 26, at 32 (discussing the implications of *Lafler* for review under AEDPA and for its potential application in state prisoners' federal habeas cases).

129. Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012).

130. *Id.* at 2463.

131. *But see* King, *Preview*, *supra* note 5, at 15 (arguing that states might still prefer to take their chances in federal habeas: "given the ease with which such claims can be defeated in most cases, and the chances that a petitioner will be released before even reaching federal court, a state may conclude that waiving the default defense and defending the merits of those defaulted ineffectiveness claims that actually reach a federal court is cheaper than providing counsel or evidentiary hearing for more post-conviction petitioners . . . .").