

**INDIGENT DEFENSE OR INDIGENT OFFENSE? THE UNASHAMED
JURISPRUDENCE OF BARRING RELIEF FOR DEATH-SENTENCED
INMATES BASED UPON “GARDEN-VARIETY” INEFFECTIVENESS
OF COUNSEL**

MARK E. OLIVE*

INTRODUCTION

“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”¹

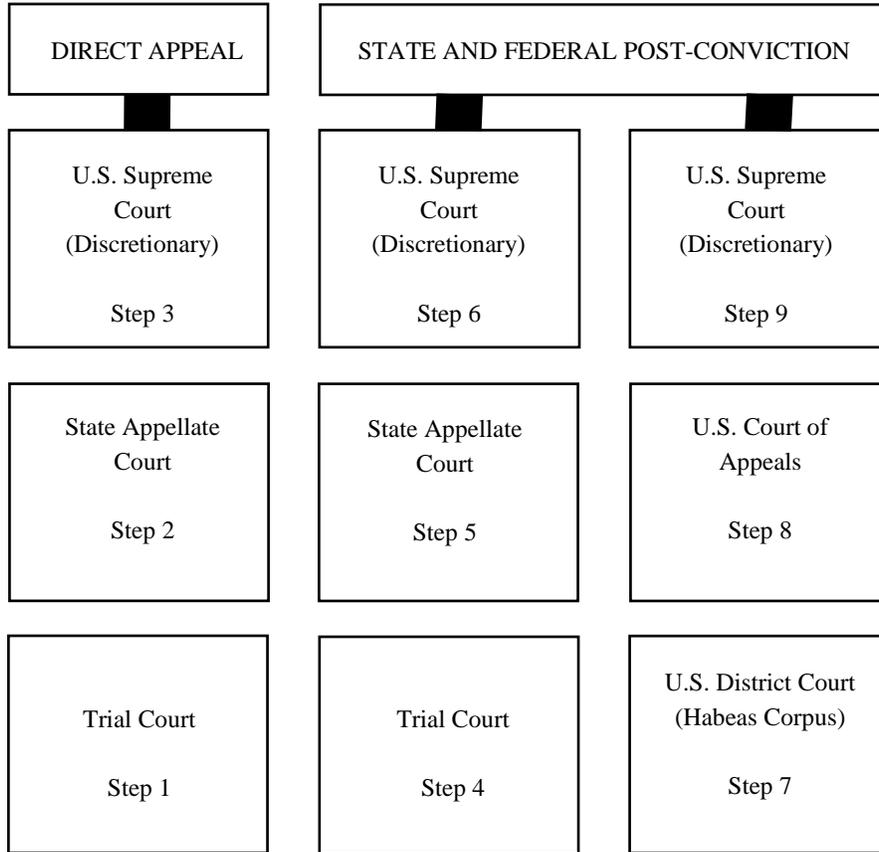
This truth has not been obvious in capital state post-conviction and federal habeas corpus proceedings. The law has crept from no right to counsel in capital post-conviction proceedings to a statutory right. While many, if not most, attorneys who handle such cases are highly competent and dedicated, they do not have to be under Supreme Court precedent. A person today may be executed due to his or her attorney’s mistakes and incompetence. We should demand the provision of effective counsel in life or death proceedings.

I. THE CAPITAL POST-CONVICTION PROCESS

Capital and other state criminal cases generally follow a nine-step process, illustrated here:

* Mark E. Olive is an attorney in private practice in Tallahassee, Florida, who was an invited speaker at the 2016 Richard J. Childress Memorial Lecture at Saint Louis University School of Law. This article is an expanded version of some of Mr. Olive’s comments about indigent defense in capital post-conviction cases. Mr. Olive has been involved in representation of individuals facing the death penalty at trials, on appeals, and in post-conviction proceedings since 1980.

1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).



After trial and direct appeal (Steps 1–3), a capital sentenced defendant may seek relief from constitutional violations like state suppression of material, exculpatory evidence,² juror misconduct,³ and the ineffectiveness of trial counsel⁴ by filing a petition for federal habeas corpus relief under 28 U.S.C. § 2254 (Steps 7–9). However, if there is an available state court remedy for the alleged violation, then the petitioner is required to file first in state court to “exhaust” the claim (Steps 4–6).⁵ Once a claim is exhausted and relief is finally denied in state court, it is ripe for federal habeas corpus review (Steps 7–9).

2. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
 3. *Williams v. Taylor*, 529 U.S. 420, 440 (2000).
 4. *Strickland v. Washington*, 446 U.S. 668, 687 (1984).
 5. Presenting a claim in state court is called “exhausting” the claim. This is required by 28 U.S.C. § 2254(b)(1)(A). *See also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (stating that the exhaustion rule is grounded in “comity concerns”; “[t]he purpose of exhaustion is . . . [to] afford the State a full and fair opportunity to address and resolve the [federal] claim on the merits.”).

II. FUNDING FOR COUNSEL IN CAPITAL POST-CONVICTION PROCEEDINGS

In the 1970s and 1980s, there was little to no funding for state and federal post-conviction representation. What was provided in capital cases was on a pro bono basis by attorneys, law firms, and non-profit organizations.⁶ Now all states with the death penalty, except Alabama and Georgia,⁷ provide counsel in capital post-conviction proceedings (Steps 4–7) via legislation, not as a matter of constitutional right.⁸

There was no federal right to counsel in capital habeas corpus proceedings (Steps 7–9) until 1988 when Congress passed the Anti-Drug Abuse Act.⁹ With this Act, Congress provided petitioners who seek to have their convictions and death sentences vacated in proceedings under sections 28 U.S.C. §§ 2254 (state judgment) or 2255 (federal judgment), but are financially unable to obtain adequate representation, with “the appointment of one or more attorneys.”¹⁰ In *Martel v. Clair*,¹¹ the Court addressed Congress’s § 3599 concerns and intentions:

The new statute grants federal capital defendants and capital habeas petitioners enhanced rights of representation, in light of what it calls ‘the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.’ § 3599(d) (2006 ed.). . . . And the statute aims in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike.¹²

Congress intended “to promote effective representation” in these proceedings, a goal § 3599 fulfills in “myriad ways.”¹³

6. See Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons from Florida*, 34 AM. J. CRIM. L. 277 (2007) (hereinafter *Post-Conviction Counsel*).

7. See Steven H. Pollak, *Stop Ga. Death Penalty Until Problems Solved, Report Says: ABA Study Cites Habeas Issues, Jury Confusion*, LAW.COM (Feb. 1, 2006), <http://www.law.com/jsp/article.jsp?id=1138701911792> [<https://perma.cc/G9NY-FTDJ>]. See also *Barbour v. Haley*, 471 F.3d 1222, 1223–24 (11th Cir. 2006); A.B.A. EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT 151 (2006), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf> [<https://perma.cc/P8ER-YVEZ>].

8. Pollak, *supra* note 7.

9. 21 U.S.C. § 848(q) was the portion of the Act that provided for counsel in capital §§ 2254 and 2255 cases. It was moved to 18 U.S.C. § 3599 by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 231 (2006).

10. 18 U.S.C. § 3599(a)(2) (formerly 21 U.S.C. § 848(q)).

11. 132 S. Ct. 1276 (2012).

12. *Id.* at 1284–85 (interpreting former statute 21 U.S.C. § 848(q), which was “repealed and recodified without change at 18 U.S.C. § 3599” *Harbison v. Bell*, 129 S. Ct. 1481, 1489 (2009)). The Supreme Court has recognized “this statute grants indigent capital defendants a *mandatory* right to qualified legal counsel.” *McFarland v. Scott*, 512 U.S. 849, 854 (1994) (emphasis added).

13. *Martel*, 132 S. Ct. at 1285. The enhanced representation includes: requiring lawyers to have more experience than 18 U.S.C. § 3006(A) demands in non-capital cases; higher rates of

III. EFFECTIVE INDIGENT DEFENSE – COUNSEL SHOULD NOT DISAPPEAR OR BE EXTRAORDINARILY (RATHER THAN SIMPLY NORMALLY) INEFFECTIVE

While counsel are now required for almost all death-sentenced inmates in post-conviction proceedings, all that counsel must do (with largely only one exception) is not disappear—not “abandon” the petitioner. This egregiously low bar for the performance of counsel creates an intolerable risk that individuals will be executed despite, at best, prejudicial constitutional violations at the state trial and appeal and, at worst, being actually innocent or wrongfully sentenced to death.

Capital post-conviction representation is complex, intensely time-consuming, and “brimming with traps for the unwary.”¹⁴ A series of cases from the Supreme Court in the last sixteen years has exposed the level of dysfunction and non-existent lawyering in many of these life-or-death cases, but has left a baffling and deeply unsatisfying jurisprudence for correcting the patent injustices.

A. *Supreme Court Approaches to Bad Lawyering*

1. Default and “Cause” to Excuse Them in Federal Courts

A federal district court may decline to address the merits of a claim that was inexcusably “defaulted” by the petitioner in state court proceedings. A federal “default” question generally involves an evaluation of whether and how a claim for relief was presented to and considered by a state court. If a claim in a federal habeas corpus petition was not presented, or not fully presented, to a

compensation (“in part to attract better counsel”) than § 3006(A) allows; and “more money for investigative and expert services.” *Id.*

14. *Post-Conviction Counsel*, *supra* note 6, at 280 (for a non-exclusive list of the chores of effective counsel, *see id.* at 281–83). “[Q]uality 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.*’” *McFarland*, 512 U.S. at 855 (emphasis added) (quoting former 21 U.S.C. § 848(q)(7)). “[O]ur *carefully crafted doctrines* of waiver and abuse of the writ make it especially important that the first petition adequately set forth all of a state prisoner’s colorable grounds for relief.” *McFarland*, 512 U.S. at 860 (O’Connor, J., concurring in part and dissenting in part) (emphasis added); *see also id.* at 855–56 (majority opinion); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1 and accompanying commentary (rev. ed. 2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf [<https://perma.cc/JDA4-T3XK>], *reprinted at* 31 HOFSTRA L. REV. 913 (2003) (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . Habeas corpus actions are governed by a complex set of procedural rules”) [hereinafter ABA GUIDELINES]; ABA GUIDELINES, Guideline 10.15.1 and accompanying commentary (“The field is increasingly complex and ever-changing.”).

state court, it may be considered procedurally defaulted.¹⁵ In addition, a claim that *was* presented to a state court, but not in the manner that the state court normally and regularly requires that it be presented (e.g., an untimely presentation of the claim), *and* the state court invokes its state rule to bar consideration of the claim,¹⁶ a “default” issue arises.

Whether there is a default, and whether a default will be excused so a district court can reach the federal constitutional merits of a claim, are issues which require considerable analysis and possibly even the taking of evidence.¹⁷ Even if there has been an enforceable default, a petitioner may receive merits review of a claim in federal court if he or she can demonstrate “cause” for and “prejudice” from the default. Cause is established, *inter alia*, where trial/appellate counsel were ineffective (Steps 1 and 2).¹⁸ Even otherwise “unexcused” defaults must be ignored by district courts when to enforce a default would result in a fundamental miscarriage of justice.¹⁹

15. If a state court remedy remains available, it is possible in some instances to obtain a stay of federal proceedings while the petitioner returns to state court to present the new claim. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005).

16. This is called a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72, 82–83 (1977). In order for there to be this type of a default, the state court’s ruling (a) must *not* be based upon the federal constitution (that is, the state ruling must be “independent”), and (b) *must be* based upon an *adequate* state ground. *Id.* at 81. Imposition by the state of a procedural bar, and federal court recognition of that bar, is

subject to our standards for assessing the *adequacy* of independent state procedural grounds to bar all consideration of claims under the national Constitution. . . . In any given case . . . the *sufficiency* of a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. “*Novelty in procedural requirements cannot be permitted to thwart* review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”

Ford v. Georgia, 498 U.S. 411, 423 (1991) (citation omitted) (emphasis added). Only a “‘firmly established and regularly followed state practice’ may be interposed by a State to prevent subsequent review by [a federal court] of a federal constitutional claim.” *Id.* at 423–24 (citation omitted).

17. Whether there exists an independent and adequate state court basis for barring a claim is decided by the district court, and “[w]hether a petitioner’s actions have created a state law procedural bar is a mixed question of law and fact.” *Hansbrough v. Latta*, 11 F.3d 143, 144–45 (11th Cir. 1994). Despite a state court finding regarding default, the federal court must make an independent finding. *Macklin v. Singletary*, 24 F.3d 1307, 1312–13 (11th Cir. 1994) (default is a *de novo* determination).

18. *Coleman v. Thompson*, 501 U.S. 722, 725 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Smith v. Murray*, 477 U.S. 527, 535–36 (1986).

19. For example, if the evidence and claims reveal that constitutional errors “probably resulted in the conviction of one who is actually innocent,” *Murray v. Carrier*, 477 U.S. 478, 496 (1986), or that the state court process “‘has probably resulted’” in capital punishment for one who is “‘actually innocent’ of a death sentence,” *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989), no procedural default can prevent relief for the petitioner. *Schlup v. Delo*, 513 U.S. 298, 317 (1995)

2. *Coleman v. Thompson* – No Ineffectiveness “Cause” to Excuse a Default

It is unclear whether states must provide collateral or post-conviction review of criminal judgments,²⁰ but the Supreme Court held in *Pennsylvania v. Finley*²¹ there is no constitutional right to an attorney in collateral attacks on convictions and sentences: “We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that *the right to appointed counsel extends to the first appeal of right, and no further.*”²²

In *Coleman v. Thompson*,²³ the Court reaffirmed its holding in *Finley* and held that because there is no right to an attorney in post-conviction proceedings, there is no right to the effective assistance of counsel in such proceedings.²⁴ Accordingly, the ineffective assistance of counsel in state post-conviction proceedings (Steps 4 and 5) could not constitute cause to excuse a procedural default at Step 7.²⁵

Coleman argued that deficient performance by state post-conviction counsel should constitute “cause” allowing federal courts to consider defaulted claims of ineffective assistance of trial and appellate counsel because, under Virginia law, state post-conviction proceedings were the first time that a petitioner could raise such claims. Coleman’s counsel had raised ineffective claims properly in the state circuit court (Step 4) but then unreasonably failed

(“[i]f the habeas court were merely convinced that [the] new facts raised sufficient doubt about [petitioner’s] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, [the petitioner’s] threshold showing of innocence would justify a review of the merits of the constitutional claims”). The petitioner raises sufficient doubt if he or she establishes that it is more likely than not that, in light of the new evidence, no juror “conscientiously obey[ing] the instructions of the trial court” would have voted to find him guilty beyond a reasonable doubt. *Id.* at 329. *See also* *Sawyer v. Whitley*, 505 U.S. 333, 346–47 (1992) (the “innocence of the death penalty” inquiry “must focus on those elements which render a defendant eligible for the death penalty”); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992) (“[a] habeas petitioner’s failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.”); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (petitioner must show “that he is *ineligible* for the death penalty”).

20. *See* *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (granting certiorari to consider whether a constitutional right to state post-conviction review exists, but dismissing the grant after Nebraska adopted a comprehensive state post-conviction review scheme). *But cf.* *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) (“State collateral proceedings are not constitutionally required . . .”); *Pennsylvania v. Finley*, 481 U.S. 551, 554–55 (1987) (plurality opinion) (similar).

21. *Finley*, 481 U.S. 551.

22. *Id.* at 555 (emphasis added) (citation omitted); *see also* *Murray*, 492 U.S. at 10.

23. *Coleman v. Thompson*, 501 U.S. 722 (1991).

24. *Id.* at 752.

25. *Id.* at 752–53.

to properly assert those claims in an appeal to the higher state court (Step 5). The Supreme Court found that it need not answer the question of whether there would be an exception to *Finley* for claims that could be raised for the first time in post-conviction proceedings because Coleman's attorney *had* presented Coleman's ineffective assistance claims on his first opportunity to do so in the state trial court. The Court found that Coleman was not, in fact, alleging a right to counsel at his "first" opportunity to assert a constitutional right, but at a subsequent appellate stage, and this was clearly prohibited under *Finley*.²⁶ Thus, *Coleman* left open the question 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.

3. *Martinez v. Ryan* – "Cause" to Excuse the Default of an Ineffectiveness of Trial Counsel Claim Can be Shown by the Ineffectiveness of Post-Conviction Counsel

This question was resolved in *Martinez v. Ryan*,²⁷ but only with respect to one issue—the ineffective representation by trial counsel. In *Martinez*, post-conviction counsel filed a "Notice of Post-Conviction Relief" necessary to initiate proceedings in Arizona, but later filed with the court a statement asserting that she could find no colorable claims for relief.²⁸ In subsequent federal habeas corpus proceedings, Martinez argued that he had a federal constitutional right under the Sixth and Fourteenth Amendments to the effective assistance of counsel in initial-review collateral proceedings in state court with respect to claims of ineffective assistance of trial counsel because it was his first opportunity to raise such claims. Martinez further argued that because he received ineffective assistance in his initial-review collateral proceedings in state court (Step 4), he had established "cause" sufficient to excuse the default of his ineffective assistance of trial counsel claims, and allow the federal court to review them on their merits (Step 7) even though the claims never were presented to the state courts.

The Supreme Court refused to find that the Sixth and Fourteenth Amendments required states to provide effective assistance of counsel to inmates in state post-conviction proceedings. But the Court held that ineffective assistance of counsel at initial-review collateral proceedings (Step 4) could establish "cause" allowing the federal court (Step 7) to review the merits of claims of ineffective assistance of counsel at trial (Step 1), if it was shown that state post-conviction counsel's deficient performance was the reason the claim was not properly presented to the state court.²⁹

26. *Id.* at 755.

27. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

28. *Id.* at 1314.

29. *Id.* at 1313, 1315.

The Court distinguished its holding in *Coleman* because Coleman's ineffective assistance claims were defaulted on appeal from his initial-review collateral proceeding, and therefore his claims had been addressed initially on the merits by the state circuit court that first addressed his post-conviction petition.³⁰ The Court emphasized that the difference between Coleman's case and Martinez's was that to enforce the default in Martinez's case would mean that *no* state court would ever hear his claims.³¹

The Court held that in order to establish "cause" under *Martinez* a petitioner must demonstrate that counsel in his initial-review collateral proceedings were ineffective under *Strickland v. Washington*³²—that post-conviction counsel acted contrary to prevailing professional norms and that, but for counsel's unreasonable actions, the results would have been different.³³ The petitioner must also demonstrate that the underlying claim of ineffective assistance of trial counsel "is a substantial one."³⁴

Martinez imposed on counsel appointed to represent a federal habeas petitioner the duty to investigate, develop, and present—and imposed on federal courts the duty to address—"claim[s] of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding."³⁵ Federal counsel must litigate and federal courts must resolve whether initial-review proceedings in state court "may not have been sufficient to ensure that proper consideration was given to a substantial claim" because petitioner's state post-

30. *Id.* at 1316.

31. *Id.* The Court further emphasized that in Arizona state law required that ineffective assistance of trial counsel claims be brought in the first instance in collateral proceedings, rather than on direct appeal. *Id.* at 1317. The Court noted that "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* These principles were further addressed in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

32. *Strickland v. Washington*, 466 U.S. 668 (1984).

33. *Martinez*, 132 S. Ct. at 1318.

34. *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The Court emphasized that its ruling was an equitable ruling, not a constitutional ruling. *Id.* at 1319. A constitutional ruling, the Court reasoned, would create a free-standing constitutional claim, require the appointment of counsel in every initial-review collateral proceeding, mandate the same system of appointing counsel in every state, and would require reversal in every case in which the state's system for appointing counsel for initial-review collateral proceedings "did not conform to the constitutional rule." *Id.* An equitable ruling, on the other hand, would allow states to maintain a variety of systems for appointing counsel in collateral proceedings, and even allow them the option to forego appointing counsel all together. *Id.* at 1319–20. Should a state choose the latter course, it either could not assert procedural default in federal habeas proceedings in defense of a state court decision, or it could simply argue the defaulted ineffective assistance of counsel claim was not "substantial" and, therefore, not cognizable under *Martinez*. *Id.* at 1320.

35. *Id.* at 1318.

conviction counsel were constitutionally ineffective.³⁶ The need for effective assistance of counsel at this initial-review collateral proceeding is especially acute because “the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record,” and “the right to [effective trial] counsel is the foundation for our adversary system” and “a bedrock principle in our justice system.”³⁷ This bedrock principle was used to distinguish, and single out for special treatment, violations of the Sixth Amendment right-to-counsel-at-trial claims from other significant violations which are found to be defaulted by federal courts.³⁸ The Court stressed it was creating only a “limited qualification” to *Coleman*.³⁹

4. *Maples v. Thomas* – Abandonment by Counsel as “Cause” to Excuse a Procedural Default

Mr. Maples was convicted of murder and sentenced to death in Alabama.⁴⁰ Following his conviction, two attorneys from a major law firm, acting pro bono, filed a petition for post-conviction relief in state court.⁴¹ Before the petition was decided, the two attorneys left the firm without telling Mr. Maples

36. *Id.*

37. *Id.* at 1317 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). The Court found that, when a State deliberately chooses to move “trial-ineffectiveness claims” from direct appeal where counsel is constitutionally guaranteed, it “significantly diminishes prisoners’ ability to file such claims.” *Id.* at 1318. In the context of this kind of state procedural framework, “counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default,” and, “as an equitable matter,” allows “a federal habeas court to hear [otherwise defaulted] . . . claim[s] of ineffective assistance of trial counsel.” *Id.*

38. See *Martinez*, 132 S. Ct. at 1317–18.

39. *Id.* at 1319. Justice Scalia, joined by Justice Thomas, noted:

There is not a dime’s worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of “newly discovered” prosecutorial misconduct, for example, see *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), claims based on “newly discovered” exculpatory evidence or “newly discovered” impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel. The Court’s soothing assertion, *ante*, at 1320, that its holding “addresses only the constitutional claims presented in this case,” insults the reader’s intelligence.

Id. at 1321.

The Supreme Court recently granted certiorari to review an extension of *Martinez*:

[Whether] the rule established in *Martinez v. Ryan* and *Trevino v. Thaler*, that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also applies to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims?

Davila v. Davis, 650 F. App’x 860 (5th Cir. 2016), *cert. granted*, 580 U.S. 2 (U.S. Jan. 13, 2017) (No. 16-6219).

40. *Maples v. Thomas*, 132 S. Ct. 912, 916 (2012).

41. *Id.*

and without requesting to withdraw.⁴² The trial court later denied the petition and sent the notice of its denial to the two attorneys who were no longer at the firm, and the firm returned the notice unopened.⁴³ Maple's deadline for appealing the denial passed.⁴⁴

New attorneys moved the trial court to reissue the order and restart the appeal clock.⁴⁵ The trial court refused, the Alabama Court of Criminal Appeals denied a petition for mandamus for leave to file an out-of-time appeal, and the Alabama Supreme Court affirmed.⁴⁶ Maples sought federal habeas corpus relief, but the federal district court denied his request based on the procedural default in state court, and the Eleventh Circuit affirmed.⁴⁷

The Supreme Court noted that "negligent conduct" by an attorney "agent" would not provide "cause" to excuse a default.⁴⁸ The Supreme Court reversed, however, holding that the abandonment of Maples by his attorneys provided "cause" to excuse the procedural default in state court.⁴⁹ "Cause" for excusing a procedural default exists where something external to the defendant impeded his ability to comply with the state's procedural rule.⁵⁰ The Court held that the attorneys' abandonment of Maples severed their agency relationship so the failure to appeal could not be attributed to Maples.⁵¹ Maples was "left without any functioning attorney,"⁵² which provided cause to excuse his procedural default.

B. Holland v. Florida – Equitable Tolling of the AEDPA Statute of Limitations for Exceptional Circumstances – Attorney Misconduct

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is the federal statutory scheme under which habeas corpus petitions are adjudicated.⁵³ Under the AEDPA there is a one year statute of limitations for filing a federal habeas corpus petition.⁵⁴ Lawyers cannot seem to manage to

42. *Id.* at 916–17.

43. *Id.* at 917.

44. *Id.*

45. *Maples*, 132 S. Ct. at 917.

46. *Id.*

47. *Id.*

48. *Id.* at 922.

49. *Id.*

50. *Maples*, 132 S. Ct. at 923.

51. *Id.* at 917.

52. *Id.* at 927.

53. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

54. 28 U.S.C. § 2244(d)(1) (2014). The statute of limitations is tolled during the pendency of state collateral review. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

count to 365.⁵⁵ In *Holland v. Florida*, the Eleventh Circuit held that a lawyer's gross negligence of not timely filing a federal habeas petition, absent a finding of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part,"⁵⁶ could never warrant equitable tolling of the AEDPA statute of limitations. The Supreme Court held this "standard [was] too rigid"⁵⁷ and equitable tolling was available if a petitioner "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing."⁵⁸ In Mr. Holland's case, his lawyers' egregious actions, and Holland's due diligence, raised sufficient questions about equitable tolling to warrant a remand.⁵⁹

Absent "extraordinary circumstances," however, habeas corpus petitioners must live with and die for attorney ineffectiveness.⁶⁰ "[G]arden variety" ineffectiveness by counsel is forgiven.⁶¹

55. Jonathan Atkins, Danielle B. Rosenthal & Joshua D. Weiss, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 431, n. 13 (2016) (as of 2014, "[s]ince Congress passed AEDPA in 1996, lawyers for at least eighty petitioners sentenced to death have missed the statute's one-year filing deadline for federal habeas review.")

56. *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008), *rev'd*, 130 S. Ct. 2549 (2010).

57. *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010).

58. *Id.* at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

59. With respect to extraordinary circumstances, the Court held:

Here, Collins [appointed counsel] failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters. . . .

Id. at 2564.

With respect to due diligence, the Court held:

Here, Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins—the central impediment to the pursuit of his legal remedy—removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Id. at 2565. On remand, the district court granted equitable tolling. Order Following November 18, 2010 Status Conference Requiring Filing of Amended Petition and Setting Briefing Schedule, *Holland v. Florida*, 1:06-CV-20182 (S.D. Fla., Nov. 22, 2010).

60. *Id.* at 2562.

61. *Id.* at 2564.

C. *Substitution of Counsel in Federal Habeas Corpus Proceedings – Conflicts of Interest*

At times an appointed federal capital attorney seeks to withdraw from his or her appointment, or the petitioner seeks new counsel. In *Clair, supra*, the Supreme Court held that general, run-of-the-mill withdrawal and substitution motions under § 3599, based upon disagreements between counsel and client, are controlled by an “interest of justice” standard.⁶² However, withdrawal and substitution motions premised on a conflict of interest were different: “*the court would have to appoint new counsel if the first lawyer developed a conflict.*”⁶³ The district court judge in *Clair* had noted: “[n]o conflict of interest . . . is shown.”⁶⁴

But if a conflict of interest is shown, then counsel must be removed, as the Court later held in *Christeson v. Roper*.⁶⁵ Mr. Christeson was convicted of murder and sentenced to death.⁶⁶ After additional state proceedings, under the one-year statute of limitations imposed by the AEDPA, his federal habeas petition was due on April 10, 2005.⁶⁷ Nine months before the deadline, the District Court appointed attorneys to represent Mr. Christeson.⁶⁸ The attorneys did not meet with Mr. Christeson until more than six weeks after his petition was due and filed the petition 117 days late.⁶⁹ They justified their failure to meet with Mr. Christeson and timely to file his habeas petition on a simple miscalculation of the AEDPA limitations period.⁷⁰ The federal district court dismissed the petition as untimely.⁷¹

Seven years later, these attorneys contacted new attorneys who filed a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen the district court’s final judgment on the ground that the AEDPA’s statute of

62. *Martel v. Clair*, 132 S. Ct. 1276, 1287 (2012). The Court explained “interest of justice”: As its name betrays, the “interests of justice” standard contemplates a peculiarly context-specific inquiry. So we doubt that any attempt to provide a general definition of the standard would prove helpful. In reviewing substitution motions, the courts of appeals have pointed to several relevant considerations. Those factors may vary a bit from circuit to circuit, but generally include: the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client’s own responsibility, if any, for that conflict).

Id.

63. *Clair*, 132 S. Ct. at 1286 (emphasis added).

64. *Id.* at 1282.

65. *Christeson v. Roper*, 135 S. Ct. 891 (2015).

66. *Id.* at 892.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Christeson*, 135 S. Ct. at 892.

71. *Id.*

limitations should have been equitably tolled.⁷² Because previous counsel could not litigate their own failures, Mr. Christeson requested substitute counsel.⁷³ The District Court denied the motion for substitution, and the Court of Appeals for the Eighth Circuit affirmed.⁷⁴

The Supreme Court reversed:

Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct." *Holland v. Florida*, 560 U. S. 631, 651–652 (2010). Advancing such a claim would have required [counsel] to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. See Restatement (Third) of Law Governing Lawyers §125 (1998). Thus, as we observed in a similar context in *Maples v. Thomas*, 565 U. S. ___, ____, n. 8 (2012) (slip op., at 17, n. 8), a "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument—i.e., that his attorneys had abandoned him."⁷⁵

The Supreme Court found "Christeson might properly raise a claim for relief pursuant to Rule 60(b),"⁷⁶ arguing that prior counsel's conduct provided a basis for equitable tolling. The Court relied on *Maples*,⁷⁷ a case about "cause" for procedural defaults, not about equitable tolling.⁷⁸ Mr. Christeson lost on remand and was executed.⁷⁹

72. *Id.* at 892. Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6) (2016). To be granted, a motion under subsection (b)(6) requires, *inter alia*, a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Federal courts are split on whether the decision in *Martinez* is an "extraordinary circumstance" that could warrant Rule 60(b) relief under *Gonzalez*.

73. *Christeson*, 135 S. Ct at 892.

74. *Id.* at 893.

75. *Id.* at 894. Initial federal counsel "abandoned" Mr. Christeson:

[Counsel] failed to meet with Christeson until more than six weeks *after* his petition was due. There is no evidence they communicated with their client at all during this time. They finally filed the petition on August 5, 2005—117 days too late. . . . A legal ethics expert . . . stated in a report submitted to the District Court: "[I]f this is not abandonment, I am not sure what would be."

Id. at 892 (citations omitted) (emphasis in original).

76. *Id.* at 895.

77. *Id.* at 894.

78. *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012). Even though *Maples* was a "cause" to excuse a procedural default case, and *Holland*, *supra*, was an equitable tolling of the AEDPA statute of limitations case, some courts have held that *Maples* effectively overruled *Holland*. See *Atkins*, *supra* note 54, at 438. Since *Holland* and *Maples*, courts of appeals have taken different approaches on whether only abandonment may satisfy the extraordinary circumstances for equitable tolling. *Id.* at 439. Several circuits have held that "a range of attorney misconduct not limited to abandonment," govern the extraordinary circumstances inquiry. *Luna v. Kernan*, 784

D. The Operation of 18 U.S.C. § 3599 and Abandonment

Under 18 U.S.C. § 3599(e), attorneys appointed in federal capital habeas corpus proceedings are required to continue to represent the petitioner even when the case has completed (Step 9), i.e., after federal habeas corpus has been denied, the denial has been affirmed, and a petition for writ of certiorari has been denied:

Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.⁸⁰

“Under § 3599(e), a lawyer appointed to represent a capital defendant is obligated to continue representing his client until a court of competent jurisdiction grants a motion to withdraw.”⁸¹ Unfortunately some attorneys and clerks are unaware of this requirement.⁸²

F.3d 640, 648 (9th Cir. 2015). *See also* Ross v. Sarano, 712 F.3d 784, 800 (3d Cir. 2013) (recognizing “an attorney’s malfeasance” may warrant tolling); Whiteside v. United States, 775 F.3d 180, 185 (4th Cir. 2014) (characterizing *Holland* as a case of “extraordinary negligence”); Schmid v. McCauley, 825 F.3d 348, 350 (7th Cir. 2016) (applying *Christeson*, holding that abandonment “is one potentially extenuating circumstance” supplying the requisite extraordinary circumstances). Others have espoused a categorical position that attorney abandonment is needed. *See* Thomas v. Atty. Gen., Florida, 795 F.3d 1286, 1293 (11th Cir. 2015); Rivas v. Fischer, 687 F.3d 514, 538 (2d Cir. 2012) (citing *Maples*); Mack v. Falk, 509 F. App’x 756, 759 (10th Cir. 2013) (identifying abandonment under *Maples* as providing the extraordinary circumstances for tolling); United States v. Wheaton, 826 F.3d 843, 852 (5th Cir. 2016) (finding no abandonment and thus no extraordinary circumstances for tolling); Sneed v. Shinseki, 737 F.3d 719, 727 (Fed. Cir. 2013) (construing *Maples* to have clarified the extraordinary circumstances analysis in tolling cases).

79. *Christeson v. Griffith*, 845 F.3d 1239, 1241 (8th Cir. 2017); Jim Salter, *Missouri executes man for killing woman, 2 children in 1998*, WASH. TIMES, <http://www.washingtontimes.com/news/2017/jan/31/missouri-inmate-faces-execution-for-killing-family/> [https://perma.cc/J2KN-UNNB].

80. 18 U.S.C. § 3599(e) (2012).

81. *Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016).

82. The following letter was sent to a client who had appointed counsel for federal habeas corpus purposes:

As I have explained before, I was appointed to represent you before the United States federal courts. My representation of you ended with the conclusion of the case before the United States Supreme Court, when your request for issuance of a writ of certiorari was denied. I am told by the Clerk of the United States Court of Appeals for the Fifth Circuit that my court appointed representation does not continue into state court matters.

[CJA counsel] expressly stated that he believes that his representation does not extend to state competency proceedings. This belief is mistaken. Under § 3599(e), counsel “shall represent the defendant throughout every subsequent stage of available judicial proceedings, . . . and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.”⁸³

“We conclude that [CJA counsel] “abandoned” Battaglia for purposes of pursuing a Ford claim.”⁸⁴ The Court concluded it had jurisdiction to enter a stay of Mr. Battaglia’s execution, appoint new counsel, and conduct further proceedings even though this case had completed the nine-step process.⁸⁵

IV. THE SUPREME COURT SHOULD REQUIRE EFFECTIVE ASSISTANCE OF FEDERAL AND STATE POST-CONVICTION COUNSEL IN CAPITAL CASES

Martinez, *Holland*, and *Maples* represent progress in policing the performance of counsel in capital post-conviction proceedings. But, they insulate shabby representation in hundreds of cases. Other than for a claim of trial counsel’s ineffectiveness, appointed post-conviction counsel in capital cases are not accountable to their clients or the courts for what they do unreasonably and prejudicially wrong. Absent disappearing, evaporating as counsel, not functioning at all, or being extraordinarily (as opposed to ordinarily) incompetent, these post-conviction attorneys’ conduct binds a death sentenced client’s hands and seals their fate. This is unconscionable.

Proof of an utterly unconstitutional trial or sentencing, negligently not raised at Step 4, will not be heard at Step 7. A lawyer’s failure timely to file a federal petition (Step 7) will not be corrected unless counsel utterly abandoned their clients. Death-sentenced inmates have been and will continue to be executed without any review of substantial claims for relief.

This is not indigent defense; it is indigent *offense*. It is shameful that a thing called “ordinary, run-of-the-mill, garden variety, attorney neglect and ineffectiveness” in post-conviction proceedings operates to bar condemned

Nevertheless, if you wish to challenge this death sentence, please write *to* the District Court and to the Texas Court of Criminal Appeals and ask for the appointment of a lawyer to continue to represent you in the state courts. Again, I provide you with the address to both of these courts below.

A copy of the letter is on file with the author.

83. *Battaglia*, 824 F.3d at 474. “Competency proceedings” are proceedings pursuant to *Ford v. Wainwright*, 477 US 399 (1986), where the Supreme Court held that death sentenced inmates had to be mentally competent at the time of execution. *See id.* at 474–75.

84. *Id.* at 474.

85. *Id.* at 474–75. “Battaglia effectively lacked counsel to prepare his claim of incompetency. In our view, it would be improper to approve his execution before his newly appointed counsel has time to develop his Ford claim. A stay is needed to make Battaglia’s right to counsel meaningful.” *Id.* at 475.

persons from challenging their convictions and sentences. The fact that there is “garden variety” ineffectiveness means there is a lot of ineffectiveness going around. What civilized system of law has an entire category for incompetence called “ordinary” that must be tolerated?

These condemned petitioners cannot receive appointed counsel of choice and cannot be expected to understand and navigate the shoals of post-conviction and habeas corpus jurisprudence when even their protectors’ ignorance and incompetence is excused. An attorney’s ineffectiveness should not be the obstacle to hearing a (1) substantial claim of any constitutional error; (2) a petitioner’s defense to a missed statute of limitations; or (3) any other substantial argument in favor of vacating the state court death judgment. The illusion of counsel cannot be allowed to make judges and the public comfortably numb. Ordinary failures when it comes to executing people should be ferreted out and corrected, not embraced as an institutional reason not to listen.