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A Case for a Constitutional Right to Counsel in Habeas Corpus

EMILY GARCIA UHRIG*

[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.

—Justice Hugo Black, *Griffin v. Illinois*¹

INTRODUCTION

The right to assistance of counsel for the criminally accused and convicted facing the potential loss of liberty abides by the following well-established jurisprudential contours: the Sixth and Fourteenth Amendments secure the right at trial, which includes “all critical stages of the proceeding,” and the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments guarantee the right to counsel on the first appeal as of right.² To the extent the issue has been contemplated, most courts agree that a constitutionally protected right to counsel does not extend beyond the first appeal.³ The rationale for drawing the line at this juncture is that, for any further appeals, the appellant-petitioner has the benefit of past appellate counsel’s work in identifying, researching, and framing all potentially meritorious issues, as well as an appellate court’s written decision. Thus, he or she need not conduct original legal research and writing to pursue further appeals, which typically occur before the respective state supreme court or the United States Supreme Court.

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1. 351 U.S. 12, 19 (1956) (Black, J., plurality opinion).

2. See discussion *infra* Parts I.A.3–5.

3. See *infra* Part I.B.

Insofar as an inmate seeks to raise issues in state or federal habeas corpus proceedings that he⁴ already litigated on direct appeal, the same logic dictates against recognizing a constitutional right to counsel in habeas. Indeed, in *Pennsylvania v. Finley*, decided in 1987, the Supreme Court held that no constitutional right to counsel attaches to state postconviction proceedings involving claims litigated on direct appeal.⁵ The Court affirmed this holding two years later, in *Murray v. Giarratano*, for capital cases.⁶ But in 1991, in *Coleman v. Thompson*, the Supreme Court explicitly reserved the question as to whether the same conclusion applies to proceedings involving claims that a petitioner can *only* raise in the first instance in habeas corpus, such as allegations of ineffective assistance of counsel at trial or on direct appeal, where habeas corpus functions as the first appeal of right.⁷ To date, the Supreme Court has not attempted to answer this question.

What is perhaps most remarkable about this issue is the relatively scant attention that the judiciary and academia have devoted to it. Every federal court of appeals to confront the issue, either directly or indirectly, has concluded that no constitutional right to counsel applies to claims for which habeas corpus proceedings provide the first forum for review. But the vast majority of these decisions involve little more than summary analysis that endorses, without justification, a broader application of *Finley* than that case itself embraced. Some simply apply *Finley*'s holding to cases involving new claims without considering the distinct constitutional implications presented. Others acknowledge that they are in uncharted constitutional territory but then, with little ceremony, extend *Finley* to this category of claims. In the seventeen years since *Coleman*, only two circuits actually have grappled with the implications of applying *Finley* to claims raised in the first instance in habeas corpus proceedings. Although ultimately rejecting a constitutional right to counsel in *any* habeas proceeding, these decisions have provoked spirited dissents that reflect the difficulty of the issue.

Furthermore, only a single state appellate court—the Washington Supreme Court—has been willing to recognize a constitutional right to counsel in habeas corpus proceedings that provide the first forum for review of claims challenging the integrity of a criminal judgment. In *Honore v. Washington State Board of Prison Terms & Paroles*, decided in

4. For ease of reference only, this Article will refer to petitioners as “he,” recognizing of course that there are many women currently incarcerated in state and federal prisons in the United States. See WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2006, at 3–4 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/po6.pdf> (stating that the number of men in prison in 2006 was 1,458,363; the number of women, 112,498).

5. 481 U.S. 551, 555 (1987).

6. 492 U.S. 1, 10 (1989).

7. 501 U.S. 722, 755 (1991).

1970, the Washington Supreme Court concluded that the same principles of equal protection and due process that underpin the United States Supreme Court's recognition of a constitutional right to counsel on the first appeal of right apply in full force to habeas proceedings in which a petitioner raises claims that he could not raise at trial or on direct appeal.⁸ But the decision predates *Finley*, *Giarratano*, and *Coleman* by approximately twenty years. Nonetheless, the issue the *Honore* court resolved is precisely the one reserved in *Coleman*.

Similarly, the scholarship that has evolved around the issue of a right to counsel in habeas corpus largely accepts as well-established the proposition that there is no constitutional right to counsel in *any* postconviction proceedings.⁹ Often, it focuses instead on constructing a legislative right to counsel in habeas, particularly in capital cases.¹⁰ A number of scholars, however, have noted the issue reserved in *Coleman*, with at least one pointing to the willingness of federal courts of appeals to extend *Finley* to claims litigated in the first instance in habeas corpus without clear instruction from the Supreme Court on the issue.¹¹

8. 466 P.2d 485, 492 (Wash. 1970).

9. E.g., Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999) (noting as a threshold matter that "[t]he Supreme Court has rejected arguments that either the Due Process Clause or the Equal Protection Clause require that the right to counsel apply to collateral, post-conviction proceedings"); Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 TULSA L. REV. 253, 265 (2006) ("The government has no constitutional obligation to provide postconviction counsel to indigent capital inmates."); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 681 (2007) (arguing for expansion of factual record on direct appeal to permit litigation of ineffective assistance of counsel claims in part because defendants "have no constitutional right to an attorney on collateral review"); Letty S. Di Giulio, Note, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109, 111 (1999) (noting that the Supreme Court has interpreted the "mandate" of *Gideon v. Wainwright*, 372 U.S. 335 (1963), "as a limited one: lawyers are apparently not required at post-conviction proceedings"); cf. Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 801-02 (2004) (arguing that *Massaro v. United States*, 538 U.S. 500 (2003), calls into question continued viability of prior Supreme Court jurisprudence read to deny a constitutional right to counsel in state habeas proceedings); Sarah L. Thomas, Comment, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1141 n.9 (2005) (observing that the United States Supreme Court "explicitly held that there is no federal constitutional right to counsel in habeas corpus proceedings").

10. E.g., Geraldine Szott Moohr, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 805-09 (1990) (proposing federal legislation solution to the right to counsel issue); Thomas, *supra* note 9, at 1165. See generally McConville, *supra* note 9 (arguing that even if, after *Finley* and *Giarratano*, no constitutional right to postconviction counsel exists in the first instance, due process could impose an effectiveness guarantee once the government decides to provide such counsel).

11. See William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 849 (2007) (noting that the Supreme "Court's expressed preference for factual development in the collateral proceeding is tempered by its concurrent precedent declining to hold explicitly that there is a right to counsel in postconviction proceedings," but recognizing the issue left

This Article critically examines, and seeks to open an academic dialogue on, the question left open in *Coleman*. Consistent with the *Honore* decision, I argue that, under principles enunciated in the United States Supreme Court's right to counsel jurisprudence, due process and equal protection principles dictate that a constitutional right to counsel attaches whenever habeas petitioners seek review of claims for which habeas corpus provides the first opportunity for judicial review. The complexity of habeas corpus, particularly in light of the procedural thicket through which a petitioner must expeditiously wade lest he confront procedural default of his claims, further compels this conclusion.

As implemented, this right to counsel applies to state inmates for the first state habeas petition in which he is able to seek judicial review of new claims that challenge his criminal judgment.¹² For federal inmates seeking habeas relief under 28 U.S.C. § 2255 based on claims for which federal habeas corpus provides the first forum for review, the right to counsel should apply to the first petition filed.¹³

This Article is structured as follows: Part I synthesizes the history and current status of the constitutional right to counsel for the criminally accused at the trial, direct appellate, and discretionary appellate stages. Part II provides a brief overview of federal habeas corpus and, more specifically, describes the current status of the right to counsel, both statutory and constitutional, in habeas corpus proceedings. Part III sets forth the due process and equal protection framework that informs a

unresolved in *Coleman*); Brad Snyder, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 YALE L.J. 2211 (1998); Di Giulio, *supra* note 9, at 110; Jennifer N. Ide, Comment, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1103 (1998) (noting that the message sent by various federal courts of appeals is that "although one may have a right to counsel" under the possible exception to *Finley* and *Giarratano* noted in *Coleman*, "the courts will not guarantee the enforcement of that right"); see also 1 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.2c (5th ed. 2005) (arguing under *Douglas v. California* for an equal protection right to counsel in postconviction proceedings that function as a first appeal of right, and in so doing noting the "irrelevance" of the United States Supreme Court's analysis in *Finley* and the unresolved nature of the issue).

12. The lack—or ineffective performance—of counsel during this first state habeas proceeding thus would excuse any resulting procedural default that otherwise bars federal habeas review under 28 U.S.C. § 2254.

13. In light of the complexity of the myriad procedural hurdles that a federal habeas petitioner must navigate before obtaining review of the merits of his habeas claims under § 2254 or § 2255, there is a strong case to be made under *Bounds v. Smith*, 430 U.S. 817, 828 (1977), that the right to counsel should attach to *all* federal habeas proceedings, regardless of the substantive nature of the claims raised therein. That case, however, is beyond the scope of this Article, and is something I intend to explore in a subsequent piece. See LIEBMAN & HERTZ, *supra* note 11, § 7.2c (arguing that the Due Process Clause arguably requires "counsel and necessary financial assistance . . . in those circumstances in which the petitioner . . . makes a particularized showing that the denial of counsel and necessary financial assistance is tantamount to the denial of meaningful access to postconviction remedies").

constitutional right to counsel in state and federal habeas proceedings where the claims raised require expansion of the record and thus, the habeas corpus court operates as the court of first review. In so doing, this Part addresses the issue of the hypothetical “infinite habeas” that recognition of a constitutional right to counsel in habeas may trigger: if a defendant has a right to counsel in the first state or federal habeas proceeding that functions as his first appeal, does this necessarily mean he will have a right to counsel in a second habeas proceeding to the extent he wishes to challenge the effectiveness of his first habeas counsel (and so on)? I argue that the risk of a right to counsel attaching in perpetuity to an endless series of habeas petitions is negligible. Furthermore, to the extent a defendant suffers the misfortune of receiving deficient representation in his first, or even “*n*th” habeas petition, our justice system requires nothing less than providing him with an opportunity to correct any resulting injustice. The interest of finality simply cannot compete with an individual’s interest in due process and equal protection throughout any process that results in his loss of liberty or life.

Since the United States Supreme Court first began to evaluate the parameters of the constitutional right to counsel in criminal cases, it has underscored the essential role of the “guiding hand of counsel” in enforcing the principles of justice enunciated and elevated in the Constitution. This Article makes a case for honoring those principles in habeas corpus proceedings in an effort to ensure more than the meaningless ritual currently experienced by many pro se inmates struggling mightily to vindicate constitutional, federal, and treaty law violations through the Great Writ.

I. THE HISTORY AND CURRENT STATUS OF THE CONSTITUTIONAL RIGHT TO COUNSEL FOR THE CRIMINALLY ACCUSED AT THE TRIAL, DIRECT APPELLATE, AND DISCRETIONARY APPELLATE STAGES

A. RIGHT TO COUNSEL AT TRIAL AND RELATED PROCEEDINGS

To appreciate the force of authority and principle that call for recognition of at least a limited right to counsel in habeas corpus proceedings, it is essential to begin with a brief review of the history of the constitutional right to counsel and its jurisprudence. The history of the right to assistance of counsel in criminal cases, until relatively recently, has been one of gradual expansion, with increasing recognition of the critical nature of the role counsel plays in assisting the plight of the criminal defendant.

1. *Early English Law*

As with many of the principles enshrined in the U.S. Constitution, the right to counsel finds its roots in the English common law. Until the

late seventeenth century, English common law provided a right to counsel in criminal cases involving only misdemeanor offenses, but denied it in felony and treason cases, except to the extent the defendant identified purely legal issues that required resolution.¹⁴ Some scholars attribute this seeming paradox to the instability of the English state at the time due to the Glorious Revolution of 1688.¹⁵ That is, the right to counsel was a privilege England could ill-afford when dealing with individuals who appeared to pose the greatest threat to its security, i.e., those charged with serious crimes and treason.¹⁶ As a result, the individuals who stood to lose the most—indeed, their very lives—had to fend for themselves in defending against criminal charges, without any assistance of counsel on factual matters.¹⁷ This practice persisted, despite harsh criticism from prominent jurists such as Blackstone, who considered the denial of counsel in felony and treasons cases to be indefensible and at odds “with the rest of the humane treatment of prisoners by the English law.”¹⁸

In 1695, with the emergence of a more stable political and social environment, the British Parliament passed a statute that permitted defendants in treason cases to retain counsel and required courts to appoint counsel at the defendant’s request.¹⁹ By the mid-1700s, judges at their discretion permitted counsel to assist defendants in criminal cases.²⁰ But judges still at times restricted counsel’s role to matters of law, leaving

14. *Powell v. Alabama*, 287 U.S. 45, 60 (1932); DAVID FELLMAN, *THE DEFENDANT’S RIGHTS TODAY* 209–10 (1976); FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 109 (1969) (asserting that, at the time of the American Revolution, English common law allowed the criminally accused a right to counsel only in misdemeanor and treason cases); JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 3 (2002); Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000, 1018–30 (1964) (contending that English common law provided for right to counsel in matters of law, but not fact).

15. HELLER, *supra* note 14, at 10; JOHN B. TAYLOR, *RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION* 47 (2004).

16. See HELLER, *supra* note 14, at 10 (“[T]he manner in which the accused was either deprived of or hampered in his liberty of defense . . . [was] not only tolerated but even applauded by a large body of public opinion . . . because the government was so weak and its enemies so strong that it was felt, not without reason, that it must take every advantage of its enemies.” (quoting 5 SIR WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 196 (4th ed. 1938)); TAYLOR, *supra* note 15 (“Perhaps the best explanation for this curious situation is that the government was more willing to be liberal when it had less at stake than when it had more. Especially in the revolutionary seventeenth century, the government—monarchy or commonwealth—was far from secure.”); see also TOMKOVICZ, *supra* note 14, at 1, 3–4.

17. See TOMKOVICZ, *supra* note 14.

18. *Id.* at 5–6; see also *Powell*, 287 U.S. at 60–61 (“An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers [such as Blackstone].”); FELLMAN, *supra* note 14, at 210.

19. HELLER, *supra* note 14, at 10 (citation omitted); TAYLOR, *supra* note 15.

20. See cases cited *supra* note 19.

the defendant to develop the facts unassisted.²¹ In 1836, Parliament finally enacted a statute guaranteeing the right to counsel in felony cases.²²

2. *The American Colonies and the Ratification of the Sixth Amendment*

The American colonies departed from English common law by adopting a somewhat more generous approach to providing a right to counsel in criminal cases. In *Powell v. Alabama*, Justice Sutherland calculated that, prior to the American Revolution, at least twelve of the thirteen colonies had recognized a right to counsel, at minimum, in criminal prosecutions involving capital offenses or other serious crimes.²³ On the eve of the Sixth Amendment's adoption, seven state constitutions guaranteed a right to counsel, four states did so by statute, and another state protected the right by common law.²⁴ Prior to adoption of the Sixth Amendment, only Georgia had no form of a right to counsel in criminal cases.²⁵ In the states that permitted only a right to retain counsel, the right mimicked the practice that had evolved by the mid-1700s in England.²⁶ But as the number of lawyers in colonial America grew, American courts reflected a more pronounced awareness of the injustice inherent in requiring an accused to defend against a criminal charge without the assistance of counsel.²⁷

The states ratified the Constitution in 1787 without a bill of rights, but with the assumption and understanding that one would soon follow.²⁸ James Madison, in particular, pledged his support for a bill of rights when campaigning for approval of the Constitution.²⁹ With the understanding that his constituents in Virginia had approved the Constitution with the expectation that a bill of rights would follow, on June 8, 1789, Madison proposed a draft of amendments to Congress.³⁰ Included in these amendments was a provision that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance

21. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8 (Greenwood Press 1972) (1955); HELLER, *supra* note 14, at 9–10 (citation omitted); TAYLOR, *supra* note 15; TOMKOVICZ, *supra* note 14, at 7–9.

22. BEANEY, *supra* note 21, at 8–11; FELLMAN, *supra* note 14, at 210; HELLER, *supra* note 14, at 10 (citation omitted); TAYLOR, *supra* note 15, at 47; TOMKOVICZ, *supra* note 14, at 8–9.

23. *Powell*, 287 U.S. at 61–65 (quoting *Holden v. Hardy*, 169 U.S. 366, 386 (1898)); BEANEY, *supra* note 21, at 21 (arguing that Justice Sutherland in *Powell* was correct only to the extent that all the colonies had confirmed by statute a right to counsel that extended after 1750 in England by judicial discretion, rather than legislative mandate).

24. TAYLOR, *supra* note 15, at 48.

25. Georgia incorporated a right to counsel provision in its constitution in 1798. *Id.*

26. BEANEY, *supra* note 21, at 25.

27. *Id.*

28. TOMKOVICZ, *supra* note 14, at 16–18.

29. *Id.* at 19.

30. 1 ANNALS OF CONG. 424 (Joseph Gales ed., 1834); TOMKOVICZ, *supra* note 14, at 19.

of counsel for his defence."³¹ The provision emerged unchanged and without debate through committee, House, and Senate action and state ratification and became enshrined in the Sixth Amendment, as ratified in 1791.³²

In light of the dearth of debate on the Sixth Amendment's right to counsel clause, the Framers' intent behind the provision is far from apparent.³³ Several scholars have suggested that the contemplated right to counsel was simply the right of the criminally accused to retain counsel of choice, rather than the broader right to have counsel appointed by the government where a defendant lacks sufficient resources to retain private counsel.³⁴ Regardless, the task fell to the courts to define the contours of the Sixth Amendment's right to counsel.

In 1833, the Supreme Court made clear that the Bill of Rights, including the Sixth Amendment, constrained only the power of the federal government, and had no effect on state authority exercised against the individual.³⁵ Thus, the Sixth Amendment applied only to defendants facing trial in federal court, leaving unprotected the majority of criminal defendants.³⁶ But in 1868, after the end of the Civil War, Congress amended the Constitution to include the Fourteenth Amendment, which provided in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."³⁷ The Fourteenth Amendment ultimately became the gateway for extending the Sixth Amendment right to counsel protections to state criminal defendants.³⁸

3. *Judicial Interpretation of the Right to Counsel Under the Sixth and Fourteenth Amendments*

The Supreme Court first tackled the issue of the right to counsel in state criminal prosecutions under the Sixth and Fourteenth Amendments in *Powell v. Alabama*.³⁹ In *Powell*, the defendants⁴⁰ were black youths

31. 1 ANNALS OF CONG. 424; BEANEY, *supra* note 21, at 23 (citation omitted); TAYLOR, *supra* note 15, at 49; TOMKOVICZ, *supra* note 14, at 19 (citation omitted).

32. U.S. CONST. amend. VI.

33. See BEANEY, *supra* note 21, at 24 ("It is extremely difficult, if not impossible, with the available material to reach any positive conclusion concerning the intention of Congress in proposing the clause or the interpretation given it by the states at the time of ratification."); TOMKOVICZ, *supra* note 14, at 20 ("For those seeking a window into the intentions of those who formulated and approved the Sixth Amendment right to counsel, the historical record is a disappointment.").

34. E.g., BEANEY, *supra* note 21, at 24; TOMKOVICZ, *supra* note 14, at 20-21.

35. *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833).

36. *Betts v. Brady*, 316 U.S. 455, 474 (1942); TOMKOVICZ, *supra* note 14, at 21.

37. U.S. CONST. amend. XIV.

38. See *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963).

39. 287 U.S. 45, 52 (1932).

40. *Powell* reached the Supreme Court as a habeas corpus petition. Hence, as the Court observed, the defendants were more accurately described as "petitioners." But for ease of reference, I will adhere to the Court's adoption of the term "defendants." See *id.* at 49.

who had fought with a group of white youths on a freight train traveling in Alabama.⁴¹ After all but one of the white youths had been tossed from the train, the sheriff at the next station was notified and asked to remove the black youths from the train.⁴² When the train arrived at the station, an angry crowd awaited the youths.⁴³ The black youths, and two white girls who had also been riding on the train, were taken to Scottsboro, the county seat.⁴⁴ The girls accused the youths of rape.⁴⁵ The youths denied ever having seen the girls before the sheriff removed them from the train.⁴⁶ Amidst tremendous local hostility, the youths, whom the Court described as “ignorant” and “illiterate,” were charged with rape.⁴⁷

The trial court did not appoint trial counsel until the morning of trial.⁴⁸ Neither the defendants nor the court knew at that juncture what the facts were: “No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial,” convicted, and sentenced to death.⁴⁹ In his dissent to the Alabama Supreme Court’s decision upholding the defendants’ conviction on direct appeal, Chief Justice Anderson described trial counsel’s representation as “rather *pro forma* than zealous and active.”⁵⁰

On this record, the United States Supreme Court concluded that the “defendants were not accorded the right of counsel in any substantial sense.”⁵¹ The Court noted it was bound by the state supreme court’s determination that Alabama’s state constitutional and statutory rights to counsel were not violated.⁵² Instead, the Court turned to whether the denial of assistance violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.⁵³ More specifically, the Court was required to resolve whether the Fourteenth Amendment’s Due Process Clause required a right to assistance of counsel in the defendants’ case.⁵⁴ The Court held that it did.⁵⁵

In oft-quoted eloquence,⁵⁶ Justice Sutherland, writing for the majority, noted the crucial role of counsel in criminal cases:

41. *Id.* at 50–51.

42. *Id.* at 51.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 49, 51–52.

48. *Id.* at 56–58.

49. *Id.* at 49–51, 57–58.

50. *Id.* at 58 (quoting *Powell v. State*, 141 So. 201, 214 (Ala. 1932) (Anderson, C.J., dissenting)).

51. *Id.*

52. *Id.* at 60.

53. *Id.* at 60–61.

54. *Id.* at 61–67.

55. *Id.*

56. See, e.g., *United States v. Cronin*, 466 U.S. 648, 653 n.8 (1984) (“Time has not eroded the force

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.⁵⁷

The Court concluded that the trial court's failure to appoint counsel violated the Fourteenth Amendment's Due Process Clause.⁵⁸ But despite its expansive language, the Court was careful to limit its holding to the facts of *Powell*, concluding that, in a capital case, a court must appoint counsel "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."⁵⁹

Foreshadowing future precedent, the Court further elaborated: "In a case such as this, whatever may be the rule in other cases, *the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.*"⁶⁰

Six years after *Powell*, the Supreme Court decided another milestone in right to counsel jurisprudence, *Johnson v. Zerbst*.⁶¹ In *Zerbst*, petitioner and his co-defendant, both U.S. marines, were arrested and charged with feloniously uttering and passing counterfeit currency and possessing counterfeit currency.⁶² Both defendants were from out of state and had no relatives, friends, or acquaintances to assist them in Charleston, where they were prosecuted.⁶³ Both lacked education and

of Justice Sutherland's opinion for the Court in *Powell* . . ."); *United States v. Ash*, 413 U.S. 300, 307 (1973); *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 334-45 (1963); *Chandler v. Fretag*, 348 U.S. 3, 5 (1954); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

57. *Powell*, 287 U.S. at 68-69.

58. *Id.* at 71.

59. *Id.*

60. *Id.* at 72 (emphasis added); cf. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936) (observing that *Powell* concluded that among the fundamental rights safeguarded by the Due Process Clause of the Fourteenth Amendment is the "right of the accused to the aid of counsel in a criminal prosecution").

61. 304 U.S. at 469.

62. *Id.* at 459-60.

63. *Id.* at 460.

financial resources.⁶⁴ Neither had prior experience in the criminal justice system.⁶⁵

Counsel represented both men at their preliminary hearings, at which the defendants, unable to post bail, were ordered detained pending grand jury action.⁶⁶ At their subsequent arraignment, the men entered not guilty pleas.⁶⁷ Unable to employ counsel for trial, they informed the court they lacked counsel, but did not request appointment of counsel.⁶⁸ Without assistance of counsel, the two were tried, convicted, and sentenced to four and one-half years' incarceration.⁶⁹

After being convicted and sentenced, both men asked the jailer to call a lawyer for them, but were not allowed to contact one themselves.⁷⁰ Two days later, they were transported to a federal penitentiary and placed in isolation for sixteen days.⁷¹ They made no requests for counsel, nor to file a motion for a new trial or notice of appeal.⁷² More than four months later, petitioners filed applications for appeal, which were denied as untimely.⁷³ Both men then filed petitions for a writ of habeas corpus, alleging deprivation of their Sixth Amendment right to counsel.⁷⁴ The district court appeared to agree that the trial court violated petitioner's Sixth Amendment right to counsel, but concluded that such error, though a basis for correction on direct appeal, did not warrant habeas relief.⁷⁵ The Fifth Circuit affirmed, and the Supreme Court granted certiorari.⁷⁶

As a threshold matter, the Court noted that the Sixth Amendment's guarantee of a right to counsel in criminal cases is "necessary to insure fundamental human rights of life and liberty," and "stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'"⁷⁷ The Court observed that the Sixth Amendment's right to counsel clause

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* There was some issue as to whether petitioner requested appointment of counsel from the prosecutor: petitioner contended that he asked the prosecutor to provide counsel but was told that, in South Carolina, the trial court would appoint counsel only in capital cases; the prosecutor denied both that petitioner had requested counsel and that he (the prosecutor) had informed petitioner that he had no right to counsel. *Id.* at 460–61.

69. *Id.*

70. *Id.* at 461.

71. *Id.* at 460–62.

72. *Id.* at 462.

73. *Id.* The deadline for filing a motion for new trial or appealing was three and five days, respectively. *Id.* (citations omitted).

74. *Id.* at 459.

75. *Id.*

76. *Id.*

77. *Id.* at 462 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious.⁷⁸

The Court further noted that Congress had expanded the breadth of habeas corpus relief to permit any necessary development of the factual record.⁷⁹ The Court thus reversed and remanded the case to the district court for findings as to waiver of counsel by petitioner.⁸⁰

Unlike in *Powell*, the Court did not limit its holding in *Zerbst* to the particulars of the case, that is, it did not condition the holding on the sympathetic nature of the defendants and the dire consequences of their conviction.⁸¹ Thus, *Zerbst* made clear that the Sixth Amendment requires assistance of counsel for every criminal defendant in federal court who faces loss of life or liberty, unless the defendant waives that right.⁸² For those unable to afford counsel, the Sixth Amendment requires appointment of counsel at government expense.⁸³

In 1942, four years after deciding *Zerbst*, the Supreme Court confronted the question of whether the Due Process Clause of the Fourteenth Amendment includes a right to counsel for state defendants facing loss of life or liberty and, if indigent, a corollary right to appointment of counsel.⁸⁴ In *Betts v. Brady*, the Court, divided six to three, held there is no due process right to appointment of counsel for indigent criminal defendants in state court.⁸⁵

The Court noted that *Powell v. Alabama* and *Johnson v. Zerbst* seemed to support the petitioner's argument that, "in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant."⁸⁶ In other words, the Court confronted whether the Sixth Amendment, as construed in *Johnson v. Zerbst* to require appointment of counsel in all federal cases to indigent defendants, "expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the

78. *Id.* at 462-63.

79. *Id.* at 465-66.

80. *Id.* at 469.

81. *Id.*; see also TOMKOVICZ, *supra* note 14, at 27 ("[T]he Sixth Amendment rule announced by the Court was apparently intended to apply to every case. Unlike the holding in *Powell*, the conclusion in *Zerbst* was not limited by the specific nature of the charges, the individual inadequacies of the defendants, or the particular jeopardy that they faced.").

82. 304 U.S. at 462-63.

83. *Id.* at 463.

84. *Betts v. Brady*, 316 U.S. 455, 458 (1942).

85. *Id.* at 471.

86. *Id.* at 462-64.

Fourteenth Amendment.”⁸⁷ Noting the diversity of law on the issue among the states, the Court declined to find that the Fourteenth Amendment *mandates* appointment of counsel to all indigent defendants, regardless of the particular circumstances of their case.⁸⁸ Rather, the Court held an asserted denial of due process is to be evaluated “by an appraisal of the totality of facts in a given case.”⁸⁹

After *Betts*, the state defendant’s right to assistance of counsel under the Fourteenth Amendment was significantly more limited than the federal defendant’s right to counsel under the Sixth Amendment. The former, if indigent, was at the mercy of state law in obtaining assistance of counsel because the Due Process Clause did not mandate appointment of counsel in all cases.⁹⁰ Whereas, after *Zerbst*, the latter, if indigent, had a Sixth Amendment right to have counsel appointed to assist him in *all* cases involving a potential loss of life or liberty.

In 1954, the Supreme Court addressed a corollary issue to that resolved in *Betts* and *Zerbst*: whether the right to representation by *retained* counsel under the Fourteenth Amendment’s Due Process Clause is more limited than the right to retained counsel guaranteed by the Sixth Amendment.⁹¹ In other words, is a state criminal defendant’s right to retain counsel more limited than, or on equal footing with, the right to retain counsel guaranteed to federal defendants by the Sixth Amendment?

Chandler v. Fretag involved a defendant who was initially charged with housebreaking and a larceny involving items valued at three dollars, an offense punishable by three to ten years incarceration.⁹² On the day of trial, petitioner appeared without counsel, intending to plead guilty as charged.⁹³ At that point, he did not believe he would benefit from the assistance of counsel.⁹⁴ The trial court thereupon informed him that, based on three alleged prior felonies, the state also intended to try him as a habitual criminal under the Tennessee Habitual Criminal Act.⁹⁵ The penalty for conviction under the Act was a mandatory life term, without the possibility of parole.⁹⁶ Petitioner immediately sought “a continuance

87. *Id.* at 465.

88. *Id.* at 467–73.

89. *Id.* at 462.

90. *Betts* acknowledged that the Fourteenth Amendment may require appointment of counsel in some cases based on the nature of the charge and/or the personal characteristics of the defendant. *Id.* at 462, 471–73 (citing *Palko v. Connecticut*, 302 U.S. 319 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932); *Twining v. New Jersey*, 211 U.S. 78 (1908)).

91. *Chandler v. Fretag*, 348 U.S. 3, 7 (1954).

92. *Id.* at 4.

93. *Id.*

94. *Id.*

95. *Id.* at 4–5.

96. *Id.* (citation omitted).

to enable him to retain counsel" on the new charge.⁹⁷ The trial court denied the request, and trial immediately ensued.⁹⁸ Petitioner pleaded guilty on the housebreaking and larceny charge but went to trial on the habitual criminal charge.⁹⁹ The entire proceeding—from jury empanelment to conviction—lasted no more than ten minutes.¹⁰⁰

The Supreme Court concluded that the trial court violated petitioner's Fourteenth Amendment due process rights by denying him an opportunity to retain counsel to defend against the habitual criminal allegation.¹⁰¹ Quoting *Powell*, the Court underscored the essential role of counsel in asserting the right to be heard and cited *Powell's* conclusion that a court's refusal to hear retained counsel in a particular case is a denial of due process.¹⁰² The Court then concluded that "[a] necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."¹⁰³ Thus, every state criminal defendant has an absolute right under the Fourteenth Amendment to retain counsel.¹⁰⁴

4. Gideon v. Wainright

Less than nine years later, in *Gideon v. Wainright*, the Supreme Court reversed the course set by the majority in *Betts* nineteen years earlier regarding whether the Due Process Clause of the Fourteenth Amendment requires appointment of counsel to indigent state criminal defendants.¹⁰⁵ For a man whose name would become a hallmark of civil liberties, and synonymous with "watershed judicial decisions," Clarence Earl Gideon's case involved facts that were prosaic, at best: he was charged with breaking and entering into a poolroom with intent to commit a misdemeanor, which was a felony under Florida law.¹⁰⁶ Unable to hire a lawyer, Gideon asked the trial court to appoint one for him.¹⁰⁷ The court refused, with apologies, on the ground that state law only permitted appointment of counsel to indigent defendants in capital

97. *Id.* at 5.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 9–10.

102. *Id.*

103. *Id.* at 10.

104. See TOMKOVICZ, *supra* note 14, at 31 ("The *Chandler* Court discerned a clear distinction between the scope of due process entitlement to retain representation and the scope of the due process right to have counsel appointed, concluding that every defendant has an absolute Fourteenth Amendment Right to retain representation.").

105. 372 U.S. 335, 345 (1963).

106. *Id.* at 336–37.

107. *Id.* at 337.

cases.¹⁰⁸ Gideon proceeded to trial, representing himself “about as well as could be expected from a layman.”¹⁰⁹ The jury convicted him, and the court sentenced him to five years’ incarceration.¹¹⁰ Gideon filed a habeas petition in the Florida Supreme Court, challenging his conviction and sentence on the ground that the trial court’s denial of his request for appointment of counsel denied him rights “guaranteed by the Constitution and the Bill of the Rights by the United States Government.”¹¹¹ The court summarily denied the petition.¹¹²

Noting that the issue of a defendant’s federal constitutional right to counsel in state court had been “a continuing source of controversy and litigation in both state and federal courts” since *Betts*, the United States Supreme Court granted certiorari.¹¹³ As a threshold matter, the Court noted that, in light of the marked similarity in facts between *Gideon* and *Betts*, if *Betts* remained intact, Gideon’s right to counsel claim must also fail.¹¹⁴ The Court then overruled *Betts* in a unanimous decision.¹¹⁵

First, the Court agreed with *Betts*’s assumption that the states are bound by any provision of the Bill of Rights that is “fundamental and essential to a fair trial.”¹¹⁶ But the Court disagreed with *Betts*’s conclusion that the Sixth Amendment’s guarantee of counsel for the criminally accused does not qualify as a fundamental right.¹¹⁷ Indeed, in *Powell v. Alabama* the Supreme Court had “unequivocally declared that ‘the right to the aid of counsel is of this fundamental character.’”¹¹⁸ Acknowledging that the Court had limited its holding in *Powell* to the facts of that case, the Court in *Gideon* observed that *Powell*’s conclusions regarding “the fundamental nature of the right to counsel are unmistakable.”¹¹⁹ The Court further noted that it had reemphasized the fundamental nature of the right to counsel in several cases throughout the ensuing decade, including *Johnson v. Zerbst*.¹²⁰ Thus, *Betts* represented an “abrupt break

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (internal quotation marks omitted).

112. *Id.*

113. *Id.* at 337–38.

114. *Id.* at 339.

115. Justices Douglas and Harlan joined the majority opinion, but filed separate, concurring opinions. *Id.* at 345–47 (Douglas, J., concurring), 349–52 (Harlan, J., concurring). Justice Clark joined in only the result reached by the majority. *Id.* at 347–49 (Clark, J., concurring in the result).

116. *Id.* at 342. (internal quotation marks omitted).

117. *Id.*

118. *Id.* at 342–43 (quoting *Powell*, 287 U.S. 45, 68 (1932)).

119. *Id.* at 343.

120. *Id.* (noting that the Sixth Amendment right to counsel is “necessary to insure fundamental human rights of life and liberty” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938))); *see also* *Smith v. O’Grady*, 312 U.S. 329, 332–34 (1941) (concluding that petitioner’s conviction without assistance of counsel would violate the “procedural guarantees protected against state invasion through the Fourteenth Amendment”); *Avery v. Alabama*, 308 U.S. 444, 450 (1940) (finding no violation of

with its own well-considered precedents.”¹²¹ In returning to those old, “sounder” precedents, the Court sought to “restore constitutional principles established to achieve a fair system of justice,” observing:

Not only these precedents but also reason and reflection require us to recognize that in 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.¹²²

This “truth,” the Court observed, was well-illustrated by the practices of those for whom money—and thus, access to counsel—was *not* an issue:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.¹²³

The Court noted that the right to counsel was rooted in the political origins of the United States:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.¹²⁴

The Court again invoked Justice's Sutherland's eloquence in *Powell v. Alabama* as comprehending the right to counsel as being an essential part of the right to be heard in that laypersons, unskilled in “the science of law,” require “the guiding hand of counsel at every step in the proceedings against [them].”¹²⁵

petitioner's right to assistance of counsel under the Fourteenth Amendment where he was “afforded the assistance of zealous and earnest counsel from arraignment to final argument in [the United States Supreme] Court”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936) (noting that the Supreme Court in *Powell* held that “the fundamental right of the accused to the aid of counsel in a criminal prosecution” was protected against state action by the Due Process Clause of the Fourteenth Amendment).

121. *Gideon*, 372 U.S. at 343-44.

122. *Id.* at 344.

123. *Id.*

124. *Id.*

125. *Id.* at 344-45.

Gideon v. Wainwright was, by all assessments, a landmark decision which elevated the Sixth and Fourteenth Amendment right to counsel to an exalted position within the panoply of constitutional rights that protect the criminally accused. Although *Gideon* may not have realized its "noble ideal" of creating fair trials for all state criminal defendants, the decision at least narrowed the enormous gap in justice that preexisted the decision.¹²⁶ Although groundbreaking, the decision left a number of critical questions unanswered. In particular, which proceedings, beyond trial itself, require assistance of counsel for the indigent? Did the decision really mean criminal defendants in *all* cases, state and federal, were entitled to assistance of counsel, regardless of their ability to afford to retain that assistance? Answers to these questions began to emerge in the ensuing decades, as the Supreme Court further clarified the parameters of the Sixth and Fourteenth Amendment right to counsel.

5. *Post-Gideon Developments in Supreme Court Jurisprudence*

In a series of decisions between 1979 and 2002, the Court devised an important limitation on the right to counsel pursuant to *Gideon*, concluding that while the right to appointed counsel applies to all *felony* defendants, only misdemeanor defendants who face a potential loss of physical liberty are similarly protected. First, in *Scott v. Illinois*, the Court held, five to four, that whether an indigent defendant has the right to appointed counsel at trial depends on the ultimate sanction imposed.¹²⁷ Specifically, an indigent defendant has no such right to appointed counsel unless he faces some period of incarceration.¹²⁸ Fifteen years later, in *Nichols v. United States*, the Court indicated in dicta that, for felony cases, incarceration is irrelevant: "In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived."¹²⁹ Finally, in *Alabama v. Shelton*, the Court further qualified the incarceration standard set forth in *Scott*.¹³⁰ Again split five to four, the Court held that the right to appointed counsel exists in a misdemeanor case even if the sentencing court suspends a prison or jail sentence and puts the defendant on probation.¹³¹ The Court left unresolved whether the right to appointed counsel also applies to defendants simply placed on probation. Some lower courts have concluded that the right to appointed counsel does not apply, but that

126. ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 8–11 (1992).

127. 440 U.S. 367, 373–74 (1979).

128. *Id.*

129. 511 U.S. 738, 743 n.9 (1994) (citation omitted).

130. 535 U.S. 654, 654 (2002).

131. *Id.* at 674.

the failure to appoint counsel may well foreclose incarcerating a defendant who was denied counsel and whose probation is later revoked.¹³²

In *United States v. Wade*, the Supreme Court made a second crucial post-*Gideon* clarification to the right to retained and appointed counsel by emphasizing what it deemed to be an implicit finding in its precedent since *Powell v. Alabama*: that a criminal defendant is entitled to assistance of counsel at all “‘critical’ stages of the proceedings” against him, not merely the trial, itself.¹³³ The Court explained that the right to counsel is guaranteed “at any stage of the prosecution . . . where counsel’s absence might derogate from the accused’s right to a fair trial” and that counsel’s presence at all critical stages assures that the accused’s interests will be protected.¹³⁴

The Court summarized the right to counsel principles derived from *Powell* and its progeny as requiring that it

scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.¹³⁵

To do so, the Court must “analyze whether potential substantial prejudice to defendant’s rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.”¹³⁶ The Court in *Wade* concluded that a postindictment lineup was a critical stage of the prosecution and thus, the defendant had a right to assistance of counsel at the lineup.¹³⁷ In *United States v. Gouveia*, the Supreme Court also made clear that the right to assistance of counsel attaches only at or after initiation of adversarial proceedings against a defendant.¹³⁸

132. See, e.g., *United States v. Pollard*, 389 F.3d 101, 111 (4th Cir. 2004); *United States v. Perez-Macias*, 335 F.3d 421, 428 (5th Cir. 2003).

133. 388 U.S. 218, 224–25 (1967) (emphasis added) (citing *Powell v. Alabama*, 287 U.S. 45, 57 (1932)); *Miranda v. Arizona*, 384 U.S. 436, 514 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964); *Massiah v. United States*, 377 U.S. 201, 206 (1964); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *Spano v. New York*, 360 U.S. 315, 326 (1959).

134. *Wade*, 388 U.S. at 226–27.

135. *Id.* at 227.

136. *Id.*

137. *Id.* at 228–39; cf. *United States v. Ash*, 413 U.S. 300, 321 (1973) (explaining that the Sixth Amendment right to counsel does not require presence of defense counsel at post-indictment showing of photo spread containing defendant’s picture to eyewitness); *Gilbert v. California*, 388 U.S. 263, 274 (1967) (explaining that preindictment taking of handwriting exemplars from defendant is not a critical stage of criminal proceedings at which defendant is entitled to assistance of counsel).

138. 467 U.S. 180, 192–93 (1984) (explaining that there is no right to counsel during administrative detention in prison prior to indictment for murder of another inmate); cf. *Miranda*, 384 U.S. at 494 (holding that the privilege against compulsory self-incrimination includes a right to counsel at pretrial custodial interrogation).

Consistent with *Wade* and *Gouveia*, the Supreme Court has held that a criminal defendant has a constitutional right to assistance of counsel at a preliminary hearing¹³⁹ and arraignment¹⁴⁰ if "certain rights may be sacrificed or lost,"¹⁴¹ and unconditionally has the right to counsel at sentencing.¹⁴² In *Mempa v. Rhay*, the Court underscored the "critical nature of sentencing in a criminal case" and the role of counsel to assist "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence."¹⁴³

6. Assistance of Counsel: The Substance

Moreover, the Sixth and Fourteenth Amendment right to assistance of counsel is not without content: that is, the right is not realized simply by appointment of a lawyer to represent a defendant throughout the criminal proceedings brought against him. In 1970, the Court noted in *McMann v. Richardson* that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."¹⁴⁴ Thus, the Court concluded that the accused is entitled to "a reasonably competent attorney," whose representation is "within the range of competence demanded of attorneys in criminal cases."¹⁴⁵

Three years later, the Court elaborated in *United States v. Ash* that "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."¹⁴⁶ In 1980, the Court in *Cuyler v. Sullivan* held that the Constitution guarantees the criminally accused "adequate legal assistance."¹⁴⁷ And in *Engle v. Isaac*, the Court

139. See *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (holding that Alabama preliminary hearing—the sole purpose of which was to determine whether there was evidence sufficient to present case to grand jury—was critical stage of state's criminal process at which right to assistance of counsel attached); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam) (explaining that regardless of normal function of preliminary hearing under Maryland law, hearing was critical state of proceeding invoking right to assistance of counsel where defendant entered guilty plea and that plea was admitted against him at subsequent trial).

140. See *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (holding that arraignment in Alabama is critical state of the proceeding at which the right to counsel attaches because of effect of proceeding on entire trial, i.e., under state law, defenses must be asserted or else subsequently deemed waived).

141. *Coleman*, 399 U.S. at 7 (citing *Hamilton*, 368 U.S. at 54).

142. See *Gardner v. Florida*, 430 U.S. 349, 359 (1977); *Mempa v. Rhay*, 389 U.S. 128, 133-34 (1967); *Specht v. Patterson*, 386 U.S. 605, 608-11 (1967); see also *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981) (holding that prosecution's use of psychiatric evidence, obtained from defendant without notice to defense counsel, at sentencing in capital murder trial to show future dangerousness violated defendant's Sixth and Fourteenth Amendment right to counsel at critical stage of the proceeding); *Townsend v. Burke*, 334 U.S. 736, 738-41 (1948).

143. 389 U.S. at 134-35.

144. 397 U.S. 759, 771 n.14 (1970) (emphasis added).

145. *Id.* at 770-71.

146. 413 U.S. 300, 309 (1973).

147. 446 U.S. 335, 344 (1980).

noted the accused's constitutional guarantee of "a fair trial and a competent attorney."¹⁴⁸ In *United States v. Cronic* and *Strickland v. Washington*, a pair of landmark right to counsel decisions issued in 1984, the Supreme Court breathed full life into the constitutional meaning of the words "assistance of counsel."¹⁴⁹

In *Cronic*, the Court made clear that the Sixth Amendment requires more than simply providing counsel to the accused, but rather, "assistance," which is to be "for his defense."¹⁵⁰ Thus, "[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated."¹⁵¹ The Court concluded that "[t]o hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.'"¹⁵²

The Court in *Cronic* identified the central, underlying purpose of the Sixth Amendment's guarantee of *effective* assistance of counsel:

"[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."¹⁵³

Thus, the Court in *Cronic* concluded that "the adversarial process" that the Sixth Amendment guarantees "requires that the accused have 'counsel acting in the role of an advocate'".¹⁵⁴

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a

148. 456 U.S. 107, 134 (1982).

149. 466 U.S. 668, 686 (1984); 466 U.S. 648, 654 (1984).

150. 466 U.S. at 654.

151. *Id.* (footnote omitted).

152. *Id.* at 654–55 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

153. *Id.* at 655 (alteration in original) (footnotes omitted) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975); *Herring v. New York*, 422 U.S. 853, 862 (1975)).

154. *Id.* at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)).

near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”¹⁵⁵

The Court emphasized the inevitable impact of the right to effective assistance of counsel on a defendant's ability to receive a fair trial: “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”¹⁵⁶

The burden of showing a constitutional violation based on denial of effective assistance of counsel, however, is on the accused.¹⁵⁷ But certain circumstances warrant a presumption of prejudice to a defendant's right to a fair trial.¹⁵⁸ “Most obvious,” the Court noted, “is the complete denial of counsel”: the presumption that counsel's assistance is essential means that a trial is constitutionally unfair if the accused is denied counsel, or counsel is prevented from assisting the accused, at a critical stage of his trial.¹⁵⁹ Another circumstance is where “counsel entirely fails to subject the prosecution's case to meaningful adversarial testing,” which renders the “adversary process itself presumptively unreliable.”¹⁶⁰ Similarly, citing the facts at issue in *Powell v. Alabama*, the Court in *Cronic* noted that, where defense counsel functions under circumstances such that “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”¹⁶¹ In short, “when surrounding circumstances justify a presumption of ineffectiveness,” a Sixth Amendment claim is made “without inquiry into counsel's actual performance at trial.”¹⁶²

In *Strickland v. Washington*, decided on the same day as *Cronic*, the Court reiterated that the Sixth Amendment right to counsel is required “to protect the fundamental right to a fair trial.”¹⁶³ A fair trial results from the adversarial system in action.¹⁶⁴ “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment,

155. *Id.* at 656–57 (footnotes omitted) (citations omitted).

156. *Id.* at 654, 658 (footnotes omitted) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

157. *Id.* at 658.

158. *Id.*

159. *Id.* at 659 (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–76 (1945)).

160. *Cronic*, 466 U.S. at 659.

161. *Id.* at 659–60.

162. *Id.* at 662.

163. 466 U.S. 668, 684–85 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]”).

164. *Id.* at 685.

since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."¹⁶⁵

"Because of the vital importance of counsel's assistance, . . . with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained."¹⁶⁶ But Justice O'Connor, writing for the majority, observed:

That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.¹⁶⁷

Thus, counsel, though appointed or retained to represent a defendant, can still "deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'"¹⁶⁸ The Court emphasized that the purpose of this rule is not to improve the quality of representation defendants as a whole receive.¹⁶⁹ Rather, "[t]he purpose is simply to ensure that criminal defendants receive a fair trial."¹⁷⁰

The Court turned to the question of what in fact constitutes "adequate legal assistance," finding that the "benchmark" for assessing a claim of constitutionally ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹⁷¹ The Court held this principle applies to both a trial and a capital sentencing, the latter being "sufficiently like a trial in its adversarial format and in the existence of standards for decision."¹⁷² The Court demurred on considering the role of counsel in noncapital sentencing.¹⁷³

To establish constitutionally ineffective assistance of counsel, the Court in *Strickland* devised a two-part test: First, the defendant must prove that defense counsel acted unreasonably, that is, contrary to "prevailing professional norms."¹⁷⁴ Second, the defendant must show prejudice: that there is a "reasonable probability" that the result of the

165. *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

166. *Id.* (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

167. *Id.*

168. *Id.* at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

169. *Id.* at 689.

170. *Id.*

171. *Id.* at 686.

172. *Id.* at 686-87 (citations omitted).

173. *Id.* at 686.

174. *Id.* at 687-88.

proceeding would have been different if defense counsel had performed competently.¹⁷⁵ For a capital sentencing, prejudice means that there is a reasonable probability that the defendant would not have received the death penalty but for his attorney's incompetence.¹⁷⁶ For a trial, prejudice requires a reasonable probability that the defendant would not have been convicted.¹⁷⁷ In *Glover v. United States*, a noncapital case, the Court elaborated further on the *Strickland* test, finding that *any* increase in the length of incarceration due to counsel's deficient performance can constitute prejudice sufficient to sustain a claim of ineffective assistance of counsel.¹⁷⁸ In any event, if attorney error amounts to constitutionally ineffective assistance of counsel under *Strickland*, the Sixth Amendment demands the error be imputed to the state.¹⁷⁹

B. RIGHT TO COUNSEL ON THE FIRST APPEAL OF RIGHT

On direct appeal, the Supreme Court has taken a somewhat different approach constitutionally to the right to counsel but nonetheless abided by the same principle of fairness underlying *Gideon* in extending the right to counsel to indigent defendants who seek to appeal their criminal convictions and/or sentences. The Supreme Court has observed repeatedly that there is no constitutional right to appeal a criminal conviction in the first instance.¹⁸⁰ Rather, the Sixth Amendment protects only the right to a trial.¹⁸¹ Neither at common law nor now is "[a] review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, . . . a necessary element of due process of law."¹⁸² Thus, "the right of appeal, as we presently know it in criminal cases, is purely a creature of statute."¹⁸³ "[T]he right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper."¹⁸⁴ But "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself."¹⁸⁵

175. *Id.* at 692, 694.

176. *Id.* at 695.

177. See *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

178. 531 U.S. 198, 203 (2001).

179. See *Coleman v. Thompson*, 501 U.S. 722, 754 (1991).

180. *Martinez v. Court of Appeal*, 528 U.S. 152, 160–61 (2000) (finding no constitutional right to represent oneself on appeal); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (Black, J., plurality opinion); *McKane v. Durston*, 153 U.S. 684, 688 (1894); cf. *McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988) ("If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel . . .").

181. See sources cited *supra* note 180.

182. *McKane*, 153 U.S. at 687.

183. *Martinez*, 528 U.S. at 160 (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)).

184. *McKane*, 153 U.S. at 687–88.

185. *Id.* at 688.

But in *Griffin*, decided in 1956, the Supreme Court also held that, where states *do* provide for a statutory right to appeal, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit erecting any financial barriers that might prevent the indigent from appealing.¹⁸⁶ The Illinois law challenged in *Griffin* required defendants who wished to appeal their convictions in noncapital cases to buy their trial transcripts at their own expense.¹⁸⁷ Petitioners argued that the trial court's failure to provide the needed transcripts violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁸⁸

In a plurality opinion, the Court observed that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal."¹⁸⁹ In the tradition of the Magna Carta, "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"¹⁹⁰

The Court observed that a law that conditioned the right to trial on the ability to pay court costs "would make the constitutional promise of a fair trial a worthless thing."¹⁹¹ The ability to pay court costs upfront "bears no rational relationship to a defendant's guilt or innocence and [can] not be used as an excuse to deprive a defendant of a fair trial."¹⁹²

The Court found "no meaningful distinction" between laws that discriminate against the poor at the trial level and those that do so on appeal.¹⁹³ True, the state has no constitutional obligation to provide an appeal in the first instance.¹⁹⁴ But once a state decides to provide a right of appeal, it cannot do so in a manner that discriminates against convicted defendants who are poor.¹⁹⁵ The Court described the state appellate system in Illinois as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant. . . . [A]t all

186. 351 U.S. 12, 18–19 (1956) (Black, J., plurality opinion).

187. *Id.* at 14. In postconviction proceedings, Illinois law permitted indigent appellants to obtain transcripts at no cost to the extent they were alleging *constitutional* errors on appeal. *Id.* at 15. But for nonconstitutional errors, appellants were on their own. *Id.* The petitioners in *Griffin* sought to raise nonconstitutional errors as a basis to set aside their convictions and thus, had to buy the trial transcripts. *Id.*

188. *Id.* at 14–15.

189. *Id.* at 16.

190. *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

191. *Id.*

192. *Id.* at 17–18.

193. *Id.* at 18.

194. *Id.*

195. *Id.*

stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.¹⁹⁶

The Court noted that every state provides for some manner of appeal of criminal convictions, which leads to reversal in a “substantial proportion” of cases:

Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.¹⁹⁷

Following *Griffin*, the Supreme Court struck down as violating the Fourteenth Amendment other financial obstacles to direct appeal, though it reaffirmed *McKane v. Durston*’s holding that states have no constitutional obligation to provide an appellate process to criminal defendants in the first place.¹⁹⁸ These obstacles included a state law enabling only public defenders to obtain free transcripts of a hearing on a *coram nobis* application,¹⁹⁹ which thus denied indigent appellants transcripts sought for appeal that counsel had not ordered;²⁰⁰ a requirement that an indigent appellant satisfy the trial judge that his appeal has merit before obtaining free transcripts;²⁰¹ and filing fees to process a state habeas petition²⁰² or to seek review from the state supreme court.²⁰³

In 1963,²⁰⁴ the Supreme Court took the reasoning of *Griffin* and its progeny to its next logical level, holding that where states provide for a right to appeal, the Due Process and Equal Protection Clauses impose a right to counsel.²⁰⁵ In *Douglas v. California*, the Court evaluated the

196. *Id.*

197. *Id.* at 18–19 (footnotes omitted).

198. See *Draper v. Washington*, 372 U.S. 487, 497–98 (1963); *Lane v. Brown*, 372 U.S. 477, 478 (1963); *Smith v. Bennett*, 365 U.S. 708, 713–14 (1961); *Burns v. Ohio*, 360 U.S. 252, 258 (1959).

199. A writ of *coram nobis*, as authorized by the All Writs Act, 28 U.S.C. § 1651 (2006), permits defendants to seek correction of purely factual errors in their case but does not enable review of substantive legal matters. See *United States v. Mayer*, 235 U.S. 55, 67–68 (1914).

200. *Lane*, 372 U.S. at 480–81.

201. *Draper*, 372 U.S. at 494.

202. *Smith*, 365 U.S. at 708.

203. *Burns*, 360 U.S. at 253.

204. The Court decided *Draper*, *Douglas*, and *Lane* on the same day. See *Draper*, 372 U.S. at 487; *Lane*, 372 U.S. at 477; *Douglas v. California*, 372 U.S. 353, 353 (1963).

205. *Douglas*, 372 U.S. at 357–58. There is some ambiguity in the majority opinion as to whether the decision turns on both equal protection and due process principles or merely the former. See *id.* at 353–58. But the dissenting opinions of Justice Clark, *id.* at 359 (Clark, J., dissenting), and Justice Harlan joined by Justice Stewart, *id.* at 360–61 (Harlan, J., dissenting), clarify that, like the *Griffin*

constitutionality of a California law that instructed appellate courts to make a threshold assessment of the merits of the case before deciding to appoint counsel to assist a defendant who sought to file his first appeal of right.²⁰⁶ The Court noted the impossibility of the task:

At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required.²⁰⁷

The Court made clear that the Fourteenth Amendment does not demand "absolute equality" between rich and poor in criminal appeals: "lines can be and are drawn and we often sustain them. But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."²⁰⁸ The Court concluded that when an indigent has "to run th[e] gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure," stating:

The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.²⁰⁹

In *Penson v. Ohio*, the Court further elaborated on the Fourteenth Amendment underpinnings of the right to counsel on a first appeal.²¹⁰ The Court noted the importance of the adversarial system, in which the appellate court hears vigorous advocacy on both sides, and from which truth and fairness emerge.²¹¹ Absent assistance of appellate counsel, however, a criminal defendant, with "small and sometimes no skill in the

opinion on which it depends, the Supreme Court's decision in *Douglas* invokes both equal protection and due process doctrine, "with obvious emphasis on 'equal protection.'" *Id.* at 361.

206. *Id.* at 354-56 (majority opinion).

207. *Id.* at 356.

208. *Id.* at 357 (emphasis omitted) (citations omitted).

209. *Id.* at 357-58.

210. 488 U.S. 75, 84-85 (1988).

211. *Id.* at 84.

science of law," cannot forcefully make his case.²¹² Writing for the majority, Justice Stevens observed:

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over.²¹³

The Court noted that, in an appeal, a defendant is trying to show that his conviction and consequent loss of liberty are unlawful.²¹⁴ To do so, he must engage in an adversary proceeding that—like a trial—"is governed by intricate rules that to a layperson would be hopelessly forbidding."²¹⁵ Thus, "[a]n unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake."²¹⁶

Most recently, in *Halbert v. Michigan*, the Court added the observation that the challenge of filing a direct appeal pro se is all the more exacerbated by the low rates of literacy, as well as the high rates of learning disabilities and mental impairments that plague inmates.²¹⁷ The Court noted that "[n]avigating the appellate process without a lawyer's assistance is . . . well beyond the competence of" inmates such as these.²¹⁸ Additionally, in *Evitts v. Lucey*, the Supreme Court recognized that the due process and equal protection right to counsel on direct appeal requires *effective* assistance of counsel.²¹⁹

In *Anders v. California*, the Court confronted an issue that inevitably stemmed from its recognition of a constitutional right to assistance of counsel on appeal: what is the constitutional duty of counsel appointed to represent an indigent appellant but unable to identify any arguable issues to appeal?²²⁰ In *Anders*, the state appellate court reviewed the trial record and affirmed a conviction after appointed counsel filed a conclusory statement indicating that, despite appellant's desire to appeal, counsel would not file a brief because the appeal had no merit.²²¹ The Supreme Court concluded that, although the court of appeal conducted an independent review of the record, appellant was denied "counsel acting in the role of an advocate" and did not receive "full consideration and

212. *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

213. *Id.* at 85.

214. *Id.* (citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)).

215. *Id.* (quoting *Evitts*, 469 U.S. at 396).

216. *Id.* (quoting *Evitts*, 469 U.S. at 396).

217. 545 U.S. 605, 620–21 (2005).

218. *Id.* at 621.

219. 469 U.S. at 396.

220. 386 U.S. 738, 739 (1967).

221. *Id.* at 742–43.

resolution of the matter as is obtained when counsel is acting in that capacity."²²² The Court observed:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in [sic] behalf of his client The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court.²²³

The Court concluded that, where counsel finds an appeal to be "wholly frivolous, after a conscientious examination of it," he should advise the court and move to withdraw.²²⁴ But in conjunction with such a request, counsel must also file "a brief referring to anything in the record that might arguably support the appeal."²²⁵ The Court emphasized, however, that counsel should not brief the case against the client, but rather identify all potential issues.²²⁶ The indigent appellant should receive a copy of counsel's motion and companion brief, as well as an opportunity to raise any issues pro se.²²⁷ The appellate court then must conduct a full and independent review of the record to assess whether the appeal is in fact without merit.²²⁸ If the court agrees that the appeal has no merit, it may grant the motion to withdraw and either dismiss the appeal, under federal law, or deny it on the merits, if required under state law.²²⁹ If, on the other hand, the court concludes that there are arguable issues, it must provide assistance of counsel to the indigent appellant to argue the appeal.²³⁰

C. RIGHT TO COUNSEL ON DISCRETIONARY APPEALS

The Supreme Court has drawn a line at recognizing a constitutional right to counsel in seeking discretionary review from a state's high court or a subsequent writ of certiorari from the United States Supreme Court. In *Ross v. Moffitt*, the Court concluded that the due process and equal protection interests at play in a criminal defendant's first appeal of right do not extend to discretionary review.²³¹

The Court noted that neither the Equal Protection nor Due Process Clause entirely justified the rationale of *Griffin* and *Douglas*:

222. *Id.* at 743.

223. *Id.* at 744 (footnote omitted).

224. *Id.*

225. *Id.*

226. *Id.* at 745.

227. *Id.* at 744.

228. *Id.*

229. *Id.*

230. *Id.*

231. 417 U.S. 600, 601-02 (1974).

"Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.²³²

But the Court concluded that the Due Process Clause does not require a state to provide counsel on a discretionary appeal to the state supreme court.²³³ Contrasting the role of counsel at trial, the Court observed: "The defendant needs an attorney on appeal not as a shield to protect him from being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."²³⁴

As such, the Due Process Clause does not "automatically" mandate appointment of counsel to the indigent on appeal.²³⁵ "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty."²³⁶ Thus, the issue is better framed under the Equal Protection Clause.²³⁷

Turning to the equal protection analysis, the Court noted as a threshold matter that "[t]he Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions."²³⁸ Rather, the Equal Protection Clause requires that the state appellate process "be free of unreasoned distinctions and that indigents have an adequate opportunity to present their claims fairly within the adversary system."²³⁹ The state cannot adopt procedures that function to cut off the appellate process from the indigent.²⁴⁰ Nor can a state "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'"²⁴¹

The Court has summarized its distinction between assistance of counsel in a first appeal of right and in a discretionary appeal. A first appeal of right entails adjudication on the merits of the case and is dedicated to error correction, as opposed to other concerns that extend beyond the individual defendant's case. In addition, the first appellate review differs from later appellate stages at which the claims have

232. *Id.* at 609.

233. *Id.* at 610.

234. *Id.* at 610-11 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

235. *Id.* at 611.

236. *Id.*

237. *Id.*

238. *Id.* at 612 (internal quotation marks omitted).

239. *Id.* (citations omitted) (internal quotation marks omitted).

240. *Id.* (internal quotation marks omitted).

241. *Id.* (quoting *Lane v. Brown*, 372 U.S. 477, 481 (1963); *Douglas v. California*, 372 U.S. 353, 358 (1963)).

already been presented by appellate counsel to an appellate court. A defendant who had counsel in his first appeal who then seeks discretionary review in a higher court would have the record in his case, briefs from the first appeal, and in many cases an opinion by the appellate court that affirmed his conviction and/or sentence. The Court in *Moffitt* noted that “[o]nce a defendant’s claims of error are organized and presented in a lawyerlike fashion” during the first appeal of right, equal protection does not require further assistance of counsel.²⁴² At that point, the indigent defendant is sufficiently better equipped to represent himself than an indigent defendant seeking to file his very first appeal. But the Court concluded that where, as in *Moffitt*, the defendant has the trial record, including transcripts, a brief prepared and filed by appointed counsel in the court of appeals, in many cases an opinion by the court of appeals denying the claims, and his own pro se submission, the state supreme court has “an adequate basis for its decision to grant or deny review.”²⁴³

The Court noted further that the Fourteenth Amendment does not require appointment of counsel for discretionary appellate review because considerations other than just the merits of the appeal are at issue in deciding whether the high courts will grant review.²⁴⁴ For state supreme courts, these concerns can include “whether the subject of the appeal has significant public interest, whether the cause involves legal principles of major significance to the jurisprudence of the State, or whether the decision below is in probable conflict with a decision of the Supreme Court.”²⁴⁵ Thus, the court can deny review despite believing that the court of appeals’ decision was incorrect.²⁴⁶ And once appointed counsel has organized and presented defendant’s claims of error “in a lawyerlike fashion” on the first direct appeal, the state supreme court ought to be able to determine whether the case warrants further appellate review.²⁴⁷

In declining to extend the right to counsel to discretionary appeals, the Court conceded that an indigent defendant is “somewhat handicapped in comparison with a wealthy defendant who has counsel.”²⁴⁸ But it concluded that “the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of the discretionary review . . . make this relative handicap far less than the

242. *Id.* at 615.

243. *Id.*

244. *Id.*

245. *Id.* (internal quotation marks omitted).

246. *Id.*

247. *Id.*

248. *Id.* at 616 (noting the advantages to having a “skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review” to act on one’s behalf).

handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*.²⁴⁹ In short, the fact that assistance of counsel may be useful does not make it constitutionally required.²⁵⁰ The Court remarked:

The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.²⁵¹

Similarly, in seeking certiorari from the United States Supreme Court, there are other concerns at stake in granting that review, namely, whether the case presents issues of great public interest or the opportunity to resolve a split among the federal circuits.²⁵² The Court noted further that the source of the right to seek certiorari is federal law, rather than state law.²⁵³ Thus, the argument in *Griffin* and *Douglas* that, once a state creates a right of appeal, it must provide all defendants "an equal opportunity to enjoy that right," is inapplicable.²⁵⁴

In dissent, Justice Douglas, joined by Justices Brennan and Marshall, disputed the majority's characterization of the limited utility of counsel in seeking discretionary review:

"An indigent defendant is as much in need of the assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.

"Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant."²⁵⁵

Thus, the dissent argued, the same concepts of fairness and equality that underlie *Douglas* mandate a right to counsel in seeking discretionary review.²⁵⁶

In 2005, the Supreme Court clarified its holdings in both *Douglas* and *Moffitt* with respect to the nature of the constitutional underpinnings

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 616-17.

253. *Id.* at 617.

254. *Id.* at 617-18 ("[I]t would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so.").

255. *Id.* at 620-21 (Douglas, J., dissenting) (alteration in original) (citation omitted) (quoting *Moffitt v. Ross*, 483 F.2d 650, 653 (4th Cir. 1973)).

256. *Id.* at 621.

of the right to counsel on appeal. In *Halbert v. Michigan*, the Court noted:

[B]arriers encountered by persons unable to pay their own way, we have observed, cannot be resolved by resort to easy slogans or pigeonhole analysis. Our decisions in [sic] point reflect both equal protection and due process concerns. The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs, while [t]he due process concern homes in on the essential fairness of the state-ordered proceedings.²⁵⁷

In *Halbert*, the Court noted two key issues it considered in *Douglas*, where the Court decided that a state must provide appointed counsel to indigents who wish to pursue a first appeal as of right.²⁵⁸ First, an initial appeal of right involves a review of the merits of the issues raised.²⁵⁹ Second, unlike in the subsequent appellate stages, no appellate counsel or appellate court has had a chance to evaluate and/or present the issues as an advocate in brief form.²⁶⁰ Thus, there is nothing for an indigent appellant to parrot in terms of preparing a subsequent appeal.

Relying on *Moffitt*, the Supreme Court has rejected any claim of ineffective assistance of counsel in a discretionary appeal on the ground that there can be no constitutionally ineffective counsel absent a right to counsel in the first instance.²⁶¹

II. THE RIGHT TO ASSISTANCE OF COUNSEL IN HABEAS CORPUS PROCEEDINGS

A. A BRIEF OVERVIEW OF THE WRIT OF HABEAS CORPUS

1. *The Legal Underpinnings of the Writ of Habeas Corpus*

Once an appellant's conviction becomes final on direct appeal, that is, once the court of appeals has affirmed the trial court's judgment and the state supreme court and the United States Supreme Court have either denied review or affirmed, he may seek to set aside his conviction or sentence through a writ of habeas corpus. Habeas corpus, a Latin phrase that translates to "that you have the body," is a writ that compels a person to be brought before a court, most commonly, to ensure that his imprisonment or detention is legal.²⁶² The writ of habeas corpus is a civil

257. 545 U.S. 605, 610–11 (2005) (second alteration in original) (citations omitted) (internal quotation marks omitted).

258. *Id.* at 611.

259. *Id.*

260. *Id.*

261. *Wainright v. Torna*, 455 U.S. 586, 587–88 (1982) (denying a claim of ineffective assistance of counsel raised in habeas corpus based on retained counsel's untimely filing of state application for certiorari).

262. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

remedy, though in form only, rather than effect, as the result sought is the same achieved by a successful defense at trial or challenge on direct appeal: release from custody or mitigation of the sentence or conditions of confinement. In *Fay v. Noia*, Justice Brennan remarked on the purpose of the civil status of habeas:

[T]he traditional characterization of the writ of habeas corpus as [a] . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the . . . criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before.²⁶³

The Great Writ, as it is known, derives from English common law and is guaranteed by the Suspension Clause of the U.S. Constitution.²⁶⁴ In *Ex parte Yerger*, the Court summarized the historical origins of the writ:

The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.

In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, "for the better securing of the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta."

It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.

Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution.²⁶⁵

In 1963, Justice Brennan remarked on "the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence" as "the most celebrated writ in the English law":²⁶⁶

It is a writ antecedent to statute, and throwing its root deep into the genius of our common law. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity . . .²⁶⁷

263. 372 U.S. 391, 423-24 (1963) (footnote omitted).

264. U.S. CONST. art. I, § 9, cl. 2.

265. 75 U.S. 85, 95 (1868) (emphasis omitted) (footnotes omitted).

266. *Fay*, 372 U.S. at 399-400 (emphasis omitted) (footnote omitted) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *129).

267. *Id.* at 400 (internal quotation marks omitted); see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment."). The purpose of the writ of habeas corpus has expanded to enable challenges to a criminal conviction and sentence based on violation of constitutional, federal, and treaty law. See *Hensley v. Mun. Court*, 411 U.S. 345, 349 (1973) ("While the rhetoric celebrating habeas corpus has changed little over the centuries, it is nevertheless true that the functions of the writ have undergone dramatic change." (internal quotation marks

In *Fay v. Noia*, the Supreme Court described the Great Writ as the “ultimate remedy” “in the struggle for personal liberty.”²⁶⁸ More recently, in *Boumediene v. Bush* the Supreme Court noted that “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”²⁶⁹

The Suspension Clause of the U.S. Constitution safeguards the writ by providing that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”²⁷⁰ At a minimum, the Suspension Clause protects the writ “as it existed in 1789.”²⁷¹ Although broader today, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”²⁷² Where the writ is invoked following conviction in a criminal court, rather than challenges in the first instance to an executive detention, there is arguably more distance between the writ and its historical core.²⁷³

But Chief Justice Chase, in *Ex parte Yerger*, noted “the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States.”²⁷⁴ In a similar vein, a century later, Justice Black remarked in *Jones v. Cunningham*: habeas corpus “is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”²⁷⁵

omitted)); accord WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 7 (1980).

268. 372 U.S. at 441; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (“That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension.”).

269. 128 S. Ct. at 2244.

270. U.S. CONST. art. I, § 9, cl. 2. Congress may, however, withdraw habeas jurisdiction if it provides an “adequate and effective” alternative remedy. *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001) (upholding provision shifting habeas challenges to local D.C. courts, despite lack of tenure and salary protections); *Swain v. Pressley*, 430 U.S. 372, 381 (1977). See generally *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255, which requires filing of habeas petitions in federal sentencing district, rather than district of detention).

271. *St. Cyr*, 533 U.S. at 301 (internal quotation marks omitted).

272. *Id.* at 301.

273. See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 74–75 (2006).

274. 75 U.S. 85, 102 (1868) (emphasis omitted).

275. 371 U.S. 236, 243 (1963); see DUKER, *supra* note 267, at 9 (noting that gradually habeas corpus expanded to permit review of constitutional and nonconstitutional federal issues, is no longer confined to the remedy of release from custody as that term was defined in 1789, and includes other forms of custody).

Initially, English common law defined the substantive scope of the habeas remedy.²⁷⁶ The writ enabled federal prisoners “to challenge confinement imposed by a court that lacked jurisdiction or detention by the Executive without proper legal process.”²⁷⁷ Though subject to other various statutory and judicial changes,²⁷⁸ the major statutory expansion of the federal habeas corpus occurred in 1867, when Congress extended the writ to state prisoners.²⁷⁹ But judicial opinion has wrought the most significant expansion in the substantive scope of the habeas remedy.²⁸⁰ Initially, the Court interpreted “jurisdictional defect with generosity to include sentences imposed without statutory authorization and convictions obtained under an unconstitutional statute.”²⁸¹ Over time, the Court “discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review.”²⁸² The Court extended habeas review to all claims alleging a violation of the accused’s constitutional rights “where the writ is the only effective means of preserving his rights.”²⁸³ Today, the writ extends to all constitutional violations except those involving the Fourth Amendment, where the petitioner was denied a full and fair opportunity to litigate that claim.²⁸⁴ Moreover, federal habeas provides a remedy for violations of federal and treaty law.²⁸⁵

2. Statutory Authority for the Writ of Habeas Corpus

Both state and federal law provide statutory vehicles for inmates to pursue the writ of habeas corpus. The Supreme Court has interpreted the Suspension Clause to guarantee a constitutional right to federal habeas corpus.²⁸⁶ Moreover, in order to animate its constitutional guarantee, the Court has assumed that the Suspension Clause requires enactment of federal habeas statutes.²⁸⁷ Thus, the federal habeas statutes are, at least at

276. *McCleskey v. Zant*, 499 U.S. 467, 478 (1991) (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–03 (1830)).

277. *Id.* (citations omitted).

278. *See id.* (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463–99 (1963)).

279. *See* Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–87.

280. *See McCleskey*, 499 U.S. at 478.

281. *See id.* (citing *Wainright v. Sykes*, 433 U.S. 72, 79 (1977); *Ex parte Siebold*, 100 U.S. 371, 376–77 (1880); *Ex parte Lange*, 85 U.S. 163, 176 (1874)).

282. *McCleskey*, 499 U.S. at 478.

283. *Id.* (internal quotation marks omitted).

284. *Id.* at 479 (citing *Stone v. Powell*, 428 U.S. 465, 495 (1976) (holding Fourth Amendment claims not cognizable in federal habeas proceedings)).

285. *See* 28 U.S.C. §§ 2254, 2255 (2006).

286. *See* *Fay v. Noia*, 372 U.S. 391, 405 (1963); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807); *cf.* *DUKER*, *supra* note 267, at 126–80 (arguing the framers intended the Suspension Clause only to guarantee state habeas for federal prisoners).

287. *See* *Fay*, 372 U.S. at 406. But there is some debate as to the extent to which these federal statutes are coextensive with the constitutional guarantee of habeas corpus enshrined in the Suspension Clause. *See Bollman*, 8 U.S. (4 Cranch) at 95 (noting that if the legislative means by which

their core,²⁸⁸ constitutionally protected. But the Suspension Clause does not guarantee a right to state habeas corpus, which thus exists only as a creature of statute or state constitutional law.²⁸⁹

State inmates who wish to seek federal habeas relief based on the alleged illegality of their conviction or sentence must file under 28 U.S.C. § 2254. They may raise only claims alleging a violation of constitutional, federal, or treaty law; errors of state law alone are not cognizable.²⁹⁰ To obtain relief, a petitioner must show not merely error on the part of the state court, but that the state court's decision "'was contrary to . . . ' or . . . 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"²⁹¹ "Clearly established," in turn, means the United States Supreme Court has definitively resolved the legal principle at issue in the case.²⁹²

To raise a claim under § 2254, a petitioner must first exhaust the claim by presenting it to the highest state court, unless state law lacks an avenue for doing so.²⁹³ To exhaust, the petitioner must present the

the "great constitutional privilege" of habeas corpus "receive[s] life and activity[] . . . be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted").

288. See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

289. See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); cf. *DUKER*, *supra* note 267, at 126–80 (arguing that state habeas is constitutionally guaranteed).

290. 28 U.S.C. § 2254 (2006).

291. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (quoting 28 U.S.C. § 2254(d)(1) (2000)).

292. *Id.* at 390.

293. See 28 U.S.C. § 2254(b)(1) (2006); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *Young v. Ragen*, 337 U.S. 235, 238–39 (1949). Although codified in § 2254, the exhaustion doctrine derives from principles of comity in the common law. See *Fay v. Noia*, 372 U.S. 391, 418–20 (1963). In *Fay*, the Supreme Court advised that:

[O]rdinarily the federal court should stay its hand on habeas pending completion of the state court proceedings. . . .

"... [C]omity demands that the state courts, under whose process he is held, and which are, equally with the Federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired."

Id. at 418–19 (quoting *Cook v. Hart*, 146 U.S. 183, 194–95 (1892)). Under both the common law and § 2254, the rationale for the exhaustion doctrine is identical:

"[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . . . [C]omity . . . teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." The rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power."

Id. at 419–20 (citation omitted) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950); *Bowen v. Johnston*, 306 U.S. 19, 27 (1939)).

substance of his federal claim to the state courts.²⁹⁴ Mere similarity between claims is not sufficient to exhaust.²⁹⁵ Thus, for example, a habeas petitioner cannot raise a claim alleging error under state law in state court, but then seek to frame the issue in federal court as a violation of due process under the Fourteenth Amendment. Similarly, a petitioner does not exhaust state remedies by appealing generally to a broad constitutional provision.²⁹⁶ Rather, he must reference the specific constitutional provision at issue and the facts that entitle him to relief.²⁹⁷ In so doing, a petitioner may provide additional facts to support a claim under § 2254 as long as those facts do not fundamentally alter the legal claim presented to the state courts.²⁹⁸

Absent a showing of cause and prejudice or a fundamental miscarriage of justice,²⁹⁹ a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule.³⁰⁰ To show cause, a petitioner must show that "some objective factor external to the defense" prevented compliance with the state procedural rule.³⁰¹ Ineffective assistance of counsel under *Strickland v. Washington* provides cause for procedural default.³⁰² But to use ineffective assistance of counsel as cause for default, a petitioner must first exhaust the ineffective assistance claims as an independent constitutional claim in state court.³⁰³

Section 2254 bars a petitioner from filing a second or successive petition unless the court of appeals first authorizes the district court to consider a second petition.³⁰⁴ To obtain certification to file a second petition, an inmate must show either "(1) newly discovered evidence that . . . establish[es] by clear and convincing evidence" that the defendant was not guilty, or (2) a new, retroactive "rule of constitutional

294. See *Picard v. Connor*, 404 U.S. 270, 278 (1971); *Bland v. Cal. Dep't of Corrs.*, 20 F.3d 1469, 1473 (9th Cir. 1994) (citations omitted).

295. See *Duncan*, 513 U.S. at 366.

296. See *Gray v. Netherland*, 518 U.S. 152, 163 (1996) (citing *Anderson v. Harless*, 459 U.S. 4, 7 (1982) (per curiam)).

297. *Id.* at 162-63.

298. See *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

299. The "miscarriage of justice" doctrine permits a court to grant the writ without a showing of cause if a constitutional violation has likely caused the conviction of one who is actually innocent. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

300. *Harris v. Reed*, 489 U.S. 255, 261 (1989); *Bland v. Cal. Dep't of Corrs.*, 20 F.3d 1469, 1473 (9th Cir. 1994). A state rule is adequate if it is "firmly established," see *James v. Kentucky*, 466 U.S. 341, 348 (1984), and regularly and consistently applied by the state court, see *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). The rule is independent if it does not "depend . . . on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

301. *Murray*, 477 U.S. at 488.

302. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Murray*, 477 U.S. at 488.

303. *Murray*, 477 U.S. at 489.

304. 28 U.S.C. § 2244(b)(3) (2006).

law” by the Supreme Court that invalidates the criminal conviction.³⁰⁵ The standard to assess whether a petitioner has abused the writ by filing multiple petitions is the same as that used to determine cause to excuse a procedural default.³⁰⁶ That is, the petitioner must show cause for failing to raise the claim in the earlier petition and actual prejudice resulting from the alleged error in the successive petition.³⁰⁷ The practical effect of the ban on successive petitions is to require a petitioner to raise all possible claims in the first § 2254 petition or risk being barred from federal review of any additional claims.

Since enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996³⁰⁸ (“AEDPA”), a petitioner must also file his federal petition within one year of his conviction becoming final.³⁰⁹ The statute of limitations is tolled while the petitioner is seeking state habeas relief,³¹⁰ and is also subject to equitable tolling where, despite diligently pursuing his rights, “some extraordinary circumstance” prevents him from timely filing his federal petition.³¹¹

Federal inmates who seek a writ of habeas corpus challenging the legality of their conviction or sentence must file under 28 U.S.C. § 2255. Here, too, the petitioner must allege violations of constitutional or federal law, and is subject to the one-year statute of limitations.³¹² Petitioners are barred from raising claims based on the trial record that were not litigated at trial and on direct appeal, absent a showing of cause and prejudice.³¹³ Again, the AEDPA bars “second or successive” habeas petitions in district court unless the court of appeals authorizes the lower court to consider the second petition.³¹⁴ To obtain authorization to file a second or successive § 2255 motion, a petitioner must demonstrate:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

305. *Id.* § 2255.

306. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

307. *Id.* at 494.

308. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

309. 28 U.S.C. § 2244(d)(1) (2006).

310. *Id.* § 2244(d)(2).

311. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The operation of the statute of limitations for state inmates is exceedingly complicated; the federal courts are still trying to figure out how properly to calculate it. *See, e.g., Evans v. Chavis*, 546 U.S. 189, 202–03 (2006); *Pace*, 544 U.S. at 418; *Carey v. Saffold*, 536 U.S. 214, 220 (2002). This Article presents only a summary discussion of this complexity. The topic will receive a more in-depth treatment in a second article that I am currently writing.

312. *See* 28 U.S.C. §§ 2244(d)(1), 2255.

313. *Bousley v. United States*, 523 U.S. 614, 621–22 (1998); *United States v. Frady*, 456 U.S. 152, 167–68 (1982).

314. 28 U.S.C. § 2244(b)(3). A petition filed pursuant to § 2255 is referred to as a motion “to vacate, set aside or correct the sentence.” *See id.* § 2255(a)–(b).

convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.³¹⁵

There are a number of claims that are appropriate for state and federal habeas review that cannot be raised on direct appeal. These are claims that require evaluating facts that lie outside of the trial record and, thus, are generally beyond the scope of direct appellate review. Claims alleging ineffective assistance of trial or appellate counsel under *Strickland v. Washington* comprise an estimated 25% of these new claims.³¹⁶ Habeas corpus is also often the first forum for judicial review of claims alleging due process violations based on prosecutorial or police misconduct, such as withholding exculpatory evidence from the defense at trial, in violation of *Brady v. Maryland*,³¹⁷ or withholding impeachment evidence, in violation of *Giglio v. United States*,³¹⁸ in that these claims, by definition, typically surface after a defendant's trial and conviction.³¹⁹ In most cases, a defendant will be able to raise each of these claims only in habeas proceedings because the predicate facts are not part of the trial record, which defines the scope of direct appellate review.³²⁰ Yet another type of claim that may be brought only in habeas is where, after a defendant's conviction becomes final, the Supreme Court issues a new substantive rule of criminal law or a new "watershed" rule of criminal procedure, in the magnitude of *Gideon v. Wainwright*,³²¹ that implicates the "fundamental fairness and accuracy of the criminal proceeding."³²² The court that reviews a habeas petition that raises this category of claims is the first court to evaluate whether error occurred at trial of such magnitude that the defendant's conviction should be reversed. For these

315. *Id.* § 2255(h).

316. See Brian Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 1020 (2000) (citing ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 12, 14 (1995)) (statistic based on state inmate § 2254 petitions only).

317. 373 U.S. 83, 90-91 (1963).

318. 405 U.S. 150, 154-55 (1972).

319. See *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970) (stating that "[m]anifestly," an unsworn statement of a witness "cannot be properly considered by us in the disposition of the case"); *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by *ex parte* affidavits."); *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record.").

320. See *Adickes*, 398 U.S. at 157-58 n.16; *Hopt*, 114 U.S. at 491-92; *Russell*, 53 U.S. at 158-59.

321. 372 U.S. 335, 342-43 (1963).

322. See *Schirra v. Summerlin*, 542 U.S. 348, 355-58 (2004) (clarifying law regarding retroactivity of new law to support claims raised in the first instance in habeas corpus).

claims, habeas corpus functions, in effect, as both a trial court, with respect to development of new facts, and a first appeal of right.

3. *Right to Counsel*

There is a diversity of approach in state and federal courts to the issue of providing statutory assistance of counsel to indigent habeas petitioners. But most courts to address the issue have concluded that there is no constitutional right to counsel in habeas proceedings.

a. *Statutory Right to Counsel*

i. *State Postconviction Proceedings*

Many states provide the indigent with at least some measure of a statutory right to counsel during postconviction proceedings.³²³ This right ranges from an absolute right guaranteed to all indigent petitioners seeking postconviction relief, a right only reserved for indigent petitioners in capital cases, a discretionary judicial right to appoint counsel for indigent petitioners, or some combination thereof.³²⁴ Moreover, several states that provide for a right to counsel in postconviction proceedings require that the petition not be frivolous in order for the right to attach.³²⁵

Only seventeen states have statutes that provide for a right to counsel at some stage of the postconviction process in *non-capital* cases.³²⁶ In addition, Minnesota guarantees a right to counsel during

323. See Thomas, *supra* note 9, at 1152-58 (providing an exhaustive fifty-state survey and summary of the myriad range of statutory, constitutional, and court rules-based provisions for right to counsel during postconviction proceedings).

324. *Id.* at 1154-58; see, e.g., ALA. CODE § 15-12-23(a) (1995) (court has discretion to appoint counsel in postconviction proceedings); ALASKA STAT. § 18.85.100(c) (2006) (right to counsel in first postconviction proceeding; court has discretion to appoint counsel in subsequent petitions); ARIZ. REV. STAT. ANN. §§ 13-4041(B), -4234(D) (1998) (right to counsel in capital cases only); CONN. GEN. STAT. § 51-296(a) (1998) (right to counsel in any postconviction proceeding); FLA. STAT. § 27.702 (2008) (right to counsel in capital postconviction proceedings; no right to counsel in noncapital proceedings); 725 ILL. COMP. STAT. 5/122-2.1(a) (2006) (right to counsel in any postconviction proceeding unless summarily dismissed as frivolous); IND. CODE § 33-40-1-2 (2009) (right to counsel in postconviction proceedings); KAN. STAT. ANN. § 22-4506 (1995) (right to counsel in capital postconviction proceedings and noncapital proceedings involving imprisonment and substantial questions of law or triable issues of fact); LA. REV. STAT. ANN. § 15:149.1 (1999); LA. CODE CRIM. PROC. ANN. art. 930.7 (1997) (right to counsel in capital postconviction proceedings; court has discretion to appoint counsel in noncapital cases); R.I. GEN. LAWS § 10-9.1-5 (2006) (right to counsel in postconviction proceedings but counsel may move to withdraw if frivolous).

325. See, e.g., 725 ILL. COMP. STAT. 5/122-2.1(a) (right to counsel in any postconviction proceeding unless summarily dismissed as frivolous); KAN. STAT. ANN. § 22-4506 (right to counsel in noncapital proceedings involving imprisonment and substantial questions of law or triable issues of fact); R.I. GEN. LAWS § 10-9.1-5 (right to counsel in postconviction proceedings but counsel may move to withdraw if frivolous); see also Thomas, *supra* note 9, at 1157-58.

326. See ALASKA STAT. § 18.85.100(c); CONN. GEN. STAT. § 51-296(a); KY. REV. STAT. ANN. § 31.110(2)(c) (West 1991); KY. R. CRIM. PROC. 11.42(5) (1999); ME. R. CRIM. PROC. 70 (West 2007); MD. CODE ANN., CRIM. PROC. § 7-108 (LexisNexis 2001); MONT. CODE ANN. § 46-21-201 (2003); N.M. DIST. CT. R. CRIM. PROC. 5-802 (2008); NEV. REV. STAT. ANN. § 34.750(1) (West 1996); N.C. GEN. STAT. § 7A-

postconviction proceedings if the petitioner did not obtain direct appellate review of his conviction.³²⁷

ii. Federal Postconviction Proceedings

In capital cases, a federal statutory right to counsel attaches to any indigent defendant seeking to challenge a death sentence in a postconviction proceeding under 28 U.S.C. § 2254 or § 2255.³²⁸ For noncapital cases in which an indigent defendant seeks to challenge his conviction or sentence under 28 U.S.C. § 2254 or § 2255, the district court and court of appeals have discretion to appoint counsel where “the interests of justice so require.”³²⁹ Appointment of counsel is mandatory, however, whenever resolution of a habeas corpus petition requires an evidentiary hearing.³³⁰ Section 2254 specifically bars litigation of ineffective assistance of counsel claims based on counsel’s performance during federal or state postconviction proceedings.³³¹

b. Constitutional Right to Counsel

The Supreme Court has held that the Fourteenth Amendment’s Due Process and Equal Protection Clauses prohibit erecting financial barriers to filing a habeas petition that might prevent the indigent from seeking habeas relief. In *Lane v. Brown*, the Supreme Court invalidated a state law that required indigent, pro se habeas petitioners to purchase transcripts for an appeal of denial of a writ of *coram nobis*.³³² The Court concluded that the law denied the indigent equal protection of the law in that it, in effect, limited petitioner’s right to appeal “solely because of his poverty.”³³³ Similarly, in *Smith v. Bennett*³³⁴ and *Burns v. Ohio*,³³⁵ the Court struck down a state law that imposed filing fees on habeas petitions. And in *Johnson v. Avery*, the Supreme Court struck down California prison regulations that prohibited inmates from helping each other with habeas corpus filings.³³⁶ But thus far, the Supreme Court has not recognized a constitutional right to counsel to habeas proceedings,

451(a)(2) (1995); PA. R. CRIM. PROC. 904 (2008); R.I. GEN. LAWS § 10-9.1-5; S.C. CODE ANN. § 17-27-160(B) (1998); S.D. CODIFIED LAWS § 21-27-4 (1987); TENN. CODE ANN. § 8-14-205 (1997); VT. STAT. ANN. tit 13, §§ 5231-5232 (1995); W. VA. CODE § 53-4A-4 (2007); WIS. STAT. ANN. §§ 974.06(b), 977.05(4) (West 2008).

327. See MINN. STAT. § 611.14 (2007).

328. See 21 U.S.C. § 848 (2006).

329. See 18 U.S.C. § 3006A(a) (2006).

330. See Rules Governing Section 2254 Cases in United States District Court, R. 8(c), 28 U.S.C. app. § 2254 (2006) (“If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.”); accord Rules Governing Section 2255 Cases in United States District Court, R. 8(c), 28 U.S.C. app. § 2255.

331. See 28 U.S.C. § 2254(i).

332. 372 U.S. 477, 485 (1963).

333. *Id.* at 478.

334. 365 U.S. 708, 713-14 (1961).

335. 360 U.S. 252, 257-58 (1959).

336. 393 U.S. 483, 490 (1969).

either state or federal. Based on what the Court has said on the subject, courts and academics alike generally assume that no such right exists.³³⁷

In *Pennsylvania v. Finley*, decided in 1987, the Court rejected a claim that the Fourteenth Amendment's Due Process and Equal Protection Clauses require appointment of counsel for the indigent in state habeas proceedings.³³⁸ In *Finley*, the petitioner filed a pro se habeas petition in state trial court, raising the same issues her appointed counsel had raised on direct appeal to the Pennsylvania Supreme Court.³³⁹ The trial court denied relief, but the Pennsylvania Supreme Court reversed and ordered that she have counsel appointed to assist her in her postconviction proceedings.³⁴⁰ Petitioner's attorney, after reviewing the record, advised the trial court that there were no arguable bases for relief and asked to be relieved as counsel.³⁴¹ The trial court agreed with counsel's assessment of the case and granted his motion to withdraw.³⁴²

With new appointed counsel, the petitioner appealed the trial court's judgment.³⁴³ The state appeals court concluded that counsel had been ineffective in moving to withdraw without briefing potential issues as required by *Anders v. California*,³⁴⁴ and remanded for further proceedings.³⁴⁵ The Supreme Court reversed, finding *Anders* inapplicable because it is based on a constitutional right to counsel, which does not exist in postconviction proceedings.³⁴⁶

Two years after *Finley*, the Supreme Court issued a plurality decision in *Murray v. Giarratano*, affirming *Finley* and holding, in relevant part, that there is no due process right to counsel in state habeas cases involving capital defendants.³⁴⁷ *Murray* involved a civil rights suit filed by Virginia death row inmates, who argued that appointment of counsel was required in order "to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief," as guaranteed by *Bounds v. Smith*.³⁴⁸ Justice Rehnquist, joined by Justices

337. See *supra* notes 10-11 and accompanying text.

338. 481 U.S. 551, 559 (1987).

339. *Id.* at 553.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. 386 U.S. 738, 742-45 (1967). Again, the Supreme Court held the Sixth Amendment right to assistance of counsel encompasses the right to *effective* assistance of counsel, and thus, requires provision of a remedy where counsel is ineffective. See discussion *supra* Part II.

345. *Finley*, 481 U.S. at 554.

346. *Id.* at 559.

347. 492 U.S. 1, 12-13 (1989).

348. *Id.* at 3-4; *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

White, O'Connor, and Scalia, concluded that the Court's holding in *Finley* applies to death row inmates and "necessarily imposes limits on *Bounds*."³⁴⁹ The Court rejected the argument that severity of punishment somehow implicates a constitutional right to assistance of counsel.

Justice O'Connor, in a concurring opinion, also observed that "[a] postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment" and is not constitutionally required.³⁵⁰ Justice Kennedy, joined by Justice O'Connor, wrote separately, concurring in the judgment.³⁵¹ In so writing, Justice Kennedy noted as a threshold matter that:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As Justice Stevens observes [in dissent], a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.³⁵²

But Justice Kennedy also observed that states have wide discretion in ensuring that inmates have meaningful access to the courts, as required by *Bounds*.³⁵³ And, despite the lack of formal provision for appointment of counsel in capital cases, "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings."³⁵⁴ Moreover, Virginia's prisons employ institutional lawyers to assist inmates in preparing postconviction petitions. Thus, *on these facts*, Justice Kennedy concluded that he was "not prepared to say that this scheme violates the Constitution."³⁵⁵

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented.³⁵⁶ The dissent noted that, in contrast to the collateral review process at issue in *Finley* in which counsel had raised the claims at issue on direct appellate review, Virginia law relegates certain types of claims to habeas, rather than direct appellate, review: claims alleging ineffective assistance of trial or appellate counsel, prosecutorial misconduct allegations that surface after direct review, and

349. *Giarratano*, 492 U.S. at 12. The Supreme Court rejected the court of appeals' conclusion that *Finley* did not control *Giarratano* because the two cases involved different constitutional issues. Rather, *Finley* controlled *Giarratano* because an inmate's right of access to the courts stems from the right to due process of law. Thus, the theory at issue in *Bounds* was considered in *Finley*. *Id.* at 11.

350. *Id.* at 13.

351. *Id.* at 14.

352. *Id.* (Kennedy, J., concurring) (citation omitted).

353. *Id.*

354. *Id.*

355. *Id.* at 15.

356. *Id.* (Stevens, J., dissenting).

actual innocence claims that stem from newly discovered evidence.³⁵⁷ Thus, habeas proceedings provide the first forum for identifying and framing certain issues for court review.³⁵⁸

The dissent further noted the crucial role state habeas proceedings play in federal habeas review in light of the exhaustion requirement and procedural default rules, which require federal habeas petitioners who challenge a state judgment to present each claim to the highest available state court before seeking federal review:

State postconviction proceedings also are the cornerstone for all subsequent attempts to obtain collateral relief. Once a Virginia court determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of two difficult showings: that there was both cause for the default and resultant prejudice, or that failure to review will cause a fundamental miscarriage of justice.³⁵⁹

The dissent noted the “stringency with which [the Supreme] Court adheres to procedural default rules” and thus, the importance that “all [of a prisoner’s] substantial claims be presented fully and professionally in his first state collateral proceeding.”³⁶⁰ The dissent also observed that, to the extent claims raised in habeas require an evidentiary hearing to develop the factual record, any resulting findings may define the scope of federal review of a later federal habeas corpus petition filed under 28 U.S.C. § 2254.³⁶¹

In *Coleman v. Thompson*, decided in 1991, the Court acknowledged that, despite the broad language in its holding in *Finley* and *Giarattano*, whether the right to counsel applies to claims for which habeas corpus provides the first forum for judicial review remains an open question.³⁶² *Coleman* involved the issue of procedural default.³⁶³ The petitioner argued that state habeas counsel’s failure to file a timely notice of appeal in the Virginia Supreme Court caused his procedural default on federal habeas claims.³⁶⁴ Absent a showing of cause and prejudice, this default precluded federal habeas review.³⁶⁵ Petitioner argued his attorney’s error should constitute cause.³⁶⁶

357. *Id.* at 24–25. The dissent underscored the particularly crucial role of postconviction proceedings in capital cases, wherein many errors, uncorrected on direct appeal, are resolved in favor of the accused. *Id.* at 23–24 (noting the success rate in federal habeas proceedings in capital cases ranged from 60% to 70%).

358. *Id.* at 23–25.

359. *Id.* at 26 (citing *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)).

360. *Id.* at 26–27.

361. *Id.* at 26.

362. 501 U.S. 722, 755 (1991).

363. *Id.* at 728–29.

364. *Id.* at 752.

365. *Id.* at 750.

366. *Id.* at 755.

The Court held that when a procedural default results from attorney error in a proceeding in which the petitioner lacks a constitutional right to counsel, the attorney error does not constitute cause to excuse the default.³⁶⁷ The Court then rejected the petitioner's argument on the ground that he did not have a right to counsel in his state postconviction proceedings in which the alleged attorney error occurred.³⁶⁸ Thus, the petitioner could not invoke his attorney's ineffectiveness as cause for default in habeas.³⁶⁹

But significantly, the Court in *Coleman* left open the question as to whether an exception to *Finley* and *Giarratano* should apply to claims that can only be raised in habeas proceedings.³⁷⁰ In such cases, the petitioner has never had the assistance of counsel in identifying, researching, and framing the relevant issues. Nor does the petitioner have the benefit of an appellate court's review and analysis of the claim from which to work in future proceedings. Similarly, the Supreme Court also has not yet addressed whether a constitutional right to counsel attaches in 28 U.S.C. § 2255 proceedings, in particular, to claims for which § 2255 provides the first opportunity for judicial review.³⁷¹

Despite the limits of the Court's holdings in *Finley*, *Murray*, and *Coleman*, most lower courts and scholars assume based on this case law that there is no constitutional right to counsel in *any* habeas corpus proceeding, state or federal, that involves claims for which the proceeding provides the first opportunity for judicial review.³⁷² Indeed, every federal court of appeals to confront the issue reserved in *Coleman* has concluded that neither the Sixth Amendment, as applied to the states through the Fourteenth Amendment, nor the Fourteenth Amendment's Equal Protection or Due Process Clause apply to claims for which habeas corpus proceedings provide the first forum for judicial review. In many cases, the appellate courts have upheld a federal district court's finding of procedural default based on a lack of right to counsel in

367. *Id.* at 756–57.

368. *Id.* at 757.

369. *Id.*

370. *Id.* at 755. The Court avoided resolving the question by concluding that the petitioner had received effective assistance in obtaining his initial habeas review from the trial court, which was “appellate” in nature. Thus, in *Coleman*, the petitioner had effective assistance of counsel in his first appeal of right, which occurred in habeas corpus proceedings. *Id.* at 755–57.

371. In *McCleskey v. Zant*, Justice Kennedy, writing for a six to three majority, observed in dicta that application of the cause-and-prejudice exception to the procedural default doctrine does not “imply that there is a constitutional right to counsel in federal habeas corpus.” 499 U.S. 467, 495 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1990), as having held “the right to appointed counsel extends to the first appeal of right, and no further”).

372. See generally sources cited *supra* notes 10–11. But see LIEBMAN & HERTZ, *supra* note 11; Eric Freeman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089–91 (2006) (discussing limitations of Supreme Court's holding in *Giarratano* case).

litigating new claims in habeas corpus without even noting the unresolved nature of the issue.³⁷³ Instead, the courts of appeals simply invoke in broad terms the language of *Finley* or *Coleman*.³⁷⁴ In so doing, a few courts acknowledge that they are breaking new jurisprudential ground, but then summarily dispense with the issue under *Finley* and/or *Coleman*.³⁷⁵ Similarly, the federal circuits have uniformly applied *Finley*

373. See, e.g., *Ogan v. Cockrell*, 297 F.3d 349, 356–57 (5th Cir. 2002) (rejecting claim of ineffective assistance of state habeas counsel and procedural default without acknowledging issue reserved in *Coleman* based on same ground that “there is no constitutional right to competent habeas counsel”); *In re Goff*, 250 F.3d 273, 276 (5th Cir. 2001) (finding failure of state habeas counsel to raise trial ineffective assistance of counsel claim did not constitute “cause” to permit successive § 2254 petition, without considering implications of issue reserved in *Coleman*, because “[c]ounsel’s ineffectiveness will constitute cause only if it is an independent constitutional violation, and there is no constitutional right to counsel in habeas proceedings”); *Weeks v. Angelone*, 176 F.3d 249, 273–74 (4th Cir. 1999) (upholding procedural default of ineffective assistance of trial counsel claims on ground that no right to counsel in state postconviction proceedings exists, without noting that such claims only can be litigated in the first instance in habeas corpus); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) (en banc) (finding state habeas counsel’s failure to raise trial ineffective assistance of counsel claim did not excuse resulting procedural default of federal claim, without considering implications of issue reserved in *Coleman*, because “the law is well-established . . . that such error committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause”); *Smith v. Angelone*, 111 F.3d 1126, 1133 (4th Cir. 1997) (holding that, without even clarifying nature of § 2254 claims as to whether it was new to habeas, failure of state habeas counsel to raise claims as petitioner instructed did not excuse procedural default of § 2254 claim because petitioner “had no right to counsel (effective or otherwise) on state habeas, and cannot claim ineffective assistance of state habeas counsel, or claim that counsel’s errors were cause for procedural default”); *Neal v. Gramley*, 99 F.3d 841, 843–44 (7th Cir. 1996) (en banc) (finding habeas counsel’s failure to present trial ineffective assistance of counsel claim adequately in first § 2254 petition did not excuse abuse of writ inherent in filing successive § 2254 petition without considering implications of issue reserved in *Coleman*); *Irving v. Hargett*, 59 F.3d 23, 26 (5th Cir. 1995) (finding habeas counsel’s conflict of interest in representing both petitioner and co-defendant in capital murder prosecution and failure to file appeal of district court’s denial of first § 2254 petition was not “cause” to permit successive § 2254 petition, without considering implications of issue reserved in *Coleman*, because there is no constitutional right to counsel in federal habeas); *Johnson v. Hargett*, 978 F.2d 855, 857–59 (5th Cir. 1992) (finding error of counsel in failing to raise *Brady v. Maryland* claim in first § 2254 petition did not excuse abuse of writ, without considering implications of issue reserved in *Coleman*, because “counsel’s ineffectiveness will constitute cause only if it is an independent constitutional violation”); *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992) (finding petitioner’s pro se status in litigating state and federal habeas proceedings did not constitute cause to excuse abuse of writ in filing successive § 2254 petition which raised new claims, without considering issue reserved in *Coleman*, because “there is no constitutional right to counsel in postconviction proceedings”); *Cornman v. Armontrout*, 959 F.2d 727, 730 (8th Cir. 1992) (holding failure of “jailhouse lawyer” to include claim in first § 2254 petition did not excuse abuse of writ inherent in filing second § 2254 petition without considering implications of issue reserved in *Coleman*); *Johnson v. Singletary*, 938 F.2d 1166, 1175 (11th Cir. 1991) (finding state habeas counsel’s failure to raise ineffective assistance of counsel at sentencing claim was not cause to excuse procedural default of claim under § 2254 without considering implications of issue reserved in *Coleman*); *Henderson v. Sargent*, 939 F.2d 586, 586 (8th Cir. 1991) (vacating, under *Coleman*, without acknowledging implications of reserved issue, prior panel decision that failure of state habeas counsel to raise trial ineffective assistance of counsel was cause to excuse procedural default of claim in § 2254).

374. See cases cited *supra* note 373.

375. See, e.g., *Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir. 2004) (rejecting argument that ineffective assistance of state habeas counsel is “cause” to excuse procedural default even for “cases

and/or *Coleman* to § 2255 to conclude that no right to counsel applies therein.³⁷⁶ This extension, too, has been summary, without any analysis of the distinct issue posed by issues litigated in the first instance in § 2255 petitions.

Only two circuits, the Fourth and the Ninth, have actually tackled (at least to some extent) the issue reserved in *Coleman*. In so doing, both circuits issued split decisions that, although rejecting a constitutional right to counsel for new claims in habeas, reveal the complexity and difficulty of the issue.³⁷⁷ These decisions, analyzed together, suggest a framework for fully evaluating the implications and wisdom of recognizing a right to counsel for claims unique to habeas. This framework, positioned against the history and role of the constitutionally protected right to counsel for the criminally accused in our society and justice system, makes a compelling case for recognizing that right for claims raised in the first instance in habeas corpus.

involving constitutional claims that can only be raised for the first time in state post-conviction proceedings"); *Elizalde v. Dretke*, 362 F.3d 323, 330 (5th Cir. 2004); *Martinez v. Johnson*, 255 F.3d 229, 240 (5th Cir. 2001) (acknowledging that the case presents the issue reserved in *Coleman* in that petitioner contended he had a constitutional right to effective assistance of counsel in his first state habeas proceeding to enable him to raise claims of ineffective assistance of trial counsel, but, again citing Fifth Circuit case law that did not directly address the issue, summarily concluding the court was "foreclosed by precedent from considering whether an exception exists under the *Coleman* rule"); *Hill v. Jones*, 81 F.3d 1015, 1025–26 (11th Cir. 1996) (concluding summarily based on prior circuit case law that did not directly address the issue that the "possible exception to *Finley* and *Giarratano* the Supreme Court noted in *Coleman* simply does not exist in this circuit" with the remarkably circuitous logic that "[t]o recognize [habeas counsel's] error as cause, we would have to find a petitioner has a constitutional right to counsel in collateral proceedings. *Finley* and *Giarratano* hold otherwise; and the Supreme Court emphasized this point in *Coleman*."); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992) (acknowledging *Coleman* left unresolved whether procedural default is excused by failure of state habeas counsel to raise a claim when habeas is the first available forum for claim, but concluding that *Coleman* left "little doubt as to how the Supreme Court would decide the question" and summarily rejecting claim under *Henderson v. Sargent*, 926 F.2d 706, 710 n.7 (8th Cir. 1991), which did not directly address the issue).

376. See, e.g., *Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004) (observing in context of § 2255 that habeas petitioners do not have a constitutional right to habeas counsel); *Ellis v. United States*, 313 F.3d 636, 652–53 (1st Cir. 2002) (finding no right to counsel in § 2255 proceedings because "[a] convicted criminal has no constitutional right to counsel with respect to habeas proceedings" under *Finley*, acknowledging that habeas was the first opportunity for review of petitioner's ineffective assistance of counsel claim but simply stating that "[w]e fail to see how an adscititious ineffective assistance claim entitles a criminal defendant to the assistance of counsel on subsequent collateral review"); *Kitchen v. United States*, 227 F.3d 1014, 1019 (7th Cir. 2000) (observing in dicta that "it is well established that there is no constitutional right to counsel in collateral proceedings" but concluding that counsel's failure to file pre-appeal motion for new trial occurred as part of direct appellate process, where constitutional right to counsel attached); *United States v. MacDonald*, 966 F.2d 854, 859 n.9 (4th Cir. 1992) (declining to find cause to file a successive petition, i.e., excuse an abuse of the writ, based on failure of counsel to raise *Brady v. Maryland* issue in first § 2255 petition on ground that "[p]risoners have no right to counsel in a collateral proceeding" under *Finley*).

377. See *Mackall v. Angelone*, 131 F.3d 442, 451 (4th Cir. 1997) (en banc); *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (plurality opinion).

In *Mackall v. Angelone*, the Fourth Circuit, sitting en banc, confronted the issue reserved in *Coleman*.³⁷⁸ Although the majority managed to resolve the issue simply by invoking *Finley*, without independent analysis, the dissent did not retreat without a fight.

In *Mackall*, the petitioner sought to raise claims of ineffective assistance of trial and appellate counsel in a second state habeas corpus petition. As cause to excuse the procedural default that inhered in failing to raise these claims in the first habeas petition, the petitioner alleged the ineffectiveness of habeas counsel in the first habeas proceeding.³⁷⁹ The petitioner argued that he had a constitutional right to effective assistance of trial counsel in his first state habeas corpus proceeding because it was the first proceeding in which he was able to raise his ineffective assistance of trial and appellate counsel claims.³⁸⁰ Thus, he argued, the first habeas proceeding functioned as his first appeal of right for which a constitutional right to counsel exists pursuant to *Douglas v. California*.³⁸¹

The majority disagreed simply on the ground that recognizing a right to counsel for claims the petitioner can only raise in the first instance in habeas corpus would contradict "the explicit holding of *Finley* that no constitutional right to counsel exists in collateral review."³⁸² It concluded that, "[a]s an inferior appellate court, we are not at liberty to disregard this controlling authority."³⁸³ Having found that the petitioner lacked a right to effective assistance of counsel in his state habeas proceeding, the court readily concluded that he could not show cause for the procedural default of his claims based on habeas counsel's deficient representation.³⁸⁴

Two judges dissented, however, taking issue with the majority's summary assumption that *Finley* controlled the outcome of the case.³⁸⁵ In spare, incisive analysis, the dissent identified the heart of the issue left unresolved by *Coleman*:

The Sixth Amendment guarantees a person charged with a felony a right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 336-45 . . . (1963).

The right to counsel extends to the first appeal (sometimes called a direct appeal). *Douglas v. California*, 372 U.S. 353, 355-58 . . . (1963).

Counsel must be competent. *Strickland v. Washington*, 466 U.S. 668, 684-87 . . . (1984).

378. *Mackall*, 131 F.3d at 449.

379. *Id.* at 446.

380. *Id.* at 449.

381. *Id.*

382. *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)).

383. *Id.*

384. *Id.*

385. *Id.* at 451.

Therefore, to give effect to the foregoing precedent, [petitioner] had a right to pursue his Sixth Amendment guarantee of competent counsel during trial and appeal in his state habeas corpus proceeding with the assistance of competent counsel. Although a prisoner is not constitutionally entitled to counsel in a collateral proceeding, the exception to this general rule . . . is in reality a direct attack on the competency of his trial and appellate counsel in the only forum available to him—a habeas corpus proceeding. For this limited purpose [petitioner] is entitled to the assistance of competent counsel.³⁸⁶

The Fourth Circuit reaffirmed its holding in *Mackall* one year later, in *Quesinberry v. Taylor*.³⁸⁷

In a series of decisions following *Coleman*, the Ninth Circuit has also rejected a constitutional right to counsel for claims raised in the first instance in habeas. In so doing, the court provided substantially more analysis than the Fourth Circuit offered in *Mackall*. In a pair of decisions issued in 1990 and 1993, the Ninth Circuit provided fairly extensive analysis to support its conclusion that no right to counsel applies in *state* habeas proceedings.³⁸⁸ This conclusion appears informed in no small measure by pragmatism and the interests of finality.

In *Harris v. Vasquez*, the petitioner in a capital case attempted to raise mental health claims in a successive § 2254 petition, which the trial court denied as an abuse of the writ.³⁸⁹ As “cause” to excuse the abuse, petitioner argued his habeas counsel’s ineffectiveness in his first habeas corpus proceeding in failing to raise the mental health claims therein.³⁹⁰ Defense counsel moved to withdraw to allow investigation into the possible incompetence.³⁹¹ The Ninth Circuit denied the motions on the ground that there is no right to assistance of counsel in habeas proceedings and, hence, no constitutional right to effective counsel.³⁹² Thus, habeas counsel “could not have been constitutionally ineffective as a matter of law,”³⁹³ and in turn, could not provide cause under the standard set forth in *McCleskey v. Zant* to justify filing a successive § 2254 petition.³⁹⁴

386. *Id.* at 451–52 (Butzner, J., dissenting).

387. See *Quesinberry v. Taylor*, 162 F.3d 273, 276 (4th Cir. 1998) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1990)) (holding that any deficiencies of petitioner’s state habeas counsel could not constitute cause to excuse his procedural default of federal claims due to lack of constitutional right to counsel in state habeas).

388. See *Bonin v. Vasquez (Bonin I)*, 999 F.2d 425 (9th Cir. 1993); *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990).

389. 949 F.2d at 1513.

390. *Id.*

391. *Id.* at 1513 n.13.

392. *Id.*

393. *Id.*

394. *Id.*

In *Bonin v. Vasquez* (*Bonin I*), petitioner, who was represented by the state public defender's office, sought to add new claims to a 28 U.S.C. § 2254 petition, which challenged his conviction and sentence in a capital murder case.³⁹⁵ Counsel had not presented the claims at trial, on direct review, in state habeas corpus proceedings, or in his original § 2254 petition. The district court treated the motion to add the claims as a successive petition and, hence, an abuse of the writ.³⁹⁶ As such, in order to obtain a merits review of the claims, petitioner had to show cause and prejudice under *McCleskey*.³⁹⁷ The Public Defender moved to withdraw as counsel on the ground that its own ineffectiveness in failing to raise the new claims earlier might constitute "cause" and thus, conflict³⁹⁸ of interest principles required appointment of new counsel to litigate the issue.³⁹⁹

Citing *Coleman v. Thompson*, the district court noted ineffective assistance of counsel establishes cause only if it occurs at a time when a petitioner is constitutionally entitled to assistance of counsel.⁴⁰⁰ The court then denied the Public Defender's motion to withdraw on the ground that no constitutional right to counsel attaches in state and federal habeas proceedings.⁴⁰¹ Thus, any incompetence by the Public Defender could not constitute the independent constitutional violation required to show "cause."⁴⁰²

On appeal, the Ninth Circuit tackled the question left open in *Coleman* and rejected the Public Defender's argument that the petitioner had a Sixth Amendment right to counsel during his state habeas proceedings because that was the first forum in which he could allege constitutional ineffectiveness on the part of trial counsel.⁴⁰³ In so holding, the Ninth Circuit's reasoning derived from the practical implications of accepting the Public Defender's argument:

395. 999 F.2d 425, 427 (9th Cir. 1993). The case also involved a successive § 2254 petition, which challenged another conviction and capital sentence. *Id.* But the Ninth Circuit's ruling with respect to the successive nature of the petition is not relevant to this analysis.

396. Because the district court already had denied the petition, it construed petitioner's motion as a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and thus, tantamount to an unauthorized successive petition or an abuse of the writ. *Id.*

397. *Id.* at 426-27 (citing *McCleskey v. Zant*, 499 U.S. 467 (1991)).

398. *Id.*

399. *Bonin I*, 999 F.2d at 426.

400. *Id.* at 427.

401. *Id.* The court cited *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991), for the proposition that no right to counsel attaches in state habeas proceedings, and *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), and *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), for the apparent rule that no right to counsel attaches in federal habeas proceedings. *Id.* As discussed above, the language of *McCleskey* that interpreted *Finley* as a basis for concluding there is no right to counsel in federal, as opposed to state, habeas was dicta and, I would argue, analytically incorrect.

402. *Bonin I*, 999 F.2d at 427.

403. *Id.* at 429.

There is a practical reason why we will not follow the Public Defender's recommendation. The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore, because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state postconviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause [under] *McCleskey*, federal courts would never be able to avoid reaching the merits [of] any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.⁴⁰⁴

"To obviate such an absurdity," the court held that the Sixth Amendment right to counsel doesn't extend to state or federal habeas corpus proceedings.⁴⁰⁵ The court did not evaluate the issue in terms of the due process and equal protection principles enunciated in *Griffin* and *Douglas*.⁴⁰⁶

Two years later, a plurality of an en banc Ninth Circuit panel in *Jeffers v. Lewis* affirmed *Bonin I*'s holding that "a defendant has no Sixth Amendment right to counsel during his state habeas proceedings even if that was the first forum in which he could challenge constitutional effectiveness on the part of trial counsel."⁴⁰⁷ Again, the court reiterated its concern that extending the right to counsel to his first possible postconviction proceeding "would necessarily grant him that same right in all subsequent postconviction proceedings."⁴⁰⁸

In *Jeffers*, petitioner in a capital case sought to raise new claims of ineffective assistance of direct appellate counsel in a second § 2254 petition.⁴⁰⁹ As "cause" to justify the apparent abuse of the writ, petitioner proffered a conflict of interest on the part of counsel who represented him on direct appeal and in the first § 2254 proceeding as having prevented him from raising the claims in the first petition.⁴¹⁰

404. *Id.* at 429–30 (citation omitted).

405. *Id.* at 430.

406. *Id.*

407. 68 F.3d 299, 300 (9th Cir. 1995) (en banc).

408. *Id.*

409. *Id.*

410. *Id.*

The day before Jeffers' scheduled execution, a three-judge panel, with one judge dissenting, issued an order staying the execution to permit briefing on the issue.⁴¹¹ The court noted that the petitioner had presented colorable claims of ineffective assistance at trial, at his capital sentencing proceeding, and on direct appeal.⁴¹² The court observed:

Jeffers contends with considerable force that he is in an impossible position: he was arguably denied effective assistance of counsel in his trial, sentencing and direct appeal, and he has never had counsel who were able to raise that issue because his counsel on collateral review were the same as his counsel at trial and on direct appeal. He has a serious claim of being in . . . "the unusual situation in which ineffective counsel represented a defendant not merely at trial and on appeal, but also during collateral attack."⁴¹³

The panel emphasized that the petitioner raised "a very serious constitutional question, recognized as open by the Supreme Court in *Coleman*."⁴¹⁴ The panel also distinguished *Bonin* as not controlling Jeffers' case:

In *Bonin*, the habeas petitioner challenged two state convictions; he sought to add six new claims from one case and four new claims from the other. The focus of the entire discussion in *Bonin* was on the fact that the petitioner had failed to raise these claims promptly *at the first habeas proceeding*. The claims were therefore defaulted unless there was "cause" for the failure to raise them promptly at first habeas. Counsel asked for appointment of new, conflict-free counsel who could pursue the contention that the "cause" for failure to raise the claims at first habeas was ineffective assistance of counsel at that, first habeas stage. *Bonin* rejected the application. It held that there was no need to appoint new, conflict-free counsel because, even if it were proven that counsel had been ineffective at the first habeas stage, that fact would not constitute "cause" because there was no right to counsel at first habeas in any event.⁴¹⁵

The panel noted that *Bonin* also never argued that counsel's ineffectiveness on direct appeal may have provided "cause" for failure to raise the new claims at an earlier date.⁴¹⁶

By contrast, Jeffers *was* asserting ineffective assistance of counsel at trial and on direct appeal, at which stages there is a constitutional right to counsel and proof of ineffectiveness presents a "cognizable habeas claim."⁴¹⁷ In response to the concern of triggering an infinite continuum of cognizable ineffective assistance of counsel claims, the court noted:

411. *Jeffers v. Lewis*, 68 F.3d 295, 296 (9th Cir. 1995), *rev'd*, 68 F.3d 299.

412. *Id.*

413. *Id.* at 296-97 (quoting *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994)).

414. *Id.* at 297 (citation omitted).

415. *Id.*

416. *Id.*

417. *Id.* (citing *Bonin I*, 999 F.2d 425, 431 (9th Cir. 1993)).

[G]ranting relief to Jeffers would not start an endless chain of permissible habeas relief, as the court feared in *Bonin*. There is a right to one, conflict-free set of counsel to pursue the claim that prior counsel were ineffective at trial, sentencing and on direct appeal. After that, there is no more. To the extent that the "endless chain" example in *Bonin* may be interpreted to speak to Jeffers' situation, it is dictum; the request in *Bonin* was for counsel to explore ineffectiveness at the first habeas stage.⁴¹⁸

Convened en banc, a plurality vacated the three-judge stay under *Bonin I*, rejecting habeas counsel's ineffectiveness as cause to excuse an abuse of the writ by bringing the new claims of ineffective assistance of counsel in a successive § 2254 petition.⁴¹⁹ Four judges dissented, for "substantially" the reasons set forth in the three-judge panel's order staying the execution.⁴²⁰

In subsequent case law, the Ninth Circuit has affirmed its holding in *Bonin I* and reasoning in the *Jeffers* en banc plurality opinion that there is no Sixth Amendment right to counsel in a state habeas proceeding even where habeas provides the first possible forum for review of the claim at issue.⁴²¹

But in *Coleman v. Ignacio*, a Nevada district court held that a petitioner had a constitutional right to counsel in his first state habeas proceeding in which state law provides the only avenue of appeal of a conviction by guilty plea to review a claim of ineffectiveness of trial counsel.⁴²² The court contrasted the case with *Bonin I* and *Jeffers*, where both petitioners had assistance of counsel on direct appeal and in postconviction proceedings.⁴²³ Here, however, the petitioner had been denied counsel to challenge the conviction in the first instance in postconviction proceedings.⁴²⁴ The court observed:

Petitioner's first and only opportunity to appeal his conviction was in his first state habeas petition. The ability to pursue the post-conviction petition for writ of habeas corpus is granted as of right. The state court, however, failed to appoint counsel. Therefore, Petitioner herein has *never* had a review on the merits of his challenge to the validity of his conviction and with the assistance of counsel. The United States Supreme Court's decision in *Douglas* made clear that the denial of counsel on the first appeal of a conviction, granted as of right, constitutes discrimination against certain convicted defendants on the

418. *Id.*

419. *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc).

420. *Id.* at 301 (Fletcher, J., dissenting).

421. See *Ellis v. Armenakis*, 222 F.3d 627 (9th Cir. 2000); *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (noting the argument for a right to counsel in such cases "is not without force," but is foreclosed by *Bonin III* and *McDaniel*); *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996); *Bonin v. Calderon (Bonin III)*, 77 F.3d 1155, 1159 (9th Cir. 1996).

422. 164 F.R.D. 679, 684 (D. Nev. 1996).

423. *Id.*

424. *Id.*

basis of their poverty. Therefore, this court holds that Petitioner had the right to the appointment of counsel to assist him on his first post-conviction petition.⁴²⁵

No appeal was taken; thus, the Ninth Circuit was not required to reconcile the district court's reasoning with *Bonin I* and its progeny. As discussed further in Part III, the district court in fact embraced a position that directly supports applying *Douglas v. California* to the first habeas petition, state or federal, in which a petitioner is able to challenge his conviction on grounds that can only be raised in habeas corpus.

Despite the federal circuits' resistance to do so, the Washington Supreme Court has recognized a constitutional right to counsel for indigent inmates in state postconviction proceedings.⁴²⁶ Relatedly, the Mississippi Supreme Court has recognized a right to "competent" assistance of counsel but stopped short of attaching constitutional status to such right.⁴²⁷

In *Honore v. Washington State Board of Prison Terms and Paroles*, decided in 1970—seven years after *Douglas* but long before *Finley*, *Giarratano*, and *Coleman*—the Washington Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment requires that the indigent receive assistance of counsel at the evidentiary hearing stage and first appellate level of state habeas proceedings.⁴²⁸ The court noted that state habeas proceedings occur in a court of law, and the result "sometimes rests upon significant extraneous legal or evidentiary matters which must be researched, marshalled, and intelligently presented either at an evidentiary hearing or at the appellate level if the applicant's good faith contentions are to be fairly presented and considered."⁴²⁹ The court observed that "[i]t is within the context of such a judicial proceeding that the *Griffin* line of decisions find their expression."⁴³⁰ Thus, the court concluded:

[L]ogic and the more persuasive authority [of *Griffin* and *Douglas*] compel us to hold that an indigent state prisoner seeking habeas corpus relief is entitled, under the equal protection clause of the fourteenth amendment [sic] to the United States Constitution, to be furnished appointed counsel, upon request, to assist him in prosecuting his petition at the evidentiary hearing stage and/or at the first appellate level when (1) his petition is urged in good faith; (2) his petition raises significant issues which, when considered in the light of the state's responsive pleadings or the evidence adduced at an evidentiary hearing, are neither frivolous nor repetitive; and (3) such issues by their nature and character indicate the necessity for professional legal

425. *Id.* (footnote omitted) (citation omitted).

426. *Honore v. Wash. State Bd. of Prison Terms & Paroles*, 466 P.2d 485 (Wash. 1970) (en banc).

427. *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999).

428. 466 P.2d at 485.

429. *Id.* at 493.

430. *Id.*

assistance if they are to be presented and considered in a fair and meaningful manner.⁴³¹

In *Jackson v. State*, decided in 1999, well after *Coleman*, the Mississippi Supreme Court held that a petitioner in a capital case is entitled to court-appointed counsel to represent him in his state postconviction efforts because those proceedings, "though collateral, have become part of the death penalty appeal process at the state level."⁴³² In so holding, the court focused on the unique function of the postconviction process:

Certain issues must often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel. . . . Obtaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible. This practice ignores the reality that . . . having the same counsel represent the condemned in appellate proceedings and post-conviction actions prevents counsel from raising the claim of ineffective assistance of trial or appellate counsel at the post-conviction stage. This practice also ignores the reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. . . . The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.⁴³³

The *Jackson* court noted that Justice Kennedy, whose concurrence provided the bare majority in *Giarratano*, premised his conclusion that the state statutory scheme at issue in that case did not violate the Constitution because "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief."⁴³⁴ By contrast, in Mississippi, "repeatedly, since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers."⁴³⁵ As such, the *Jackson* court's conclusion that a right to counsel attaches in capital postconviction proceedings appeared to derive from a due process right to access to the courts, rather than the principles of equal protection and due process articulated in *Griffin* and *Douglas*. This conclusion seemed implicit, particularly in light of its failure to distinguish between habeas

431. *Id.*

432. 732 So. 2d at 191; cf. *Stevens v. Epps*, No. 2:04CV118KS, 2008 WL 4283528, at *45 (S.D. Miss. Sept. 15, 2008) (citing *Pennsylvania v. Finley*, 48 U.S. 551 (1987), and *Murray v. Giarratano*, 492 U.S. 1 (1989), for rule of law that there is no constitutional right to counsel beyond the direct appeal).

433. *Jackson*, 732 So. 2d at 190.

434. *Id.* at 191 (quoting *Murray*, 492 U.S. at 14–15).

435. *Id.*

proceedings that function as first appeals of right, as compared to all capital postconviction proceedings, as the court in *Honore* had done.

In 2003, however, the Mississippi Supreme Court retreated from its implicit recognition of a constitutionally protected right to counsel in postconviction proceedings. In *Wiley v. State*, the court observed that “*Jackson* does not specifically establish a constitutional right to compensated counsel.”⁴³⁶ Citing *Giarratano*, the court noted that “there is no constitutional right to counsel in state post-conviction proceedings.”⁴³⁷ In so doing, perhaps of necessity, the court did not, as it had in *Jackson*, mention Justice Kennedy’s concurring opinion in *Giarratano*.⁴³⁸

III. DUE PROCESS AND EQUAL PROTECTION FRAMEWORK FOR A RIGHT TO COUNSEL IN HABEAS CORPUS

There are a number of reasons why *Finley* and *Giarratano* should not control in cases in which a habeas petitioner, state or federal, is trying to raise claims for which the habeas corpus proceeding provides the first forum for judicial review.⁴³⁹ The first derives from the due process and equal protection reasoning set forth in *Griffin v. Illinois* and *Douglas v. California*.

A. DUE PROCESS AND EQUAL PROTECTION

The Supreme Court held in *Griffin* that, where states provide for a first appeal as of right, the Fourteenth Amendment’s Due Process and Equal Protection Clauses prohibit erecting any financial barriers to pursuing that appeal.⁴⁴⁰ In *Douglas*, the Court held that such barriers include a lack of assistance of counsel.⁴⁴¹ Thus, where a right to appeal exists under state law, a defendant has a constitutional right to assistance of counsel.⁴⁴² Moreover, that assistance must be “effective” within the meaning of *Strickland v. Washington*.⁴⁴³

As discussed in Part II, the Supreme Court has held that the due process and equal protection principles underlying *Griffin* and *Douglas* do not require a constitutional right to counsel for discretionary appeals, including those to a state supreme court. The Court reasoned that a defendant’s access to the trial record, appellate briefs prepared with assistance of counsel, and any appellate opinions in his case provide

436. 842 So. 2d 1280, 1285 (Miss. 2003).

437. *Id.*

438. *Id.*

439. See *Douglas v. California*, 371 U.S. 353, 355–56 (1963).

440. 351 U.S. 12, 17–19 (1956) (Black, J., plurality opinion).

441. 371 U.S. at 354–56.

442. *Id.* at 357.

443. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985).

sufficient tools to gain meaningful access as guaranteed by the Due Process Clause and to ensure against invidious discrimination under the Equal Protection Clause.⁴⁴⁴ Moreover, in determining whether to review a case on discretionary appeal, the state supreme court or United States Supreme Court considers issues beyond the merits of the particular case, i.e., whether the federal circuits have split on the legal issue presented or whether overarching policy considerations urge high court review.⁴⁴⁵

Applying the reasoning of *Moffitt* to *Pennsylvania v. Finley*, the Court declined to extend *Douglas*'s guarantee of a constitutional right to counsel on a first appeal of right to a state habeas proceeding in which a petitioner alleges claims that he raised, with assistance of counsel, on direct appeal. Again, the Court concluded that the prior assistance of counsel in having "organized and presented in a lawyerlike fashion" the claims on direct appeal satisfies the edicts of due process and equal protection.⁴⁴⁶

But this rationale loses its moorings when habeas corpus provides the first opportunity for the petitioner to raise a particular claim that, if meritorious, invalidates his conviction or sentence. The petitioner has never had the assistance of counsel in investigating, researching, and presenting in brief form claims of this nature to any court, trial or appellate. Logically, then, no court has evaluated the merits of the claim and provided a written opinion that may guide his future attempts at litigation. Indeed, the court that reviews the first habeas petition, state or federal, is the first to assess this category of claims. For claims that require development of new facts, the first habeas court functions in both a trial and appellate capacity: a trial court to the extent it conducts an evidentiary hearing and makes additional findings of fact beyond the scope of the trial and direct appellate record; an appellate court to the extent it reviews the substantive merits of the claims to evaluate whether the writ should issue. Nonetheless, despite this hybrid function, the court operates as primarily an appellate one, reviewing, in light of the new facts, whether error occurred at trial or on direct appeal of such a dimension as to warrant relief from the judgment. As such, the very considerations that compel recognition of a due process and equal protection right to counsel on direct appeal apply with equal force to claims for which habeas corpus provides the first forum for judicial review.

Additionally, when a petitioner seeks habeas relief on claims that depend on facts beyond those established in the trial record, no attorney has ever had a chance to review the relevant record and frame the

444. *Ross v. Moffitt*, 417 U.S. 600, 615 (1974).

445. *Id.*

446. *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (citing *Moffitt*, 417 U.S. at 615-16).

argument. This failing may occur because the claims are only partially evident from the record, as is often the case for ineffective assistance of counsel claims. Or the claim may escape attorney review because it derives from new evidence that only surfaces after the trial and/or appeal, such as facts that reveal prosecutorial or police misconduct. Nor are there any appellate decisions addressing such issues. Thus, a pro se petitioner, who often is illiterate and/or uneducated,⁴⁴⁷ is entirely on his own in litigating issues that are often constitutional in dimension and require careful and sophisticated legal analysis. As such, the fairness and equality principles enunciated in *Griffin* and *Douglas* apply in full force to these claims as well.

This point is perhaps best illustrated by a simple, all too common example. As discussed, one of the prototypical claims raised for the first time in state and federal habeas is the Sixth Amendment claim of ineffective assistance of trial or appellate counsel. This claim derives from the *Strickland* framework, which requires the defendant to show (1) that his lawyer's conduct was deficient in that it fell short of what a reasonable attorney would have done under the circumstances; and (2) that he was prejudiced as a result of this error, that is, there is a reasonable probability that but for the error, the result of the proceedings would have been different.⁴⁴⁸

An ineffective assistance of counsel claim can rarely be brought on direct appeal because it typically requires, at minimum, sworn affidavits from the attorney and the defendant attesting to the new facts that support the claim.⁴⁴⁹ The claim often requires investigation.⁴⁵⁰ For example, where the petitioner alleges trial counsel's failure to interview a critical, percipient witness who would have exonerated him or to adduce other exculpatory evidence, the petitioner must demonstrate by sworn affidavit the testimony of the witness whom trial counsel overlooked or

447. See *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) ("Sixty-eight percent of the state prison population did not complete high school, and many lack the most basic literacy skills. Seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." (citation omitted) (internal quotation marks omitted)).

448. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

449. See, e.g., *Hardwick v. Crosby*, 320 F.3d 1127, 1185–86 (11th Cir. 2003); *Enoch v. Gramley*, 70 F.3d 1490, 1498 (7th Cir. 1996) (finding no basis for evidentiary hearing on ineffective assistance of counsel/conflict of interest claim where petitioner alleges "no more than conclusions and speculation"); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (denying claim of ineffective assistance of trial counsel for failure to call alibi witness on ground that the evidentiary record did not support the proffered alibi).

450. See, e.g., *United States v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987) (noting insufficient showing of prejudice from alleged deficient performance of defense counsel in failing to investigate "without a comprehensive showing as to what the investigation would have produced").

otherwise proffer the evidence counsel failed to introduce at trial.⁴⁵¹ In *United States v. DeRobertis*, the Seventh Circuit underscored that, where a petitioner alleges ineffective assistance based on a failure to call potential witnesses, “it is incumbent on the petitioner to explain their absence and to demonstrate, with some precision, the content of the testimony they would have given at trial.”⁴⁵²

Beyond the factual development required for most ineffective assistance of counsel claims, which may be impossible for no reason other than the fact that the petitioner is incarcerated,⁴⁵³ a habeas petitioner must also frame the issue properly. For example, if he focuses only on the error but fails to discuss prejudice, the court will deny the claim on the ground that he has not stated a basis for relief under *Strickland*.⁴⁵⁴ Or if a petitioner alleges a violation of state law but fails to frame it as a due process violation, the court will dismiss the claim as uncognizable.⁴⁵⁵ Similarly, if a petitioner merely argues the relevant facts in his habeas petition, but neglects to obtain and file sworn affidavits from the relevant witnesses, the court will deny the claim on the ground that he has not actually proffered facts on which relief might be warranted.⁴⁵⁶ Indeed, it is remarkable that *any* incarcerated, indigent defendant, particularly one with limited skills and education, is able to present a new claim in habeas in sufficient form and content to obtain a review on the merits. Instead, he is left entirely at the mercy of other inmates—“jailhouse lawyers”—who can botch the habeas case completely yet leave the petitioner with no remedy because he lacks a constitutional right to legal assistance for habeas claims in the first instance and therefore cannot state a claim based on ineffective assistance.⁴⁵⁷

451. *Id.*

452. *Id.*

453. *Id.* (“We understand that fulfilling this burden will at times be . . . difficult for the incarcerated petitioner, and, in the appropriate case, this consideration should prompt the district court to appoint counsel to ensure the just and efficient disposition of the petition.” (emphasis added)).

454. See, e.g., *Coleman v. Brown*, 802 F.2d 1227, 1233–34 (10th Cir. 1986) (rejecting ineffective assistance of counsel claim based on failure to call alibi witness, on ground that the existence of the alibi was “dubious” and unlikely to outweigh the evidence against the defendant that was produced at trial).

455. See, e.g., *Williams v. Anderson*, 460 F.3d 789, 807 (6th Cir. 2006) (finding claim alleging error in admitting character evidence procedurally defaulted where petitioner failed to frame it as a due process violation before state supreme court, noting “[p]etitioner’s brief did not once mention the Due Process Clause, the Constitution, or the Fourteenth Amendment, nor did it cite to a single Supreme Court case” or to any state cases addressing “relevant federal constitutional law”).

456. See *Adickes v. Kress & Co.*, 398 U.S. 144, 157–58 n.16 (1970) (stating that “[m]anifestly,” an unsworn statement of a witness “cannot be properly considered by us in the disposition of the case”); *Versarge v. Twp. of Clinton, N.J.*, 984 F.2d 1359, 1370 (3d Cir. 1993) (“[U]nsubstantiated arguments made in briefs or at oral argument are not evidence to be considered [by the court].”).

457. See, e.g., *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (finding habeas petitioner’s impaired mental condition and reliance on incompetent jailhouse lawyer does not provide cause to

Nor does the inmate have the benefit of any past legal assistance to help him, given that the claim is a new one, which counsel could not have raised at trial or on direct appeal. Indeed, with respect to claims alleging the ineffective assistance of trial or appellate counsel, the petitioner faces the untenable, if not the ironic: he alleges his counsel's incompetency hurt his defense significantly enough to warrant a new trial or sentencing. But in the first forum in which he is able to apply for such judicial relief, he must proceed alone, without the very assistance of counsel he alleges he was denied.⁴⁵⁸

Additionally, for a claim raised in the first instance in habeas, as contrasted with those raised in seeking discretionary review on direct appeal, the task of the first habeas court to review the claim entails error correction, based on the merits of the claim. The availability of review, and thus relief, is not a matter of discretion but one of right.

B. THE HYPOTHETICAL INFINITE HABEAS AND THE INTERESTS OF FINALITY

Despite the obvious critical need for legal assistance in raising a claim for the first time in habeas proceedings, remarkably, the only federal circuit to grapple with the issue, post-*Coleman*, declined even to evaluate the nature of the right on its own constitutional terms. Rather, in *Bonin I*, the Ninth Circuit rejected a constitutional right to counsel where habeas corpus provides the first forum for review entirely based on the hypothetical dilemma of the infinite habeas.⁴⁵⁹ That is, if a petitioner has a constitutional right to counsel in his first habeas proceedings, then, under *Strickland*, he must also have a possible remedy for *ineffective* assistance of counsel in that initial habeas action. And in a subsequent habeas proceeding in which he raises a claim of ineffective assistance of *first* habeas counsel, he must also receive assistance of counsel, under the same reasoning that supplies the right in the first habeas proceeding. And on it goes. "To obviate such an absurdity," the Ninth Circuit concluded, there can be no right to counsel in the first habeas proceeding.⁴⁶⁰

To be sure, the Ninth Circuit's decision in *Bonin I* finds substantial resonance in Supreme Court precedent regarding considerations of finality in habeas corpus proceedings; the Court has repeatedly cited the interests of finality in upholding procedural hurdles to pursuing a writ of

excuse procedural default of ineffective assistance of trial counsel claim).

458. See generally DiGiulio, *supra* note 9 (discussing the dilemma of the pro se petitioner in litigating ineffective assistance of counsel claims).

459. As discussed, *Bonin I*, 999 F.2d 425, 426 (9th Cir. 1993), considered a constitutional right to counsel in the context of procedural default, i.e., for cause and prejudice analysis, rather than as an independent claim of ineffective assistance under *Strickland* or denial of right to counsel altogether under *Douglas*. See *State v. Mata*, 916 P.2d 1035, 1053 (Ariz. 1996) (rejecting constitutional right to counsel in habeas under *Coleman* but also noting infinite habeas dilemma).

460. *Bonin I*, 999 F.2d at 430.

habeas corpus.⁴⁶¹ In *Calderon v. Thompson*, the Court noted that “[f]inality is essential to both the retributive and the deterrent functions of criminal law. ‘Neither innocence nor just punishment can be vindicated until the final judgment is known.’”⁴⁶² Similarly, in *Teague v. Lane*, the court observed that “[t]he fact that life and liberty are at stake in criminal prosecutions shows only that ‘conventional notions of finality’ should not have *as much* place in criminal as in civil litigation, not that they should have *none*.”⁴⁶³

But by casting aside as an intolerable absurdity the hypothetical consequence of recognizing a constitutional right to counsel in any habeas proceedings, the Ninth Circuit in *Bonin I* avoided having to address the effect of *Griffin* and *Douglas* on claims for which habeas corpus provides the first forum for judicial review.

Yet, the dire consequences of a potentially infinite habeas are vastly overstated. As a practical matter, as a series of attorneys participate in a criminal defense, the odds diminish that each one of them will be constitutionally ineffective under *Strickland* and thus, provide a factual predicate for a subsequent habeas proceeding. But more importantly, in the event that a defendant *is* in fact unfortunate enough to experience consecutive incompetence in trial, appellate, and then habeas counsel, normative standards of justice demand the availability of a remedy to cure the resulting harm. A recurrent example is where trial counsel in a capital case fails to investigate a viable mitigation case for sentencing, the defendant is sentenced to death as a result, and errors by state habeas counsel result in procedural default of the ineffective assistance of trial counsel claim in federal habeas proceedings.⁴⁶⁴ Certainly principles of finality cannot compete with, or warrant, an unjustified loss of liberty or worse yet, life. To hold otherwise contravenes the principles that underpin the constitutional right to counsel jurisprudence that has evolved throughout American history.⁴⁶⁵

461. See, e.g., *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (holding that federal court of appeals’ sua sponte recall of mandate to revisit the merits of earlier denial of habeas corpus petition is abuse of discretion unless recall is to avoid miscarriage of justice); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (limiting courts’ discretion to grant habeas relief on the basis of “trial error”); *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (limiting “a district court’s discretion to entertain abusive petitions”); *Teague v. Lane*, 489 U.S. 288, 297–98 (1989) (holding that procedural defaults prevent raising the claim in later proceedings, unless fundamental fairness so requires); *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (limiting courts’ discretion to entertain procedurally defaulted claims).

462. 523 U.S. at 555 (quoting *McCleskey*, 499 U.S. at 491); see also *Teague*, 489 U.S. at 309.

463. 489 U.S. at 309 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

464. See, e.g., *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008) (affirming district court’s dismissal as a procedurally barred challenge to capital murder conviction based on trial counsel’s alleged failure to present significant mitigation evidence, noting only claim of “actual innocence” can excuse the exhaustion requirement).

465. Indeed, it is an irreconcilable irony that the federal habeas statutes cannot bear the potential

Moreover, the concern underlying the hypothetical infinite habeas appears to stem from an assumption that, by and large, the claims litigated in habeas corpus are frivolous. But we need look no further than the right to counsel jurisprudence to see the fiction of this assumption: *Evitts v. Lucey*, *Strickland v. Washington*, *Ross v. Moffitt*, *Anders v. California*, *Gideon v. Wainright*, *Griffin v. Illinois*, and *Johnson v. Zerbst* were all presented to the United States Supreme Court through habeas corpus.⁴⁶⁶ Indeed, the historic role of the Great Writ in safeguarding against unlawful, government-sanctioned detentions demonstrates that the trial and direct appeal process cannot be trusted exclusively to produce just results in criminal cases.

Nor can courts be certain that somehow, they will be able to separate the wheat from the chaff, glean the *Gideons* from the frivolous, without “the guiding hand” of counsel facilitating the process. It is axiomatic that habeas corpus is an enormously complicated body of law, both procedurally and substantively. One can only imagine how many indigent inmates with valid factual and legal bases for attacking the integrity of their judgment have foregone life or liberty simply because they had “no skill in the science of law.”⁴⁶⁷

This Article does not attempt to construct a model for actual implementation of the limited right to counsel in habeas corpus described herein.⁴⁶⁸ No doubt, significant fiscal and practical hurdles obstruct the path to full implementation of such a right, particularly in light of the problems encountered to date in enforcing the constitutional right to counsel at trial and on direct appeal and the statutory right in capital habeas proceedings.⁴⁶⁹

spectacle of a hapless petitioner trying to cross-examine witnesses and adduce his own witness's testimony. But yet, the same statutes leave to the discretion of the federal courts the decision whether to permit the same hapless petitioner to struggle out of sight, with paper and pen in hand, as he tries to research and frame his new claims appropriately.

466. *Evitts v. Lucey*, 469 U.S. 387, 390–91 (1985) (certiorari granted from decision on federal habeas petition); *Strickland v. Washington*, 466 U.S. 668, 678–84 (1984) (certiorari granted from decision on federal habeas petition); *Ross v. Moffitt*, 417 U.S. 600, 604–05 (1974) (certiorari granted from judgment on federal habeas petition); *Anders v. California*, 386 U.S. 738, 740–41 (1967) (certiorari granted from denial of state habeas petition); *Gideon v. Wainright*, 372 U.S. 335, 337–38 (1963) (certiorari granted from denial of state habeas petition); *Griffin v. Illinois*, 351 U.S. 12, 15–16 (1956) (Black, J., plurality opinion) (certiorari granted from dismissal of state habeas petition); *Johnson v. Zerbst*, 304 U.S. 458, 458–59 (1938) (certiorari granted from denial of federal habeas petition).

467. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Indeed, *Gideon v. Wainright*, 372 U.S. 335, itself illustrates brilliantly the limitations of the pro se habeas petitioner: Gideon, himself, erred in properly framing his constitutional right to counsel at trial claim as merely a general violation of his constitutional rights. Only when counsel was appointed was his issue properly framed under the Sixth Amendment. *Id.*

468. That topic is the subject of a future article on which I am currently working.

469. See generally, e.g., CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA (2008), available at

Indeed, the situation in Mississippi aptly illustrates this reality. As discussed, in 1999, the Mississippi Supreme Court held in *Jackson v. Mississippi* that a petitioner in a capital case is entitled to court-appointed counsel in postconviction proceedings, which, “though collateral, have become part of the death penalty appeal process.”⁴⁷⁰ In 2000, the state responded by establishing the Mississippi Office of Capital Post-Conviction Counsel to provide assistance of counsel to capital petitioners in postconviction proceedings.⁴⁷¹ But the Office suffered from understaffing, underfunding, and case overloads,⁴⁷² which was made worse by the state’s interference in some petitioners’ representation.⁴⁷³ Ultimately, by appearing to narrow *Jackson*’s holding to protect only a right to competent, as opposed to constitutionally effective, counsel, the Mississippi Supreme Court has enabled federal courts to dodge the exceedingly difficult questions posed by any recognition of a constitutional right to counsel in postconviction proceedings.⁴⁷⁴

Inevitably, the feasibility of providing counsel will intersect with today’s much larger public policy debate regarding the wisdom and sustainability of criminal justice policies initiated in the 1980s, which have led to record high rates of incarceration throughout the United States and more aggressive pursuit of the death penalty.⁴⁷⁵

<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

470. 732 So. 2d 187 (Miss. 1999); see discussion *supra* Part II.

471. MISS. CODE ANN. §§ 99-39-101 to 119 (2007); see also *Stevens v. Epps*, No. 2:04CV118KS, 2008 WL 4283528, at *42-43 (S.D. Miss. Sept. 15, 2008).

472. By statute, the Office was to consist of three attorneys qualified in death penalty representation. See MISS CODE ANN. §§ 99-39-103. The first director of the Office began accepting cases in November, 2000. See *Stevens*, 2008 WL 4283528, at *43. By February, 2001, the director had hired the two additional attorneys authorized by statute and the Mississippi Supreme Court already had assigned the Office seventeen capital cases to review, investigate, and brief. *Id.* Concluding that the Office could not handle the caseload, the director began contracting with private attorneys to file postconviction petitions in some of the cases, which the statute authorized him to do. *Id.* But the Mississippi Legislature never provided the funding to compensate the private attorneys. *Id.* The Mississippi Supreme Court in turn discouraged the director from hiring attorneys from outside of Mississippi, though the state lacked sufficient attorneys qualified in death penalty representation. *Id.* Moreover, some private attorneys withdrew once they realized they would not be paid. *Id.* By October, 2001, the director informed the Mississippi Supreme Court that the Office could accept no more cases. *Id.* at *44. The director resigned two months later. *Id.*

473. The state interfered by opposing appointment of private counsel in some cases on the basis that counsel was unqualified to handle death penalty cases. See *Stevens*, 2008 WL 4283528, at *44-45. The concern stemmed from the state’s desire that it qualify for the “opt-in” provision of 28 U.S.C. § 2261, which in turn functions to accelerate the judicial process to the petitioners’ detriment. *Id.*

474. As discussed above, the Mississippi Supreme Court has held that its decision in *Jackson* “does not specifically establish a constitutional right to compensated counsel.” *Wiley v. State*, 842 So.2d 1280, 1285 (Miss. 2003). Based on this precedent, despite acknowledging that “the history of the Office of Post-Conviction Counsel presents troubling questions,” the district court in *Stevens* recently denied habeas relief to a petitioner who alleged ineffective assistance of postconviction counsel. *Stevens*, 2008 WL 4283528, at *47.

475. In February, 2008, the Pew Center on the States issued a study that concluded that the United

But as a practical matter, with defense counsel involved from the beginning, identifying and framing arguable issues for the courts, the courts will require less independent legwork to evaluate the potential merits of a pro se habeas petition. Nor will they simply turn (of necessity) to the prosecutor's opposition brief for one-sided guidance in discerning the salient legal issues raised in the petition, and the relative merit of same. Moreover, where appointed counsel is unable to identify any arguable claims for habeas corpus, she can move to withdraw as counsel under the procedure endorsed in *Anders v. California* for direct appeal cases.⁴⁷⁶

CONCLUSION

Whether by distraction with the hypothetical infinite habeas or by engaging in summary, often tautological analysis, the circuit courts have dodged the tougher question: how can the Equal Protection and Due Process Clauses demand assistance of counsel for the indigent who challenges a criminal judgment on direct appeal by raising comparatively straightforward claims, but not do the same for the far more complicated category of claims that derive from new facts or law that emerge only after the trial and/or appeal have concluded? Does a misfortune of judicial timing, along with the interest in finality in criminal cases, necessarily dispense with a defendant's due process and equal protection rights? A considered answer to these questions is long overdue. And the critical implications for the liberty interests of the indigent improperly sentenced to death or incarceration demand nothing less.

States now incarcerates approximately 2.3 million people, at a per capita rate of one out of every one-hundred adults. JENIFER WARREN ET AL., PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>. The nation far surpasses the rest of the world in terms of the extent to which it incarcerates its populace. See CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME AND DELINQUENCY, US RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 1 (Nov. 2006), available at https://www.policyarchive.org/bitstream/handle/10207/5918/2006nov_factsheet_incarceration.pdf?sequence=1 (noting the U.S. incarcerates the largest number of people in the world, at four times the world average); MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES & TRENDS 2 (2003), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf (noting that the U.S. incarcerates its populace at a rate of five to eight times that of industrialized nations to which we are most similar); ICPS: School of Law, King's College London, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Feb. 14, 2009) (listing the U.S., with approximately 2.3 million people behind bars, as having the highest prison population in the world; China, with roughly 1.5 million incarcerated, as the nation with the second-highest population; and Russia, at about 0.9 million, as third). In California, alone, the cost of this incarceration has reached \$8.8 billion. WARREN ET AL., *supra*, at 11; see also Proposition 6—Title and Summary—Voter Information Guide 2008, <http://www.voterguide.sos.ca.gov/vote-sum/prop6-title-sum.htm> (last visited Feb. 14, 2009).

476. 386 U.S. 738, 744 (1967).