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Attorney Error: The Martinez Miscarriage of Justice Solution

Kristen Marie Hegge

Attorney Error: The *Martinez* Miscarriage of Justice Solution

Competition between the forces of justice and finality pervades the American criminal justice system.[1] Interest in seeing the guilty fairly convicted conflicts with the need for an efficient process in which all cases are resolved permanently.[2] If a defendant is allowed to appeal every possible error, stability and certainty will be removed from the criminal justice system.[3] Some errors, however, lead to the conviction of innocent defendants.[4] This author believes that avoiding this result clearly outweighs the interest of finality.[5]

Errors by defense attorneys are a prime example of a situation in which defendants might be convicted unfairly.[6] If an attorney makes a mistake, the unwitting defendant is held to the consequences of that error.[7] This result could lead to undeserved punishment since an innocent man could be convicted.[8] In this situation, the interests of justice should take precedence over the interests of finality.[9]

The conflict between justice and finality traditionally has been accommodated by the requirement of defense attorney diligence.[10] If the attorney does not meet this requirement, the client is denied an opportunity to proceed.[11] This denial occasionally results in punitive measures levied upon innocent defendants.[12]

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1. *See infra* notes 172-73 and accompanying text. Courts have struggled with the problem in an attempt to encourage proper use of remedies without imposing unfair penalties upon petitioners whose errors should be excused. L. YACKLE, POST CONVICTION REMEDIES 298 (1981). *See also* U.S. v. Timmreck, 441 U.S. 780, 784 (1979) (discussion of justice in comparison to finality).
2. Yackle, *supra* note 1, at 298.
3. Comment, *"Fundamental Miscarriage of Justice": the Supreme Court's version of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings,* 20 SAN DIEGO L. REV. 371, 380 (1983).
4. Yackle, *supra* note 1, at 298; *see infra* notes 6-9 and accompanying text.
5. Comment, *supra* note 3, at 380.
6. Yackle, *supra* note 1, at 298.
7. *Id.*
8. *Id.*
9. Comment, *supra* note 3, at 380.
10. *See* CAL. PENAL CODE §1181 (motion for new trial based upon newly discovered evidence).
11. People v. Clauson, 375 Cal. App.2d 699, 704, 80 Cal. Rptr. 475, 479 (1969).
12. People v. Martinez, 36 Cal. 3d 816, 826, 685 P.2d 1203, 1209, 205 Cal. Rptr. 852, 857 (1984).

A recent California Supreme Court case, *People v. Martinez*, abandons the diligence requirement in some circumstances[13] in an effort to resolve the problem of unjust punishment of innocent defendants.[14] In place of diligence, the court proposed a "miscarriage of justice" standard.[15] Under this standard, if conviction will result in a miscarriage of justice because an innocent person will be punished, the lack of diligence will be overlooked.[16]

The *Martinez* court characterized diligence as a procedural requirement.[17] Consequently, the use of the miscarriage of justice test in that case was confined to procedural errors.[18] A substantive label, however, also could be applied to the matter of attorney diligence. For example, some courts define substantive law as that which creates duties, rights, and obligations.[19] Since the diligence of the attorney could be considered a duty or an obligation to the client, diligence might be considered substantive.[20] Another argument for the characterization of diligence as substantive is found in the body of rules regulating the conduct and relationship of members of society and the state.[21] Diligence concerns the conduct of those members of society known as lawyers.[22] Whether viewed as procedural or substantive, however, the key concern in this analysis is that the defendant's constitutional right of due process cannot be abridged by attorney error.[23] Hence, although the focus of this comment primarily concerns attorney procedural errors, the miscarriage of justice analysis also should be applied to substantive errors.

The *Martinez* miscarriage of justice standard needs refining to accommodate the competing forces of justice and finality. *Martinez* does not define the standard or give any guidelines to courts.[24] The

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13. *See infra* notes 57-64 and accompanying text.
14. *Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 857.
15. *Id.*
16. *Id.*
17. *Id.* A failure to follow legitimate procedural rules that results in the loss of a remedy often is referred to as a waiver, forfeiture, or default. J. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 619, n.4 (1984).
18. *Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 857.
19. State v. Elmore, 155 So. 896, 898 (1934); State v. Pavelich, 279 P. 1102, 1103 (Wash. 1929).
20. *Id.*
21. State v. Gibson, 157 N.E.2d 475, 478 (Ind. 1959).
22. People v. Clauson, 375 Cal. App. 2d 699, 704, 80 Cal. Rptr. 475, 479 (1969).
23. *See* U.S. CONST. amend. IV.
24. *Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 857.

standard should be applied in terms of the awareness of the attorney.[25] If the attorney is aware of the error when made, the interest in finality will outweigh concerns of justice.[26] Applying the miscarriage of justice standard will provide a remedy for innocent defendants.

This author first will examine the *Martinez* case,[27] the miscarriage of justice standard,[28] and the other errors to which the miscarriage of justice might apply.[29] The standard will be shown to be necessary because other remedies available to a defendant, including malpractice[30] and habeas corpus actions,[31] are inadequate. The circumstances in which the standard should be applied will be discussed.[32]

An attorney awareness test will be proposed to determine whether a miscarriage of justice has occurred.[33] Awareness will be defined and compared to the analytical approach in the *Martinez* concurrence.[34] An analogy to a similar case in habeas corpus will be drawn.[35] The question whether the awareness of the attorney or the defendant is the more significant will be discussed.[36] Finally, a practical method for applying the test will be suggested.[37] To understand the basic conflict between attorney errors and justice, however, one first must understand the *Martinez* case and the impact of the case upon existing law.

People v. Martinez

Martinez concerned a motion for a new trial based upon newly discovered evidence.[38] The requisite elements for such a new trial motion[39] in California were established in 1887.[40] These requirements are as follows: (1) the evidence, and not merely the fact that the evidence is material, must be newly discovered;[41] (2) the evidence must

25. *See infra* notes 170-74 and accompanying text.
26. *Id.*
27. *See infra* notes 38-56 and accompanying text.
28. *See infra* notes 57-70 and accompanying text.
29. *See infra* notes 71-78 and accompanying text.
30. *See infra* notes 79-104 and accompanying text.
31. *See infra* notes 105-53 and accompanying text.
32. *See infra* notes 154-64 and accompanying text.
33. *See infra* notes 170-74 and accompanying text.
34. *See infra* notes 175-88 and accompanying text.
35. *See infra* notes 189-201 and accompanying text.
36. *See infra* notes 202-08 and accompanying text.
37. *See infra* notes 209-17 and accompanying text.
38. People v. Martinez, 36 Cal. 3d 816, 685 P.2d 1203, 205 Cal. Rptr. 852 (1984).
39. Cal. Penal Code §1181(8).
40. *Martinez*, 36 Cal. 3d at 821, 685 P.2d at 1205, 205 Cal. Rptr. at 854.
41. *Id.*

not be merely cumulative;[42] (3) the evidence will render a different result on a retrial of the cause;[43] (4) the party could not with *reasonable diligence* have discovered and produced the evidence at the trial;[44] and (5) the evidence is shown by the best evidence possible.[45] The diligence requirement has become the subject of controversy.

Traditionally, the requirement of attorney diligence has been upheld overwhelmingly in California and nationally.[46] The rationale for the diligence requirement is to encourage attorneys to work vigorously on a case from the beginning instead of relaxing their efforts and relying upon a post trial motion.[47] The term "diligence," however, is relative and incapable of exact definition.[48] The diligence of the defense attorney in marshalling the evidence for trial must be determined in light of the particular circumstances.[49]

In *Martinez*, the defendant was convicted of second degree burglary and moved for a new trial based upon newly discovered evidence.[50] At trial, the case of the prosecution centered on certain physical evidence that placed the defendant at the scene of the crime.[51] Following the conviction, the defense attorney came forward with the testimony of a key witness indicating the evidence might not have been accurate.[52] The trial court denied the new trial motion because the defense attorney had made an error by not exercising the requisite diligence.[53]

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42. *Id.*

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.; see also* CAL. PENAL CODE §1181(8) (defines the standard "when new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial....").

46. *See, e.g.*, B. WITKIN, JUDGMENT AND ATTACK IN TRIAL COURT, §564, *Diligence; see also* People v. Clauson, 275 Cal. App. 2d 699, 704, 80 Cal. Rptr. 475, 479 (1969); People v. Williams, 57 Cal. 2d 263, 273, 368 P.2d 353, 359, 18 Cal. Rptr. 729, 735 (1962); People v. Beard, 46 Cal. 2d 278, 281-82, 294 P.2d 29, 31 (1956). The one case waiving the diligence factor is Cockrell v. State, holding that even though proper diligence had not been met, the conviction should not stand where record discloses the innocence of the defendant. 160 S.W. 343, 345 (Tex. 1913).

47. *Martinez*, 36 Cal. 3d at 825, 685 P.2d at 1208, 205 Cal. Rptr. at 857.

48. People v. Williams, 57 Cal. 2d 263, 273, 368 P.2d 353, 359, 18 Cal. Rptr. 729, 735 (1962).

49. *Id.*

50. *Martinez*, 36 Cal. 3d at 820-21, 685 P.2d at 1204-05, 205 Cal. Rptr. at 853-54; *see* CAL. PENAL CODE §1181(8).

51. The evidence concerned the time a certain drill press had been painted since the palm print of the defendant had been discovered on the press the morning of the burglary. *Martinez*, 36 Cal. 3d at 820-21, 685 P.2d at 1204-05, 205 Cal. Rptr. at 853-54.

52. The witness, a former foreman, testified that the press had been painted on the day or two preceding the burglary. *Id.* Thus, the print could have been placed during the day before the burglary and not necessarily the night of the crime. *Id.*

53. *Id.* at 821, 685 P.2d at 1205, 205 Cal. Rptr. at 854. The foreman was an obvious witness the attorney should have interviewed. *Id.* at 824, 685 P.2d at 1207, 205 Cal. Rptr. at 456.

On appeal, the California Supreme Court reversed the trial court holding.[54] The court held that despite the lack of diligence, a new trial should have been granted.[55] The holding indicated that the errors of the defense attorney should be overlooked and the defendant given another chance if certain requirements are met.[56]

The *Martinez* opinion identifies two requirements to be considered in weighing attorney errors. First, the probability of a different result on a retrial is paramount;[57] if the matter were to be relitigated, the probable verdict must be favorable to the defendant.[58] Otherwise, the attorney's mistake would be harmless error.[59] Second, a miscarriage of justice[60] must result from the enforcement of the particular rule.[61] The conviction of an innocent man is a miscarriage of justice.[62] If both factors are met, the error should be overlooked and the defendant allowed to proceed as if no mistake had occurred.[63] Satisfying these requirements, therefore, results in the waiver of the diligence requirement.[64] The reason for this result is that underlying the policy of the diligence requirement is the more fundamental purpose of determining guilt or innocence.[65] Diligent presentation of a case allows the jury to decide the truth of the matter more accurately.[66] The diligence requirement is designed to ensure justice, but sustaining an

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54. *Id.* at 826-7, 685 P.2d at 1209, 205 Cal. Rptr. at 858.
55. *Id.*
56. *Id.* at 825, 685 P.2d at 1208, 205 Cal. Rptr. at 857.
57 *Id.*
58. *Id.*
59. CAL. PENAL CODE §1404.
60. This phrase is derived from the California Constitution, which states "no judgment shall be set aside, or new trial granted, in any cause. . . for any error as to a matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a *miscarriage of justice.*" CAL. CONST. art. VI, §13 (emphasis added). The amendment indicates the court must examine the evidence and determine if actual injury has occurred. *See* People v. O'Bryan, 165 Cal. 55, 65, 130 P. 1042, 1046 (1913). The phrase has been defined in one line of cases to mean a miscarriage of justice should be declared if the court determines there is a reasonable probability that a result more favorable to the appealing party would have been reached. People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956). *Watson* is not controlling with regard to attorney error, as the cases following *Watson* concern court, not attorney, error. *See, e.g.*, People v. Aho, 152 Cal. App. 3d 658, 662, 199 Cal. Rptr. 671, 673 (1984) (failure to give patterned instruction); People v. Hickok, 198 Cal. App. 2d 442, 447, 17 Cal. Rptr. 875, 878 (1961) (omitted instruction); People v. Rios, 154 Cal. App. 3d 604, 637, 201 Cal. Rptr. 448, 467 (1984) (exclusion of evidence).
61. *Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 825, 685 P.2d at 1208, 205 Cal. Rptr. at 857.
66. *See id.*

erroneous conviction because of lack of diligence does not comport with justice.[67] Thus, if a requirement designed to encourage justice is in fact an impediment to the achievement of justice, the error should be overlooked.[68] Rules should not blind the system to the occasional miscarriage of justice.[69]

Martinez not only provides an exception for the diligence standard but also poses questions about other requirements for attorney action. The diligence element, previously required for proving the need for a new trial, now is waived if a miscarriage of justice would result.[70] The question arises as to whether the *Martinez* holding can be applied to other forms of attorney error, in addition to lack of diligence.

In the interests of justice, if an attorney makes a mistake, the defendant should not always be penalized.[71] This equitable result rests in the nature of the criminal justice system, which allows attorneys to act independently of the defendants they represent. The attorney is the manager[72] of the lawsuit and often wields exclusive control over the process of the case.[73] The attorney often makes decisions and takes actions without the knowledge of the defendant.[74] Since the defendant is not always informed or aware of the necessary requirements of law, responsibility rests with the attorney to satisfy them.[75] If an attorney makes a mistake, however, the defendant suffers.[76] The interests of justice dictate that the unfortunate client should not be held to the consequences of the error.[77] This result can be accomplished by extending the concern in *Martinez* for preventing a miscarriage of justice to other attorney errors.[78] The application of *Martinez* to

67. *Id.* at 826, 685 P.2d at 1208, 205 Cal. Rptr. at 857.
68. *Id.*
69. *Id.* at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.
70. This waiver of the diligence element seems to conflict with California Penal Code §1181(8). The role of the courts, however, is to interpret laws and the *Martinez* court was delineating an exception to the Penal Code. *See Martinez*, 36 Cal.3d 816, 825, 685 P.2d 1203, 1208, 205 Cal. Rptr. 852, 857. *Cf.* CAL. PENAL CODE §1181(8) (new trial motion based upon newly discovered evidence). In addition, all other elements of §1181(8) had been met in *Martinez*. If another element had been in question, the diligence factor might not have been waived. *Martinez*, 36 Cal. 3d at 825, 685 P.2d at 1208, 205 Cal. Rptr. at 857.
71. *Id.* at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.
72. Nelson v. California, 346 F.2d 73, 81 (9th Cir. 1965).
73. Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1269 (1966).
74. *Id.* at 1270. The defense attorney is allocated the responsibility for making most, if not all, of the strategic and tactical decisions concerning the trial of the client's case. Guttenberg, *supra* note 17, at 707. *See id.* at 712 (client is not informed or advised of attorney's actions).
75. Comment, *supra* note 73, at 1269.
76. *Martinez*, 36 Cal. 3d at 825, 685 P.2d at 1208, 205 Cal. Rptr. at 857.
77. *Id.* at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.
78. *Id.*

other forms of attorney error is supported further by the lack of other remedies for the defendant because the traditional remedies of malpractice and habeas corpus are ineffective.

THE INEFFECTIVE MALPRACTICE SUIT

Criminal defendants penalized by attorney error may have a remedy in a civil malpractice suit.[79] This remedy, however, usually is unsuccessful.[80] Many criminal defendants have sued their defense counsel alleging lack of skill or expertise and have been denied relief.[81] One reason for this denial is that courts often have raised a strong presumption of attorney competence[82] and have been hesitant to review the performance of counsel.[83] With few exceptions,[84] criminal defense attorneys have not been held liable to clients for mistakes in the conduct of the case.[85] Courts generally have refused to equate effective assistance with flawless defense.[86] No defendant has a right to a perfect trial.[87] Thus, a criminal defendant has great difficulty establishing a malpractice cause of action.[88]

The agency doctrine also provides a major rationale for the refusal of the courts to grant relief for the errors of defense attorneys.[89] This concept imputes the acts of the attorney, though perhaps incompetent, to the client.[90] Thus, the actions of the attorney become the

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79. R. MALLEN, LEGAL MALPRACTICE 586-87 (1981).

80. *Id.*; Guttenberg, *supra* note 17, at 709. One commentator suggests that the unavailability of a malpractice suit in criminal cases results from either a reluctance to put a price on the wrong done a client when the attorney's errors result in a conviction or from the assumption of the court that the client got what was deserved. L. Mazor, *Power and Responsibility in the Attorney-Client Relation,* 20 STAN. L. REV. 1120, 1134 (1968).

81. Mallen, *supra* note 79, at 585-87. The criminal attorney must possess and exercise knowledge and skills not usually expected of the ordinary civil practitioner. The frequent lack of skill makes legal malpractice all too common. *Id.*

82. Comment, *supra* note 73, at 1276.

83. *Id.* at 1277.

84. *See, e.g.*, Morgan v. Ranson, 95 Cal. App. 3d 664, 669-70, 157 Cal. Rptr. 212, 215 (1979) (reversible error when dismissal based on failure to answer interrogatories that plaintiff never received).

85. D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 255 (1980).

86. Comment, *supra* note 73, at 1277. An attorney's inexperience, lack of preparation, unfamiliarity with procedure, and unwise advice have been held insufficient for a cause of action. *Id.*

87. *Id.*

88. Furthermore, when a client unsuccessfully raises the issue of his attorney's alleged incompetence by appeal or in a habeas corpus proceeding, the client may be precluded from thereafter suing the attorney for malpractice. Meiselman, *supra* note 85, at 259. The client is estopped since the matter already has been raised and answered. *Id.*

89. Mazor, *supra* note 80, at 1129.

90. Comment, *supra* note 73, at 1278. *See also* Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir., 1944), *cert. denied*, 324 U.S. 869 (1945).

actions of the defendant.[91] This imputation creates an almost insurmountable barrier to recovery for a defendant in a malpractice action.[92] Defendants cannot sue for their own mistakes.[93]

In addition to the agency doctrine, the defendant as plaintiff in a civil malpractice suit must overcome other potential barriers to success.[94] The defendant must prove actual innocence of the underlying criminal charge.[95] If the defendant is guilty, the guilt, not the negligence of the attorney, may be considered the proximate cause of the conviction.[96] Guilty defendants deserve their punishment, regardless of attorney errors.[97] The court in such a situation will not allow the defendant to recover.[98]

The defendant also may need to overcome the barrier of collateral estoppel,[99] which may prevent a client from attacking the attorney's performance in a malpractice claim.[100] A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying criminal action is estopped from raising identical issues in a subsequent malpractice action.[101] Thus, defendants who have endeavored to secure relief by claiming ineffectiveness of counsel will be denied a malpractice suit.

Another barrier to a successful malpractice suit is that errors of judgment by the attorney probably are immune from suit for malpractice liability.[102] This immunity extends to decisions within an attorney's professional discretion and to errors in judgment.[103] If the defense attorney claims the mistake was part of a considered plan, no relief will be granted.[104]

The civil remedy of a professional malpractice suit generally is ineffective due to the reluctance of the courts to review attorney effec-

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91. Comment, *supra* note 73, at 1281-82. The agency doctrine has elicited criticism. *See, e.g.*, Comment, *supra* note 73, at 1278-87; Wainwright v. Sykes, 433 U.S. 72, 114 (1977) (Brennan, J., dissenting). The *Tompsett* doctrine, however, has not been overruled. *See, e.g.*, U.S. v. Redfield, 197 F. Supp. 559, 575 (1961).

92. Comment, *supra* note 73, at 1281-82.

93. *Id.*

94. Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 543.

95. *Id.* at 546.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 543.

100. *Id.*

101. *Id.* at 551.

102. *Id.* at 560-61.

103. *Id.*

104. *Id.*

tiveness, the imposition of the agency doctrine and the existence of other potential barriers. The defendant must pursue an alternate remedy. The other traditional remedy of habeas corpus, however, also is not adequate in all circumstances.

Habeas Corpus as an Inadequate Remedy

Habeas corpus provides a general post-conviction remedy for prisoners who are attacking their convictions on a constitutional basis.[105] The writ of habeas corpus is a civil remedy since the civil right of liberty is at stake.[106] The writ was placed in the United States Constitution[107] to secure release from illegal physical confinement.[108] The grant of a writ, however, frustrates the interest of the state in the finality of convictions and interferes with the coherent administration of state criminal procedure.[109] Defendants who repeatedly challenge their decisions force the state to re-open and re-litigate cases previously considered closed.[110] To prevent the disruption of stable judicial procedure, federal courts have imposed certain judicial limitations upon use of the writ.[111]

The first of these judicial limitations is the requirement of exhaustion of state remedies.[112] Prior to seeking a writ of habeas corpus, a defendant must exhaust the direct state and federal appellate remedies.[113] The initial question under the doctrine is whether any state procedures are available by which the petitioner can raise the question sought to be presented in federal court.[114] If an appropriate

105. Comment, *Habeas Corpus—The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice" Standard,* 19 Wake Forest L. Rev. 441 (1983).

106. Ex parte Tom Tong, 108 U.S. 556, 559 (1883) (habeas corpus is remedy for enforcement of civil right of personal liberty).

107. U.S. Const. art. I, §9, cl. 2. The passage of the fourteenth amendment gave rise to the Habeas Corpus Act of 1867. Habeas Corpus Act of 1867, ch 28, 4 Stat. 385. The Act later was codified into the United States Code. 28 U.S.C. §2241 (1949). An extensive review of habeas corpus is beyond the scope of this comment. For more information, *see* Yackle, *supra* note 1, at 4 (1981); J. Cook, Constitutional Right of the Accused 228 (1976).

108. Comment, *Habeas Corpus: A Rule of Timing Evolves Into a Doctrine of Forfeiture —the Wainwright Cause and Actual Prejudice Standard Remains Undefined—Engle v. Isaac,* 26 How. L.J. 1269, 1274 (1983). The writ of habeas corpus is limited to five circumstances, only one of which is relevant here: the defendant is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §2241(3) (1949).

109. Comment, *supra* note 105, at 442. *See also* Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977).

110. Comment, *supra* note 105, at 442.

111. *Id.*

112. Cook, *supra* note 107, at 259.

113. *Id.* at 259-61. The exhaustion requirement may be excused by some courts when the defendant can prove the futility of a state court attempt. *Id.* at 265.

114. Smith v. Sheeter, 402 F. Supp. 624, 626 (S.D. Ohio) (1975).

state remedy is available and the defendant cannot indicate a valid reason for a waiver of the exhaustion requirement,[115] the writ will be refused.[116] Examples of reasons for waiver include imminent infliction of the death penalty and petty offenses.[117]

If the attorney error constitutes a state procedural default, further limitations exist on the writ.[118] In this context, the problem is that the attorney fails to comply with state procedural rules that dictate the method of preserving claims.[119] If a defendant, through an attorney, bypasses a chance to present to the state court a federal question relevant to the power of the state to hold the defendant in custody, further state process has been forfeited.[120] Thus, if a state rule indicates a method to preserve a constitutional claim and the defendant fails to abide by that rule, the claim is lost.[121] Although two recent Supreme Court cases narrow this limitation on relief, a defendant can be denied a remedy if the attorney cannot meet the new requirements.[122]

A. Fay v. Noia

In 1963, the United States Supreme Court modified the treatment of procedural forfeitures that previously had been applied under the requirement of state remedy exhaustion.[123] In *Fay v. Noia*,[124] the Court narrowed the scope of the exhaustion requirement.[125] The Court recognized that in some cases the conduct of the applicant may make the relief sought unavailable.[126] Discretion to deny relief was limited to circumstances in which a petitioner had deliberately bypassed the orderly procedure of the state courts.[127] The Court indicated that the limitation provided by the *Noia* rule was intended to prevent the manipulation or abuse of post-conviction remedies

115. For a list of possible reasons, *see* Cook, *supra* note 107, at 272-73.
116. Ex parte Royall, 116 U.S. 252, 255 (1886); Tinsley v. Anderson, 171 U.S. 101, 105 (1898); Irvin v. Dowd, 359 U.S. 394, 405 (1959).
117. Cook, *supra* note 107, at 272-73.
118. Guttenberg, *supra* note 17, at 619.
119. *Id.*
120. Comment, *supra* note 105, at 442.
121. *Id.*
122. *Wainwright*, 433 U.S. 72 (1963); Fay v. Noia, 372 U.S. 391 (1963).
123. Guttenberg, *supra* note 17, at 620.
124. 372 U.S. 391 (1963).
125. *See* 372 U.S. at 429-38; Guttenberg, *supra* note 17, at 620.
126. 372 U.S. at 438.
127. *Id. See infra* notes 188-93 and accompanying text.

by petitioners.[128] An applicant for a writ, therefore, might be denied relief only if court procedures were bypassed deliberately.[129] The deliberate bypass standard later was dismantled by the Court.[130]

B. *Wainwright v. Sykes*

In the second significant case regarding state procedural defects, *Wainwright v. Sykes*,[131] the Court discredited the *Noia* rule.[132] The Court rejected the sweeping language of *Noia* because the rule would encourage manipulation on the part of defense lawyers.[133] Some attorneys would take their chances on a verdict of guilty in the state court with the intent to raise constitutional claims later.[134] In place of the deliberate bypass standard, the Court substituted a cause and prejudice test.[135] As explained above, a prisoner typically is ineligible for habeas corpus relief if the state procedural default bars the assertion of the claim on appeal.[136] An exception to this rule is made if the petitioner can demonstrate cause for procedural default and prejudice arising from the constitutional defect.[137] The Court emphasized this rule would prevent a miscarriage of justice by allowing the federal constitutional claim of a person who deserves relief.[138] The Court left undefined the meaning of cause and prejudice, but the terms have been clarified substantially by two later cases.[139]

Cause, as defined in *Engle v. Isaac*,[140] means that the defendant must bear the cost of counsel error provided the error does not establish a valid sixth amendment claim.[141] If the error does not constitute a sixth amendment violation, the cause element will be met.[142] In addition, cause is not satisfied by unawareness of a constitutional claim.[143] In other words, ignorance is no defense to a failure to raise

128. Yackle, *supra* note 1, at 309.
129. 372 U.S. at 438.
130. Guttenberg, *supra* note 17, at 621.
131. Wainwright v. Sykes, 433 U.S. 72 (1963).
132. *Wainwright*, 433 U.S. at 89; Guttenberg, *supra* note 17, at 621. The Court underwent a significant change in personnel and philosophies. *Id.*
133. *Wainwright*, 433 U.S. at 89.
134. *Id.*
135. *Id.* at 87, *citing* Francis v. Henderson, 425 U.S. 536 (1976).
136. Comment, *supra* note 105, at 443.
137. *Wainwright*, 433 U.S. at 87; Comment, *supra* note 105, at 443.
138. 433 U.S. at 90-91.
139. *See* Engle v. Isaac, 456 U.S. 107 (1982); U.S. v. Frady, 456 U.S. 152 (1982).
140. 456 U.S. 107 (1982).
141. *Isaac*, 456 U.S. at 134; W. LaFave & J. Israel, 3 Criminal Procedure 349 (1984).
142. *Id.*
143. *Isaac*, 456 U.S. at 134. The Court also indicated that the futility of raising a claim will not suffice to permit a defendant to withhold the constitutional claim. *Id.* at 130.

a constitutional claim in compliance with a state procedural rule.[144]

Prejudice was defined in *United States v. Frady*[145] as requiring the defendant to demonstrate that the alleged errors work to the actual and substantial disadvantage of the defendant.[146] The petitioner must bring forth affirmative evidence of a wrongful conviction.[147] The prejudice must be shown to have affected the entire trial with errors of constitutional dimension.[148] If a defendant cannot meet the cause and prejudice test, habeas corpus relief will be denied.[149]

Thus, the remedy provided by habeas corpus is limited by the requirement of exhaustion of state remedies.[150] If the error is procedural, the remedy is limited further by a need to demonstrate cause and prejudice.[151] Due to these limitations, innocent defendants might be barred from justice. Defendants who cannot secure relief through habeas corpus or a civil malpractice suit need the remedy provided by a miscarriage of justice standard. The situations in which the standard would be applied arise in two general areas.

Types of Attorney Errors

Attorney errors can be divided into two broad categories. In this regard, the major concern is to distinguish between those errors of a constitutional dimension[152] and those that are merely technical.[153] Those errors with constitutional implications are subsumed under the doctrine of habeas corpus.[154] The need for a *Martinez* remedy arises when the defendant cannot satisfy the habeas corpus requirements.[155]

Some mistakes, however, are not based upon the Constitution;[156] rather, they are administrative in nature.[157] An example is a time limit

144. *Id.* at 134.
145. 456 U.S. 152 (1982).
146. *Id.* at 168.
147. *Id.*
148. *Id.*
149. *Wainwright*, 433 U.S. at 87.
150. *See supra* notes 112-17 and accompanying text.
151. *Wainwright*, 433 U.S. at 87.
152. *See supra* notes 105-62 and accompanying text.
153. *See infra* notes 156-62 and accompanying text.
154. *See supra* notes 105-49 and accompanying text.
155. *Id.*
156. *See, e.g.*, People v. Sharp, 7 Cal. 3d 448, 455, 499 P.2d 489, 493, 103 Cal. Rptr. 233, 237, *cert. denied*, 410 U.S. 944 (1972) (indicating the right to waive a constitutional protection is not a right of constitutional dimensions); U.S. v. Timmreck, 441 U.S. 780, 783-84 (1979).
157. The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not an error of the character or magnitude necessary for a writ of habeas corpus. Bowen v. Johnston, 306 U.S. 19, 27 (1939). The error

for filing papers or court appearances; the Constitution does not indicate specific temporal restraints.[158] The remedy provided by habeas corpus is not available for failure to meet these time limits but the defendant still may be injured by attorney error.[159] Since an error of this type normally would prevent the defendant from gaining relief, the "miscarriage of justice" test provided by *Martinez* fulfills the interests of justice.[160] If a miscarriage of justice would result from enforcement of the rule, *Martinez* indicates that the rule should be waived.[161] This standard also would apply to those defendants who could not meet the habeas corpus criteria.[162] An analysis of the miscarriage of justice standard, undefined by the *Martinez* court, demonstrates a need for refinement and limitation.

The miscarriage of justice standard needs to be defined because the phrase alone does not provide guidance to courts. The standard is ambiguous and leaves judges to create definitions.[163] The uncertainty caused by different interpretations would seriously impair the finality component in the dichotomy between finality and justice.[164] Some courts would define the standard very broadly and give the defendant every possible opportunity to correct errors.[165] These repeated attempts would be contrary to the interest of finality,[166] as cases need to be resolved permanently.[167] Thus, to avoid the abuse of the miscarriage of justice standard caused by differing definitions, a limitation should be created. An awareness test is the most effective means of limitation.

Miscarriage of Justice Defined: Awareness

The awareness of the defense attorney is the fairest basis for a standard of review. A tactical and deliberate decision[168] not to follow

is neither jurisdictional nor constitutional and is not a fundamental defect that inherently results in a complete miscarriage of justice. *Id.* The omission is not inconsistent with the rudimentary demands of fair procedure. *Id.*

158. *See, e.g.,* Cal. Rules of Ct. §841 (application for change of venue to be filed at least 10 days before trial date).

159. *Martinez,* 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.

160. *Id.* at 826, 685 P.2d at 1209-10, 205 Cal. Rptr at 857-58.

161. *Id.*

162. *See supra* notes 105-49 and accompanying text.

163. *Martinez,* 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 857.

164. U.S. v. Timmreck, 441 U.S. 780, 784 (1979) (discussion of miscarriage of justice in comparison to finality).

165. *See* generally Yackle, *supra* note 1, at 298 (courts have struggled with the problem of defense errors).

166. U.S. v. Timmreck, 441 U.S. 780, 784 (1979).

167. *Id.*

168. For example, trial counsel, though aware of the diligence requirement, for legitimate

rules does not deserve a waiver of those rules.[169] The attorney merely is attempting to secure a second chance upon appeal.[170] Counsel should not be allowed to make repeated attempts to secure acquittal unless the interests of justice outweigh the demands of finality.[171] If counsel knows of this error at the time the error is committed, the interest in finality takes precedence over the interests of justice.[172] Since this author proposes an awareness standard as the appropriate means to analyze attorney errors, a workable conceptual framework must be established.

"Awareness" is defined as knowledge of the surrounding factual circumstances.[173] Comparing the abstract nature of this term to other suggested standards will be helpful as a guide to understanding the legal concept of awareness. First, awareness will be compared to the "true oversight" test of the *Martinez* concurrence.[174]

According to the *Martinez* concurrence, "true oversight"[175] by the defense attorney should be the determining factor in deciding whether the defendant should be held to the mistake.[176] This factor evidences a concern for distinguishing those errors made inadvertently and those

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tactical reasons may decide not to seek a person's testimony. *Martinez*, 36 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859 (Grodin, J. concurring).

169. *Id.*

170. *See, e.g., id.; see also* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) ("sandbagging" lawyers take their chances on a verdict of not guilty in a state trial court with the intent to raise their client's constitutional claims later in a federal habeas corpus action if their initial gamble does not pay off). *Martinez* indicates, however, that tactical decisions should not be given a second chance. 36 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859. One commentator states that sandbagging might be justified if the evidence of guilt is overwhelming or if greater relief may be obtained by waiting until after the conviction. *See* Guttenberg, *supra* note 17, at 695. Otherwise, a competent defense attorney is unlikely to gamble on a later success. *Id.*

171. *See* U.S. v. Timmreck, 441 U.S. 780, 784 (1979) (discussion of miscarriage of justice in comparison to finality).

172. Finality indicates that "a line must be drawn somewhere;" the absence of finality frustrates deterrence. Comment, *supra* note 3, at 380. *Cf. Martinez*, 36 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859 (tactical errors not given a second chance). A luckless defendant might have a case for ineffectiveness of counsel. *See* Strickland v. Washington, 104 S. Ct. 2052, *reh. den.*, 104 S. Ct. 3562 (1984). *See also* Evitts v. Lucey, 105 S. Ct. 830, 836 (1985) (failure to file proper form is ineffective assistance of counsel). The *Martinez* court specifically refused to consider the ineffective counsel theory on the basis that attorneys should not have to plead incompetence. *Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1208, 205 Cal. Rptr. 857.

173. Isaacs v. U.S., 283 F.2d 587, 590 (1960).

174. 35 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859.

175. Oversight is defined as failure to see or notice; an intentional, careless mistake or omission. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1277 (2nd ed. 1979). *See also* Rath v. Sholty, 199 N.W. 2d 333, 336 (1972) (something overlooked; an omission or error due to inadvertence (lack of attentiveness)).

176. *Martinez*, 36 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859.

carefully selected as a tactical plan.[177] Under this analytical approach, the error must be inadvertent.[178] No amount of deliberation on the part of the attorney is allowed; counsel must be totally unaware of the mistake.[179] Thus, the concurring opinion in *Martinez* states that a miscarriage of justice exists when a defendant is harmed by an error made by an unaware attorney.[180] The state of being unaware, as the corollary to awareness, should be compared to oversight as an aid to analysis.

Unawareness provides a better conceptual framework than oversight because the former term is more inclusive. Unawareness[181] involves a greater degree of mental obliviousness than oversight.[182] Being unaware can entail a total lack of consciousness, while oversight means having been conscious of something at a previous time and now overlooking it.[183] While oversight thus is limited to the "forgotten" sense, unawareness concerns both loss of memory and no consciousness at all. Both forgetting and never knowing need to be recognized by the awareness standard, which allows for any errors not made tactically.[184] Unawareness would entail forgotten rules and points of which one never was cognizant. Since the definition of awareness includes unawareness as a corollary, the awareness standard would seem to be more inclusive and more appropriate than the oversight standard for defining the miscarriage of justice. The awareness standard also must be compared to the *Noia* deliberate bypass standard.

The "deliberate bypass" standard was equated by the *Noia* Court to the *Johnson v. Zerbst*[185] concept of waiver, an intentional relinquishment or abandonment of a known right or privilege.[186] The petitioner thus must make a considered decision to forfeit constitutional rights before the Court will consider those rights bypassed.[187] The underlying premise of the *Noia* case is that an accused should not suffer forfeiture of rights simply because of the inadvertence or

177. *Id.* The defendant must be denied relief if the record shows counsel's omissions resulted from an informed tactical choice. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. "Unaware" is defined as not aware or conscious; without thought. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1989 (2d. ed. 1979).
182. *Compare* "oversight" *supra*, note 175, *with* "unaware" *supra*, note 181.
183. *Id.*
184. *See supra* notes 168-72 and accompanying text.
185. 304 U.S. 458 (1938).
186. *Noia*, 372 U.S. at 439; *Zerbst*, 304 U.S. at 464.
187. 372 U.S. at 439.

negligence of counsel.[188] Rather, the waiver must be a personal decision based upon an understanding of the possible consequences.[189]

This standard of deliberate bypass and the purpose of the *Noia* decision are closely analogous to the miscarriage of justice standard.[190] Although the Court in *Noia* considered the awareness of the defendant, not the counsel, to be paramount, avoiding abuse of the criminal justice system through tactical decisions to avoid procedural requirements is still the primary concern.[191] The deliberate bypass standard is similar to the awareness standard in the necessary degree of consciousness.[192] Awareness is required before an issue can be bypassed and is an element of deliberation.[193] Since "deliberate" is equated to the *Zerbst* standard regarding waiver and awareness can be equated to deliberation, a logical conclusion is that awareness also is related to the *Zerbst* test.[194]

Generally, however, awareness would seem a better standard for miscarriage of justice than the *Zerbst* standard. Awareness appears to be a more basic and fundamental aspect of the miscarriage of justice than the *Zerbst* concept of waiver. One must be aware before one can have an intent to waive a right.[195] Awareness, however, can be related closely to the *Zerbst* standard since awareness is part of knowing and of intent.[196] The *Zerbst* test is understood and quoted universally and might serve as a definition or explanation of awareness on a practical level for attorneys who prefer a familiar guidepost. Thus, awareness has been demonstrated to be a more effective way to define the miscarriage of justice than either oversight, deliberateness, or the *Zerbst* waiver. Moreover, the standard should apply to the defense attorney rather than to the defendant.

The primary reason the awareness of the defense attorney is more appropriate for a miscarriage of justice standard lies in the reality

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188. *Id.*

189. Comment, *supra* note 3, at 384. The Supreme Court has indicated that proper advice is necessary for a voluntary relinquishment. Kercheval v. U.S., 274 U.S. 220, 223 (1927).

190. *Compare Noia*, 372 U.S. at 439, *with Martinez*, 36 Cal. 3d at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.

191. *Id.*

192. "Aware" is defined as knowing; cognizant; informed; conscious. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 131 (2nd ed. 1979). "Deliberate" means carefully thought out or formed. *Id.* at 1277.

193. One must be aware of something before one can think carefully. *See supra* note 192.

194. 304 U.S. 458, 464 (1938).

195. *See supra* notes 192-93 and accompanying text.

196. Daniels v. Berry, 146 S.E. 420, 425 (S.C. 1929) (aware defined as presupposing or requiring actual knowledge).

of the criminal justice system. As discussed above, an attorney functions independently of the defendant.[197] An attorney has no need to inform the defendant of many routine decisions or requirements.[198] Time pressures often do not permit the attorney to discuss all requirements with a client, which makes informing clients impractical.[199] Thus, defendant's awareness realistically cannot be the standard for the miscarriage of justice. The person directly responsible, the attorney, is the appropriate subject to be aware.

An argument can be made that the innocent defendant still is injured by the error of the attorney, even if the error is deliberate and not subject to the miscarriage of justice standard of relief.[200] Although harsh, the interests of finality seem to outweigh the injustice in this situation.[201] The defense attorney, however unskilled, is an agent of the defendant.[202] Defendants cannot always be allowed a second bite at the apple.[203] Hence the miscarriage of justice standard must be defined by attorney awareness. A possible method of applying the miscarriage of justice standard is suggested in the *Martinez* opinion.

First, the *Martinez* court appeared to indicate that this standard is to be applied only to cases in which no other solution is possible[204] and the result would be the conviction of an innocent defendant.[205] The California Supreme Court characterizes the conviction of an innocent person as "unthinkable."[206] The court apparently is willing to waive attorney errors if to do so is the only method available to ensure justice.[207] Thus, part of the miscarriage of justice is that no other solution exists.[208] Once necessity is established, defense counsel would submit a declaration stating the circumstances of the error with

197. Comment, *supra* note 73, at 1269; *see infra* notes 72-4 and accompanying text; *see also Wainwright*, 433 U.S. at 93 (day to day conduct of defense rests with attorney; responsibility for some decisions must rest with attorney and be made, as a practical matter, without consulting the client).

198. Comment, *supra* note 73, at 1269-70.

199. *Id.*

200. *See, e.g.*, People v. Williams, 57 Cal. 2d 263, 275, 368 P.2d 353, 360, 18 Cal. Rptr. 729, 736 (1962) (conviction of innocent man is unthinkable).

201. Comment, *supra* note 3, at 384.

202. Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); *see also* Evitts v. Lucey, 105 S. Ct. 830, 844 (1985) (Burger, C.J., dissenting).

203. *Martinez*, 36 Cal. 3d at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859.

204. *Id.* at 826, 685 P.2d at 1209, 205 Cal. Rptr. at 858.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

particularity.[209] This declaration would include the fact that the attorney was unaware.[210] The district attorney then would respond with evidence and argument that the failure stemmed from a competent tactical decision.[211] The adversary system would ensure the accuracy of the declaration.[212] This method provides a practical system of incorporating the awareness of an attorney into the miscarriage of justice standard and using the standard in court.

CONCLUSION

Competition between the forces of justice and finality is clearly demonstrated in the case of attorney errors. Interests of justice dictate that innocent defendants should not be punished for their attorney's mistakes. Yet, concerns of finality need to be recognized to provide stability and certainty in the criminal justice system. This dilemma is resolved by the *Martinez* case, which allows innocent defendants relief from attorney errors if a miscarriage of justice would result from conviction of an innocent defendant. This author has proposed an attorney awareness test to define the miscarriage of justice standard. This test is met if the defense attorney is unaware of the error made.

The miscarriage of justice standard is necessary because other traditional remedies of a defendant, malpractice or habeas corpus, are inadequate. Awareness has been shown to be a better, though analogous, test of miscarriage of justice than the *Zerbst* standard of knowing and intelligent waiver or the "true oversight" test of the *Martinez* concurrence. A practical method of using the miscarriage of justice standard has been suggested based upon necessity and the adversary system. Thus the conflict between the court's need to provide justice and an efficient criminal justice system can be met by emphasizing the mental requirement of the attorney's awareness.

Kristen Hegge

209. *Id.* at 828, 685 P.2d at 1210, 205 Cal. Rptr. at 859.
210. *Id.*
211. *Id.*
212. *Id.*