The Right to Counsel in Collateral, Post-Conviction Proceedings

Daniel Givelber
THE RIGHT TO COUNSEL IN COLLATERAL, POST-CONVICTION PROCEEDINGS

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I. INTRODUCTION

Hornbook constitutional law tells us that the state has no obligation to provide counsel to a defendant beyond his first appeal as of right.¹ The 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.² The Court also has rejected the argument that the Eighth Amendment requires that the right to an attorney attach to post-conviction proceedings specifically in capital cases.³ Without resolving the issue, the Court has acknowledged the possibility that there may be a limited right to counsel if a particular constitutional claim can be raised only in post-conviction proceedings.⁴ Despite their apparently definitive quality, none of the three cases addressing these issues involved a defendant who actually had gone through a post-conviction collateral proceeding unrepresented.⁵

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1. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 29.03[c], at 521 (2d ed. 1997) (discussing the "no-right-to-counsel principle" in discretionary appeals, state habeas corpus proceedings, and petitions for certiorari).

2. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (noting that the Court has "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions" because "the right to appointed counsel extends to the first appeal of right, and no further" (citing Johnson v. Avery, 393 U.S. 483, 488 (1969))).

3. See Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) (asserting that the protections afforded by the Eighth Amendment during trial are "sufficient to assure the reliability of the process by which the death penalty is imposed").

4. See Coleman v. Thompson, 501 U.S. 722, 755 (1991) (discussing the possibility of "an exception to the rule of Finley and Giarratano in those instances where state collateral review is the first forum in which a prisoner can present a challenge to his conviction," but refusing to resolve the question because the defendant's claims were addressed in the state habeas proceeding).

5. See id. at 755 (noting that the petitioner was represented in state habeas proceedings, but that he sought to use the attorney's error in those proceedings as cause for federal review); Murray, 492 U.S. at 14 (Kennedy, J., concurring) (providing the deciding vote against a claim by Virginia death row inmates that the Constitution requires counsel in post-conviction proceedings, but explicitly noting that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings"); Finley, 481 U.S. at 553, 559 (noting that the petitioner was represented in her post-convic-
More recently, the Supreme Court suggested a different approach to the requirements of due process. In *M.L.B. v. S.L.J.*, it held that the state could not dismiss an appeal of a termination of parental rights on the ground that the litigant had failed to pay a record preparation fee that she was unable to afford: "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'" If the importance of the interest at stake can require the state to waive fees, so as to open access to a process that the state is not constitutionally required to provide to all regardless of ability to pay, then the interest in one's own life would appear to demand at least as much.

Indeed, recently the Mississippi Supreme Court heard a death row prisoner's motion for appointment of counsel and payment of reasonable litigation expenses in state post-conviction proceedings under Mississippi's Uniform Post-Conviction Collateral Relief Act (UPCCRA). The prisoner was able to secure review of his motion without actually having to conduct a post-conviction hearing unaided by counsel. The court held that "a death row inmate[ ] is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts." Comparing the parental rights at issue in *M.L.B.* to the rights at stake in a capital post-conviction proceeding, the court reasoned that "[a]ccess to equal justice is an even greater interest where the State seeks to impose the penalty of death." The Jackson court noted that, unlike the situation that pertained in Virginia when *Murray v. Giarratano* was decided, "[i]n Mississippi, repeatedly, since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers."

Although the Supreme Court of Mississippi granted Jackson's motion on the basis of *M.L.B.*, the latter case concerned formal access to courts—the payment of a record preparation fee that an indigent mother was unable to afford. By contrast, Jackson concerned effective
access to courts. In the view of the Supreme Court of Mississippi, failing to provide counsel in state post-conviction proceedings for death row inmates:

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 confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the UPCCRA. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

One can sympathize with the Mississippi Supreme Court's view that an individual's interest in the continuation of her life is at least as weighty as a parent's interest in preserving access to her children. One can also predict that the Supreme Court of the United States is unlikely to follow where reason led the Mississippi Supreme Court. This unlikelihood is not due to an error in the Mississippi court's reasoning, but to its consequences. The problems are doctrinal and practical.

Doctrinally, the Court rejects the idea that process is still due a defendant who has been fairly convicted and sentenced. In the Court's view, while the defendant is entitled to counsel and an adversary trial before he can be convicted, this is the limit of the process that he is actually due. Because the state need not provide any appellate mechanism at all, it has no obligation to provide an attorney

13. Cf. Brad Snyder, Note, 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, 2213 (1998) (arguing that "the Court should use M.L.B., the fundamental right of access to the criminal process [as set forth in Griffin and its progeny], and wealth-based disparate impact theory to shift the current state of equal protection law so as to provide counsel at state postconviction review for indigent death row inmates").

14. Jackson, 732 So. 2d at 190. But see Gibson v. Turpin, 513 S.E.2d 186, 190 (Ga. 1999) (holding that "[n]either the federal nor Georgia constitutions require the appointment of a lawyer for a death-row inmate to have meaningful access to the courts upon habeas corpus").

15. See Ross v. Moffitt, 417 U.S. 600, 610-11 (1974) (determining that a state need not provide an indigent criminal defendant with counsel on appeal because, by contrast to a criminal trial, in which the right to counsel is fundamental, due process does not require a state to "provide any appeal at all" (citing McKane v. Durston, 153 U.S. 684 (1894))).

16. Id. at 611.

17. See McKane, 153 U.S. at 687 (holding that the decision to provide appellate review "is wholly within the discretion of the State"). Of course, since McKane, the Court has not been faced with a case in which a state actually denied any appellate process following a
for such a proceeding. Although anti-discrimination considerations blunt the force of this logic to the extent that a defendant is entitled to legal representation for the first appeal as of right, the Court has established that fundamental fairness does not require that a defendant be able to challenge the validity of his conviction.

This remarkably sanguine view of the fairness of the criminal trial process is one which has commended itself to no jurisdiction, state or federal. The right to appeal is ubiquitous and increasing. For example, every state employing capital punishment provides for an appeal as of right to the highest court of the state in capital cases. There is an odd dissonance between the Court's apparent satisfaction with the accuracy and appropriateness of the result of a trial and the universal perception that we ought not imprison someone, much less execute him, unless an appellate court has examined alleged errors.

criminal conviction. Nor was it faced with such a situation in McKane itself. See id. at 685-86 (noting that the defendant was allowed to appeal to the New York Supreme Court and that the issue concerned whether he was entitled to bail pending appeal). Nonetheless, the discretionary character of the appellate process is an oft repeated truism about constitutional criminal procedure. See generally Marc M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 UCLA L. Rev. 503 (1992) (inviting review of the current status of the constitutional right to a criminal appeal by examining three views of due process).

18. See Douglas v. California, 372 U.S. 353, 356-58 (1963) (holding that the Fourteenth Amendment requires that an indigent criminal defendant receive the benefit of counsel when a state statute grants a first appeal from a criminal conviction as a matter of right); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion) (determining that the Due Process and Equal Protection Clauses require states to provide indigent criminal defendants with transcripts of their trial if a transcript is a prerequisite for an appeal).

19. See supra note 17; see also Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals." (citing Wainwright v. Torna, 455 U.S. 586 (1982); Ross v. Moffitt, 417 U.S. 600 (1974))).

20. But see Arkin, supra note 17, at 508-09 (arguing that, in an effort to manage overcrowded court dockets, some courts and commentators are proposing to curtail the right to a first appeal).

21. See Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329, 354-55 (1995) (noting that, while it is unclear whether judicial review of a death sentence is required under Supreme Court decisions, "[m]ost states provide an automatic appeal to the highest appellate court in the state," and that "a few states also provide an appeal as of right to an intermediate appellate court").

22. The Supreme Court has never been confronted with a case involving a state criminal process that did not provide any possibility of review. The Court first articulated the proposition that states need not provide any appellate review in 1894:

   An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case . . . was not at common law and is not now a necessary element of due process of law.

McKane, 153 U.S. at 687. This proposition, however, is not the square holding of the case, because McKane considered only the claim that the Privileges and Immunities Clause re-
On a practical level, the Court has been concerned, most immediately, about the effect of recognizing the right to counsel for such standard post-conviction proceedings as a petition for certiorari. One may presume that the Court does not want to undertake the responsibility of securing counsel for the approximately 5000 in forma pauperis petitions filed annually. And what would the obligation mean for the states? Would they be required to provide counsel for every person seeking review by the state supreme court of an affirmance at the intermediate appellate court level, or for every person seeking collateral, post-conviction relief?

Attempting to limit the right to counsel only to those who are facing particularly severe penalties would reintroduce the difficulties that characterized Betts v. Brady. Limiting this right to defendants who face death would take seriously the Eighth Amendment prohibition against arbitrariness in capital cases, but the application of this right even to these cases would open the possibility of a doctrinal expansion that the current Court seems unlikely to endorse. For example, if more serious cases call for more resources, the Court would required New York to follow the practice of most other states, which allowed a defendant convicted of a criminal charge other than murder to post bail pending appeal. Id. The Court rejected this argument on the ground that an appeal is not a matter of right. Id. This proposition continues to be cited more recently. See, e.g., Ross, 417 U.S. at 611 ("[i]t is clear that the State need not provide any appeal at all." (citing McKane, 153 U.S. 684)). While this is not the place for an extended analysis of McKane, at a minimum the Court's continued insistence that contemporary post-conviction criminal procedure exceeds the requirements of the Constitution requires more support than dicta from a century-old precedent that did not address the situation of a state that had denied the right to appeal. See generally Arkin, supra note 17 (providing a comprehensive analysis of these issues).

23. Cf. Vick, supra note 21, at 416 (noting that "[w]ith the ascent to the federal bench of conservatives sympathetic to public impatience with delays carrying out death sentences, the federal courts have been increasingly unreceptive to habeas claims" (footnote omitted)).


25. 316 U.S. 455, 473 (1942) (holding that the Due Process Clause of the Fourteenth Amendment does not grant an indigent defendant the right to counsel unless there is a finding that special circumstances require such representation to ensure fundamental fairness), overruled by Gideon v. Wainwright, 372 U.S. 335 (1963).

26. See Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (reversing death sentences on Eighth Amendment grounds); id. at 306, 308 (Stewart, J., concurring) (noting that, in light of the unique nature of the death penalty, it violates the Eighth Amendment for this penalty to "be so wantonly and so freakishly imposed"); Vick, supra note 21, at 340-56 (discussing the Supreme Court's Eighth Amendment jurisprudence since Furman, which has established procedural and substantive protections in order to reduce arbitrariness in capital cases).
need to reconsider its decision in *United States v. Cronic,*\(^{27}\) which rejected per se approaches to ineffective assistance of counsel claims.\(^{28}\)

The other major difficulty with recognizing a constitutional right to an attorney at state post-conviction proceedings is that the Court has chosen to achieve finality by limiting those situations in which a defendant can raise in federal habeas a claim that was not fully adjudicated in state court to instances where counsel’s failure to raise the claim was constitutionally inadequate.\(^{29}\) Counsel can only be *constitutionally* inadequate, however, if the Constitution requires that the defendant be represented at a particular proceeding.\(^{30}\) A court determined to limit post-conviction proceedings in this way is unlikely to expand the right to counsel to new proceedings, precisely because it is through claims of ineffectiveness of counsel that a litigant is able to perpetuate post-conviction proceedings.\(^{31}\)

Even if the Court were prepared to acknowledge a constitutional right to counsel in collateral proceedings, what would this give us? A lawyer who is constitutionally ineffective under *Strickland’s* limp stan-

\(^{27}\) 466 U.S. 648 (1984).

\(^{28}\) In *Cronic,* the trial court appointed a "young lawyer with a real estate practice to represent" the defendant, who had been indicted on complex mail fraud charges. *Id.* at 649. The United States Court of Appeals for the Tenth Circuit reversed the conviction, not because it found that his lawyer's "actual performance had prejudiced the defense," *id.* at 650, but because it inferred ineffective assistance of counsel in light of the surrounding circumstances, including: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. *Id.* at 652. Rejecting this inferential approach, the Supreme Court held that, upon remand, the defendant could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.* at 666.

For a state supreme court's similar rejection of a per se approach to due process claims, see *Ex parte Grayson,* 479 So. 2d 76, 79-80 (Ala. 1985) (holding that Alabama’s statutory limit of $1000 compensation for attorneys appointed to represent indigent defendants does not violate a defendant’s due process and equal protection rights in a capital case). See also *Ex parte Smith,* 698 So. 2d 219, 224 (Ala.) (noting that the $1000 cap applies only to "fees for an attorney’s out-of-court work" and that counsel may be entitled to certain other out-of-court expenses), *cert. denied,* 522 U.S. 957 (1997).

\(^{29}\) *See* Coleman v. Thompson, 501 U.S. 722, 754 (1991) (noting that, when the state is obligated to provide competent counsel, a default due to the denial of effective assistance of counsel "as a constitutional matter" must be imputed to the state, so that a petitioner may raise her claim in a federal habeas proceeding).

\(^{30}\) See *id.* at 757 ("Because [defendant] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [defendant’s] claims in state court cannot constitute cause to excuse the default in federal habeas.").

\(^{31}\) *See* Strickland v. Washington, 466 U.S. 668, 687-98 (1984) (noting that the prisoner in this case sought collateral relief, after conviction, on the ground of ineffective assistance of counsel at a capital sentencing hearing and setting forth the standard for determining ineffective assistance).
dard may be no better than no lawyer at all. One can imagine situations in which the presence of a lawyer might be an actual detriment because it persuades the reviewing body—a commutation panel, for instance—that the defendant’s legal rights have been assiduously advanced and fairly considered. There is a genuine danger that recognizing a constitutional right to counsel in post-conviction proceedings may actually lower the quality of such representation, while protracting proceedings with the consequent diminution of a reviewing board’s sympathy for the defendant and his cause.

One might ask, then, why we ought to discuss a putative right that is so unlikely to be acknowledged by the highest court in the land. One answer, proposed by this Essay, is that effective counsel at post-conviction proceedings is essential to realizing the fundamental tenet of our criminal law—that an accused be tried, convicted, and sentenced according to due process of law. Even if the Supreme Court is reluctant to acknowledge this right because of the (in its view) undesirable consequences of such an acknowledgment, it is vital that the rest of us—the bar, the state judiciary, the academy—understand that, at a minimum, the nature of contemporary capital litigation requires effective counsel at post-conviction review in order to guarantee our most basic right of constitutional criminal procedure: the right to adversarial testing of the questions of guilt and death.

The classic understanding of what due process requires is inadequate to deal with the reality of contemporary capital litigation. The Supreme Court itself brought about this inadequacy by deciding that arbitrary and capricious capital sentencing violated the Eighth Amendment. Whatever else the Court achieved through Furman, it

32. See William S. Geimer, A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) (arguing that “Strickland has been roundly and properly criticized for fostering tolerance of abysmal lawyering”).

33. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring that an accused indigent be provided counsel at a criminal trial because “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”).

34. See Strickland, 466 U.S. at 685 (discussing the “crucial role” of counsel in the adversarial system and noting that “a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal”); cf. Vick, supra note 21, at 341 n.49 (noting that “the distinctions between capital and non-capital punishments traditionally have been invoked to justify greater procedural and substantive protections for capital defendants”).

35. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (reversing death sentences on the ground that they violated the Eighth Amendment); id. at 256 (Douglas, J., concurring) (agreeing with this result based on the arbitrary and selective application of the penalty); id. at 291 (Brennan, J., concurring) (agreeing with this result based on the
established that the decision between life and death should be attended by a level of procedural and substantive regularity that it previously had insisted upon only in relation to the decision concerning guilt. Although Furman addressed the constitutionality of the death penalty in light of the Eighth Amendment, one may discern in it an implicit due process standard for evaluating the application of this penalty. In the previous case of McGautha v. California, the Court held that it is not unconstitutional to commit "to the untrammeled discretion of the jury the power to pronounce life or death in capital cases." The concurring opinions in Furman found that the death sentences in the cases at issue violated the Eighth Amendment because they were arbitrarily applied. Thus, Furman implicitly overrules McGautha's holding that the death sentence may be imposed by juries without any limit to their discretion. In this light, Furman teaches that the defendant is entitled to a reasonable level of due process with respect to the decision between life and death.

It is one thing to articulate a due process standard when the question is how to determine the historical fact of guilt or innocence, but quite another to define the standard when the question is "what should we do with the killer"? We have had centuries of experience trying to answer the first question and twenty-five years attempting to

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Eighth Amendment's proscription against the arbitrary infliction of severe punishment); id. at 313 (White, J., concurring) (agreeing with this result and pointing to the infrequent and arbitrary nature of the application of the death sentence).

36. See California v. Ramos, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").


38. Id. at 207. But cf. id. at 202-06 (noting, despite the absence of a federal constitutional violation, the impossibility of achieving meaningful regularity in the imposition of capital punishment).

39. See Furman, 408 U.S. at 248 n. 11 (Douglas, J., concurring) (pointing to the defect of arbitrariness as the common strand among the concurring opinions).

40. See id. (noting that "the Due Process Clause . . . would render unconstitutional 'capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice'" (alteration in original) (quoting McGautha, 402 U.S. at 248 (Brennan, J., dissenting))).

41. See id. at 257 (asserting that discretionary death penalty statutes "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments"); id. at 293 (Brennan, J., concurring) (arguing that the low number of executions carried out every year leads to the "conclusion . . . that [the death penalty] is being inflicted arbitrarily"); id. at 310 (White, J., concurring) (arguing that the "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").
answer the second. Whatever one thinks of it, we are committed to the notion that the adversary system produces as satisfactory answers to the historical question of whether the defendant committed the crime as we are likely to get. With respect to determining historical fact, the important question is whether the proceeding has been adversarial in a meaningful sense of that term. But with respect to the life or death decision, no consensus has developed that even a genuine adversary system produces as accurate a set of conclusions regarding that decision as any system that government is likely to devise.

II. THE ADVERSARY SYSTEM, TRUTH AND INNOCENCE

Despite its lineage, there is considerable reason to doubt the notion that a single adversarial proceeding to determine historical fact provides an accused with all the process he deserves. This is particularly true if we value acquitting the innocent first among the purposes of the criminal process. Our contemporary criminal process provides little reason to assume that adversary criminal trials will reliably acquit those who are in fact innocent.

First, we believe that to be arrested, charged, and put on trial is to be guilty. While we honor the adversary system as our means of determining historical fact, we do not really believe that this is the institution that answers the question of who committed the crime. The police, with some pruning by the prosecutor, do that work. Trials are there to make sure that the state actually can demonstrate publicly that the defendant did it, not to engage in an open-ended historical inquiry. While both of these assumptions—that the police and prosecutor accurately determine historical fact and that an adversary trial provides an effective check on the work of the police and prosecu-


43. See Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 Rutgers L. Rev. 1317, 1372-75 (1997) (offering reasons to doubt the adequacy of the adversarial process).

44. See Herbert L. Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1, 9-13, 18-23 (1964) (discussing the competing values of the criminal process, efficiency in controlling crime, and due process, which values protecting the “factually innocent”).

45. See generally Givelber, supra note 43, at 1328-34.

46. See id. at 1329-30 (discussing the “core belief shared by virtually all personnel who work within the criminal justice system that defendants formally accused of crime are guilty”).

47. See id. at 1329 (asserting that an “administrative approach to the guilt determination process” pervades the current state of criminal law).
tor—are open to question, together they justify the existing system. In essence, then, due process demands that there be a testing of the state's case that appears adversarial.\textsuperscript{48} Due process places no obligation on the state beyond providing the fact finder with evidence which, if believed, can support a conclusion of guilt. There is no requirement that the state pursue evidence of innocence as vigorously as it searches for evidence of guilt,\textsuperscript{49} or even that the state preserve evidence that the defendant might use to establish her innocence.\textsuperscript{50} Instead, we have the requirement that a minimally competent lawyer mount a modest challenge to the state's evidence.\textsuperscript{51} It does not matter whether the lawyer does not do much for the defendant because we know that the defendant did it—otherwise he or she would not be on trial.\textsuperscript{52}

Indeed, the very certainty that the defendant did it permits the Court to call for competence on the one hand and ignore the lack of it on the other. The lax prejudice prong of \textit{Strickland}\textsuperscript{53} becomes little more than a requirement that the police and prosecutor did their jobs by selecting the "right" perpetrator.\textsuperscript{54} When courts employ "lack of prejudice" as the reason for denying a claim of ineffective assistance of counsel, they are saying that there is no need for adversarial testing because the police and prosecutor appear to have done a competent job.\textsuperscript{55}

\textsuperscript{48} \textit{See id.} at 1332 (describing one view of the adversary system as a system in which "clever advocates can free a guilty person by outperforming adversaries in front of a passive factfinder").

\textsuperscript{49} \textit{Cf. Ex parte} Brandley, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (en banc) (identifying the inadequacy of an investigation as the basis for granting post-conviction relief in a rare case).

\textsuperscript{50} \textit{See Arizona v. Youngblood}, 488 U.S. 51, 58 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

\textsuperscript{51} \textit{See Strickland v. Washington}, 466 U.S. 686, 687-88 (1984) (noting that an attorney "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" (citing \textit{Powell v. Alabama}, 287 U.S. 45, 68-69 (1932))).

\textsuperscript{52} \textit{See supra} notes 46-47 and accompanying text.

\textsuperscript{53} \textit{See Strickland}, 466 U.S. at 687, 691-96 (requiring, as part of an ineffective assistance of counsel claim, that defendant prove affirmatively that her counsel's errors prejudiced her by being "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

\textsuperscript{54} \textit{See generally} Donald A. Dripps, \textit{Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard}, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) (arguing that \textit{Strickland}'s prejudice standard is too narrow and inadequately addresses "the fairness of the proceedings").

\textsuperscript{55} \textit{Cf. id.} at 284 (arguing that "ineffective assistance is easily alleged but almost impossible to prove").
Appearances are central, of course, because whether the police and prosecutor have done a competent job depends upon an evaluation of the evidence which they have gathered and disclosed. It cannot rest upon whatever they know but do not disclose because a reviewing court cannot know what has never been revealed. The adversary system pushes counsel for each side to withhold information helpful to the other side. In civil litigation, we give each side the right to demand information from the opposition as the approach most likely to ferret out the truth. On the criminal side, however, we do no such thing. Instead, we rely on the prosecutor's rectitude to insure that the defendant will receive exculpatory information. The assumption that a prosecutor can believe the defendant to be guilty and want him to be executed, yet still actively assist the defendant to undermine the prosecutor's case, is as noble as it is misguided. The assumption denies the core reality of an advocate's participation in the adversary system and ignores the systemic assumption that the defendant is guilty to begin with.

Complementing what the prosecutor or police know and do not disclose is information that neither the state nor the defense counsel ever discovers. At the guilt phase, this category of information represents a particular problem for those who had nothing to do with the crime for which they are on trial. While no one knows the size of this group, its importance cannot be overstated. Within the limits of practical human ingenuity, our system is supposed to come as close as possible to guaranteeing that the innocent will be acquitted. In order to achieve this result when the state has mistakenly charged an innocent person, the system requires an actively engaged competent defense lawyer who takes her client's claims of innocence seriously. We cannot assume that the state's case against an innocent person will

56. See Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 5.2, at 228 (3d ed. 1985) (noting ways in which discovery serves a truth-finding function).
57. See Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (rejecting the "notion that a 'prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel'" (quoting United States v. Agurs, 427 U.S. 97, 111 (1976))).
58. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").
59. Cf Agurs, 427 U.S. at 110 (noting that the "attorney for the sovereign must prosecute the accused with earnestness and vigor").
60. But see Packer, supra note 44, at 10 (discussing the "attention [to] be paid to the efficiency with which the criminal process operates to . . . determine guilt" as one of the two values of the criminal process).
61. See Givelber, supra note 43, at 1375-76 (discussing some systematic obstacles to achieving this requirement).
necessarily appear weaker than its case against a guilty one. The working presumption is that the defendant is guilty; when this presumption attaches itself to a credible prima facie case, an innocent defendant will be convicted unless the defense gives the jury reason to think otherwise.

These flaws are unlikely to be exposed even by a competent defense lawyer at trial, however, because they relate to information never revealed to or discovered by the defendant; if it occurs at all, exposure will take the form of a "missing witness" instruction and a closing argument pointing to the state's omission. There will be no presentation of the unrevealed or unknown evidence to the jury. When the lawyer's performance is actually incompetent the chances are quite remote that the jury even will learn that there is an alternative scenario that points to innocence. The only process that can aid the actually innocent defendant is one which allows for a post-trial inquiry into both the evidence that was known but not disclosed and evidence that was unknown and exculpatory. Indeed, states acknowledge the possibility that trial outcomes can be wrong through the institution of a motion for a new trial based on newly discovered evidence.

If exonerating the innocent represents a significant goal of our system of criminal procedure, this process must provide some means for evaluating whether the defendant was competently and adequately represented at trial, so that an adversarial determination of guilt indeed occurred. This process must also provide a means for determining whether there was exculpatory information that was withheld from

62. See Bob Herbert, In America: Justice, at Long Last, N.Y. TIMES, Oct. 29, 1998, at A81, available in Lexis, News Library, Nyt File (stating, on the exoneration of Jeffrey Blake eight years after being convicted for murder on the basis of the subsequently recanted testimony of a highly unreliable alleged eyewitness, "The thing that scares the hell out of the better lawyers—and I like to think I was one of them—is representing someone who is innocent" (internal quotation marks omitted) (quoting Charles Hynes, District Attorney for Brooklyn, New York, and former defense attorney)).

63. See Givelber, supra note 43, at 1374 (discussing the incompleteness of police investigations and reports, and noting that "the defendant in the adversary system may fail to hold the prosecution accountable for omissions and incomplete explanations because the defense may not be aware that problems exist").

64. See Herrera v. Collins, 506 U.S. 390, 409-11 (1993) (discussing motions for new trials based on newly discovered evidence at the state level and the time limits applicable to these motions). Herrera did not concern a motion for a new trial, but instead a petition for federal habeas relief based on the "actual innocence" of the prisoner. See id. at 395-98. The Court noted that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 404. Despite the Court's limitation on using "actual innocence" as a substantive basis for habeas relief, the universality at the state level of a motion for a new trial suggests a recognition that a trial's outcome is not always factually accurate.
the fact finder. While other arrangements are conceivable, the typical response of states to these concerns is to provide for post-conviction, collateral proceedings in which these issues can be raised.\textsuperscript{65} Without such proceedings, we can never rest easy that the defendant actually received a true adversarial testing of basic issues of historical fact. Nor can we be confident that the fact finder was exposed to all the known relevant evidence.\textsuperscript{66}

III. THE ADVERSARY SYSTEM AND SENTENCING

The sentencing phase of the capital criminal trial requires the development of a different type of information. There is no view of the police function, no matter how expansive, which encompasses collecting information that suggests that a guilty defendant ought not be executed. To the extent that the state has traditionally taken responsibility for gathering information relevant to sentencing, this work has been done by probation officers reporting to the court. In most capital states, a pre-sentence report is unlikely to be prepared because it is the jury rather than the judge who decides the sentence.\textsuperscript{67} In states that assign the sentencing authority to the judge and use a pre-sentence report prepared by a probation officer, that report must be disclosed in a capital case.\textsuperscript{68} As with any state-conducted investigation, however, what is not disclosed to the judge need not be disclosed to the accused unless probation officers in capital cases are subject to the


\textsuperscript{66} Cf. Dripps, supra note 54, at 278-79 (arguing that in a collateral proceeding, "a showing of ineffective assistance [at trial] is, without more, proof of an unfair trial"). If we cannot determine the actual impact of counsel's performance through a rigorous post-trial analysis, we certainly cannot expect that a trial judge during the trial will be in a position to make any judgment about the adequacy of the representation unfolding in front of him. Moreover, the only time that ineffectiveness will be raised at trial is when the defendant personally objects to what is transpiring, because it is unlikely that a trial lawyer will object to his own performance as it unfolds.

\textsuperscript{67} See Michael Mello, \textit{Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury}, 30 B.C. L. REV. 283, 284 nn.1-3 (1989) (noting that 29 jurisdictions allow a death sentence only if the jury votes for death, that four jurisdictions impose this sentence by the court alone, and that the remaining jurisdictions involve some interplay between judge and jury).

\textsuperscript{68} See Gardner v. Florida, 430 U.S. 349, 361 (1977) (plurality opinion) (asserting that "full disclosure of the basis for the death sentence" is required, including a pre-sentence report); id. at 364 (White, J., concurring) (agreeing with the result on the ground that the Eighth Amendment prohibits consideration of "secret information" to which the defendant is unable to respond).
requirements of *Brady v. Maryland*. Because the notion of exculpatory evidence does not have much meaning with respect to a defendant already adjudicated guilty, the line of analysis developed in *Brady* and its progeny is unlikely to be of much assistance to the defense in a sentencing context.

With respect to capital sentencing, then, it is the defendant, rather than the state, who has the practical obligation to identify and produce evidence pointing towards leniency. The defendant must also persuade the jury to show leniency. The fairness of putting the defendant to proof here is open to question. While the defendant surely knows far more than the state about his own life and how he has lived it, this does not mean that the defendant—or his lawyer—will necessarily recognize what life experiences constitute mitigating facts, or be in a position to present the evidence effectively. In view of the limited resources under which the defense in capital cases typically operates, defense lawyers frequently confront the choice between focusing on guilt or focusing on sentencing because focusing on both may appear (and be) overwhelming.

69. 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

70. Cf. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (discussing the materiality standard for what evidence must be disclosed to the defense under *United States v. Bagley*, 473 U.S. 667 (1985), and noting that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal"); *Bagley*, 473 U.S. at 676-78 (holding that while impeachment evidence falls within the *Brady* rule, nondisclosure of impeachment evidence constitutes constitutional error and mandates an automatic reversal “only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial”).

71. While the burden of showing the applicability of the death sentence is placed upon the prosecution formally, the reality is that the prosecution typically has no additional evidentiary burden at this point. The state’s case for death frequently consists of nothing more than pointing out to the jury that the evidence already introduced establishes the required aggravating circumstance and urging the jury to think about the victim as it decides whether the defendant should live.

72. See Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 50 (1997) (discussing the wide range of evidence that a defendant may present at the sentencing phase, including “his age, mental impairment, or good character and deeds” (footnotes omitted)); Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 2 (1986) (noting that “[t]he federal reports are filled with stories of counsel who presented no evidence in mitigation of their client’s sentences because they did not know what to offer or how to offer it, or had not read the state’s sentencing statute” (footnotes omitted)); see also Vick, *supra* note 21, at 403 ("Those most familiar with the operation of the capital punishment in the United States have frequently expressed dismay at the surprising number of cases in which little or no evidence is presented by the defense during sentencing proceedings.").
The sentencing phase effectively shifts the burden of production and persuasion to the defendant. Because the sentencing phase rarely involves any actual dispute over whether an aggravating circumstance exists, the issue becomes whether or not the jury should show the accused mercy. The prosecution is generally entitled to rely on evidence at the guilt phase to establish the existence of an aggravating circumstance at the sentencing phase. It is the defendant who bears the burden of producing evidence of mitigating circumstances. Almost inevitably, this burden requires the defendant to produce evidence beyond that which was presented at the guilt phase. The law provides little effective guidance as to what kind of evidence will persuade a jury to return a life sentence. Although most statutes identify factors for the jury to consider, the Supreme Court has made it clear that a state cannot limit those factors that a juror can consider to be mitigating, so that, realistically, there are no limits to what a defendant might choose to put before a jury. While many statutes call for the question of life or death to be decided by “weighing” aggravating against mitigating factors, in practice this approach is as standardless as Justice Harlan suggested it was in McGautha. While some lawyers

73. See supra notes 71-72 and accompanying text.

74. Cf. James R. Acker & C.S. Lanier, “Parsing This Lexicon of Death”: Aggravating Factors in Capital Sentencing Statutes, 30 CRIM. L. BULL. 107, 111 (1994) (noting that “[aggravating] sentencing factors [may be organized] according to the characteristics of the offender, the manner in which the crime was committed, offender's motive for the crime, and the characteristics of the victim”). For this reason, the jury typically can find the aggravating sentencing factor from evidence introduced at the guilt phase of the trial.

75. See Crocker, supra note 72, at 30-31 (discussing statutory aggravating circumstances and noting that “[b]ased on evidence about the crime or the defendant presented by the prosecution, the jury must find at least one statutory aggravating circumstance in order for the death penalty to be a possible punishment” (emphasis added; footnotes omitted)).

76. See id. at 31 (“Mitigating circumstances are constitutionally defined as 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'” (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982))).

77. See Steiker & Steiker, supra note 42, at 391 (noting that “the Court's emerging doctrine [of the Eighth Amendment's individualization requirement] has motivated every death penalty jurisdiction to permit the introduction and consideration of 'any' mitigating factor”).

78. See McGautha v. California, 402 U.S. 183, 204, 207 (1971) (holding constitutional the practice of committing sentencing in capital cases to the untrammeled discretion of the jury and asserting the impossibility of identifying “those characteristics of criminal homicides and their perpetration which call for the death penalty” and of expressing “these characteristics in language which can be fairly understood and applied by the sentencing authority”), vacated sub nom. Crampton v. Ohio, 408 U.S. 941 (1972); see also Steiker & Steiker, supra note 42, at 391 (“If standardless discretion is problematic because it gives those with a mind to discriminate the opportunity to discriminate, unconstrained consideration of any kind of mitigating evidence is problematic for precisely the same reason.”).
may view the very absence of a standard as an opportunity to present a compelling narrative of the defendant's life, many others can and do respond to the unstructured question of whether to take the accused's life by simply passing it on to the jury.\textsuperscript{79} Arguments abound to the effect, "It's up to you—do the right thing and spare his life."\textsuperscript{80}

To summarize, the Court's focus on the trial as the main event at which historical truth is reliably found does not take into account the prevalence of ineffective counsel,\textsuperscript{81} the improbability that prosecutors can police themselves in a way that reliably delivers exculpatory evidence to the defense,\textsuperscript{82} and our lack of understanding of what a "reliable" sentencing hearing looks like.\textsuperscript{83} The Court's view of when a lawyer must be provided may work well when the defendant is guilty, but it works poorly when the defendant is innocent. It works not at all when the question is whether the defendant should die.

IV. WHY THE CONSTITUTION REQUIRES COLLATERAL COUNSEL IN CAPITAL CASES

The Court's obsessive focus on the trial as the main and only constitutionally required event does not protect the innocent or guarantee serious consideration of life versus death. Denying a right to counsel in post-conviction proceedings cannot be justified on the ground that the defendant has already received all the process that he is due.\textsuperscript{84} If counsel is not to be provided at that point, it must be because counsel is unnecessary or too expensive or too likely to compromise the interest in finality.

\begin{itemize}
\item \textsuperscript{79} See supra note 72 and accompanying text.
\item \textsuperscript{80} See, e.g., Stephen B. Bright, \textit{Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer}, 103 YALE L.J. 1835, 1858 (1994) (setting forth the entire closing argument regarding capital sentencing by a defense lawyer in Texas as follows: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." (internal quotation marks omitted) (quoting Romero v. Laugh, 884 F.2d 871, 875 (5th Cir. 1989))).
\item \textsuperscript{81} See Dripps, supra note 54, at 249-50 (discussing indigent defense in death penalty cases and stating that "trial counsel in capital cases are often shockingly unqualified, unprepared, and unsupported"); Stephen J. Schulhofer & David D. Friedman, \textit{Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants}, 31 AM. CRIM. L. REV. 73, 74 (1993) (noting the "grave inadequacy of existing systems for serving the indigent," including conflicts of interest between publicly funded attorneys and their clients who do not pay for their services).
\item \textsuperscript{82} See supra notes 55-59 and accompanying text (arguing that it is inconsistent to expect a prosecutor to aid the defendant with exculpatory information while in the midst of an adversary system that provides an incentive to withhold information).
\item \textsuperscript{83} See supra note 78 and accompanying text.
\item \textsuperscript{84} See supra notes 3, 15, 17 and accompanying text.
\end{itemize}
The Court has never suggested that a prisoner will do as well representing himself as he would if represented by competent counsel, and for good reason. It is virtually impossible to conduct any kind of investigation from prison, much less one that depends upon complete access to the prosecutor's file. Further, there is no realistic chance that a prisoner will be able to disentangle even the law surrounding ineffective assistance and *Brady* sufficiently to present a credible claim to the post-conviction court.85 Failure to raise the claim typically will constitute waiver.86

Because providing counsel is necessary to vindicate our interest in assuring that the innocent are not executed, and because the burden upon states' resources is not overwhelming—most states provide for the appointment of counsel either by statute or judicial decision87—the interest in finality emerges as the central reason for refusing to recognize a constitutional right to counsel at capital collateral proceedings. As the Supreme Court of Georgia states, "[A] constitutional right to habeas counsel, carried to its logical conclusion, would spawn more litigation and delay in an already cumbersome system."88

One way of reconciling these concerns with justice and finality is to recognize a right to counsel in collateral proceedings for the purpose of raising those claims that could not have been raised effectively on direct appeal. The United States Supreme Court appeared to acknowledge the viability of this approach in *Coleman v. Thompson*,89 where it considered Coleman's argument for "an exception to the rule [that there is no right to counsel in collateral proceedings] in

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85. Justice Kennedy spoke to this point:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. . . . [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. Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring).

86. See id. at 26 (Stevens, J., dissenting) (discussing the difficulty of overcoming a state determination that a claim is procedurally barred on account of the difficulty of showing both cause for the procedural default and resulting prejudice, and observing "the stringency with which this Court adheres to procedural default rules").

87. See Gibson v. Turpin, 513 S.E.2d 186, 192 (Ga. 1999) (listing 31 states that provide for "state-funded counsel to indigent death-row habeas corpus petitioners" by statute, and noting the "right to qualified legal representation for capital petitioners in federal habeas corpus proceedings" under 21 U.S.C. § 848(q)(4)(B)).

88. Id. at 191. This court also noted that a constitutional right to counsel upon state habeas corpus would generate the additional Sixth Amendment claim of ineffective assistance of habeas counsel. Id.

those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."\textsuperscript{90} The Court refused to address this argument broadly, however, because Coleman's entitlement to a forum in which to raise ineffectiveness had been honored through the Virginia collateral post-conviction inquiry into the adequacy of the performance of his trial counsel.\textsuperscript{91}

On this view, the defendant would be provided with counsel at post-conviction proceedings to raise claims which could not be effectively raised on direct appeal. While these claims, if raised appropriately, would be preserved for presentation in federal court, the failure to raise other claims would not be. This approach acknowledges, even if not entirely implementing, the concerns of both justice and finality. This approach is consistent with Coleman.\textsuperscript{92}

Although lower courts have been unenthusiastic about acknowledging the possibility that Coleman creates an exception to the rule that there is no constitutional right to counsel in state post-conviction proceedings,\textsuperscript{93} the recognition of the right to counsel in the limited circumstances suggested would have only a minimal impact on federal habeas litigation. As the law currently stands, a state prisoner who waives a claim in the state system is nonetheless entitled to raise the claim in federal habeas if the failure of the federal court to consider

\textsuperscript{90} Id. at 755.
\textsuperscript{91} Id.
\textsuperscript{92} Coleman held that counsel's ineffectiveness does not constitute the kind of cause which permits a federal court to excuse a state procedural default unless "counsel's ineffectiveness . . . is an independent constitutional violation." Id. The approach suggested here requires counsel for the express purpose of raising particular kinds of claims; if counsel's ineffectiveness results in a default on such claims, this ineffectiveness should constitute cause for purposes of considering the claims afresh in federal court. If counsel's ineptitude instead relates to a failure to raise other kinds of claims, Coleman's bar would apply.

\textsuperscript{93} See Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997) (rejecting the "contention that Coleman recognizes a loophole and that [a petitioner] possesses a right to effective assistance of counsel to pursue in his state collateral proceedings a claim of ineffective assistance of trial or appellate counsel"); Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996) (rejecting "the proposition that collateral counsel's ineffectiveness can serve as cause excusing a procedural default" under the purported Coleman exception); Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996) (rejecting the petitioner's argument that "he had the right to effective counsel on his first set of federal habeas petitions[ ] because that was his first opportunity he had to challenge his appellate counsel's performance"); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992) (rejecting petitioner's argument for the Coleman exception because there is "little doubt how the Supreme Court would decide the question" left open in that case); Gibson v. Turpin, 513 S.E.2d 186, 191 (Ga. 1999) (noting that the argument that there is a constitutional right to a lawyer in a habeas proceeding in which a petitioner can raise for the first time an ineffective assistance claim "has since been rejected by every federal court of appeals that has considered it").
the claim would result in a fundamental miscarriage of justice.\textsuperscript{94} While the Court has resisted providing a simple definition of the "miscarriage" standard, "probable innocence"—defined as "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error"\textsuperscript{95}—presumably meets this standard.

The proposed Coleman exception typically embraces the two constitutional claims—ineffective assistance of trial or appellate counsel, and failure to disclose exculpatory material—that relate most directly to the possibility that an innocent person has been convicted or is going to be executed.\textsuperscript{96} If the exception is recognized, then the state would be responsible for providing a lawyer to raise these claims. When a lawyer fails to raise these claims, or does an inadequate job, then the prisoner can assert that a federal court should consider his claim because it was his lawyer's incompetence that caused the forfeiture of the claim in state court.\textsuperscript{97}

Even if the federal court were to agree that the lawyer's ineffectiveness was sufficient cause to ignore the petitioner's failure to raise the claim adequately in state court, the petitioner also would have to demonstrate that he suffered prejudice by not being able to raise the claim below.\textsuperscript{98} Although the meaning of "prejudice" is unclear,\textsuperscript{99} everyone agrees that it begins with a showing of a constitutional violation. In order to show this under Strickland's test for ineffective assistance, the petitioner must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."\textsuperscript{100} In order to show constitutional prejudice under Brady, the petitioner must demonstrate that "there is a reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the

\textsuperscript{94} See Murray v. Carrier, 477 U.S. 478, 496 (1986) (stating that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").


\textsuperscript{96} See supra Parts II, III.

\textsuperscript{97} See Coleman, 501 U.S. at 755 (discussing "an exception to the rule [that there is no right to counsel in state collateral proceedings] ... in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction").

\textsuperscript{98} See James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 26.3c, at 1108-12 (3d ed. 1998) (discussing the petitioner's obligation to show prejudice in order to circumvent the procedural default doctrine).

\textsuperscript{99} See id. at 1108 (noting that "[t]he Supreme Court has not yet provided a precise definition of the 'prejudice' half of the 'cause and prejudice' exception to the procedural default doctrine").

result of the proceeding would have been different."101 Thus, even under the proposed Coleman exception, it is clear that the petitioner would be required to cast doubt on the reliability of his trial in order to secure relief.

With respect to a federal court considering whether a claim could not have been adequately presented at the state level, then, the difference between rejecting or adopting the Coleman exception amounts to the difference between a federal court determining whether a Strickland or Brady violation probably affected the outcome of the trial, or determining whether such violations led to the conviction of a probably innocent person. The former is the classic prejudice inquiry, while the latter is the "miscarriage of justice" inquiry. Because claims raised under the Coleman exception would be decided under the latter standard, which still requires an evaluation of the effect of error on the outcome of the trial, it is difficult to believe that constitutionally requiring appointment of counsel in a capital post-conviction proceeding that provides the first opportunity to raise a constitutional challenge to a petitioner's conviction would truly compromise the interest in finality.102

The interest in finality would be served further by assuring that the conduct of the post-conviction proceeding itself does not generate further proceedings. The defendant would be bound by the new claims that his post-conviction lawyer raises. This makes sense if the right to a lawyer flows in significant part from the inability of even a competent lawyer to raise claims central to innocence and life on direct appeal. Whatever the source of the right, however, the lawyer should be free to raise any claims that state law permits. While one could argue that the lawyer should be permitted to raise only constitutional claims for which there would otherwise be no forum, this limitation would be both unprecedented and unwise. Our jurisprudence knows no comparable limitation on the right of an attorney to raise claims that are appropriate under state and federal law to a forum which has jurisdiction over the claims. Moreover, the structure of

102. The Supreme Court of Georgia implied that adopting the Coleman exception could lead to an infinite regress of ineffectiveness claims. See Gibson v. Turpin, 513 S.E.2d 186, 191 (Ga. 1999) (noting that a constitutional right to state habeas counsel would lead to an additional Sixth Amendment claim of ineffective assistance of habeas counsel). This notion of an infinite regress is unrealistic, however, because, under the proposed Coleman exception, the prisoner still would have to demonstrate that the incompetence of trial or appellate counsel, or the state's withholding of exculpatory material, undermined the reliability of the original verdict. Nothing in the Constitution entitles a prisoner to more than one fair resolution of this question.
most state habeas systems is such that the only claims a litigant can pursue in a state collateral proceeding are claims that could not be raised on direct appeal, such as ineffective assistance of counsel and _Brady_ claims.\(^{103}\) Finally, because ineffective assistance of trial counsel is the gateway through which "waived" trial claims can be raised in a post-conviction proceeding, it is difficult to see what would be gained through adding the complexity that a constitutionally required lawyer can only raise certain claims and not others.

Whether this proposal justifies the doctrinal uncertainty it will generate depends upon whether the right to counsel at post-conviction proceedings actually advances the interest of justice. If we are satisfied with the results of the adversary process in capital cases, then there is no reason to believe that the addition of a right to counsel in post-conviction proceedings will advance the interests of justice. If, as I have argued, we should not be so confident that an adversarial proceeding results in as just a set of results as we ought to seek, it is still a fair question as to whether the existence of a state-provided post-conviction lawyer would increase our confidence significantly. The inadequacy of judicially appointed counsel for capital indigents has been noted repeatedly.\(^{104}\) Will we achieve anything meaningful if we create a system in which these same lawyers now come forward to provide representation in post-conviction proceedings? If $1000 fees\(^{105}\) do not guarantee effective representation at trial, why should they provide effective post-conviction representation?

A cynic might suggest that, if the current low threshold for competence applies to collateral counsel, recognizing a right to counsel at that stage may do little beyond reassuring us that no prisoner has gone to his death unrepresented. If courts appoint collateral counsel

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103. See 39 C.J.S. _Habeas Corpus_ § 36 (1976) ("Questions which may or should be decided at the trial or reviewed upon appeal or error have no place in a habeas corpus proceeding, at least within the period of possibility of an appeal, or where an appeal is pending."); see also Austin v. Director, Patuxent Inst., 297 Md. 314, 316, 206 A.2d 145, 147 (1965) (dismissing several claims in a petition for post-conviction relief on the ground that "[t]hese are matters which, if meritorious, could have been raised by a direct appeal and his failure to do so bars them as grounds in this proceeding" (citing Dorris v. Warden, 222 Md. 586, 158 A.2d 105 (1960))).

104. See Bright, _supra_ note 80, at 1841 (noting that inadequate legal representation for the poor "is pervasive in those jurisdictions which account for most of the death sentences"); Marshall, _supra_ note 72, at 1 (stating that "capital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases"); _supra_ note 81 and accompanying text (discussing the prevalence of ineffective counsel).

105. This is the maximum payment for out-of-court preparation for representing a capital defendant in Alabama. See _ Ala. Code_ § 15-12-21(d) (1995); see also Bright, _supra_ note 80, at 1853 (discussing the effect on representation of inadequate compensation of attorneys in capital cases).
from the same pool of practitioners from which they pick trial counsel, and if the level of practice of these defense attorneys is as inadequate as critics suggest, then the benefits of requiring counsel may be illusory. Indeed, death row inmates may fare better with volunteer counsel for whom a given case is likely to be a singular brush with the capital punishment system than with lawyers who become habituated to processing post-conviction claims. An out-of-state lawyer will not be as limited as a local lawyer by social and economic constraints when it comes to challenging the conduct of both the defense counsel and prosecutor, the very claims which raise the most significant concerns about a defendant's potential innocence. On the other hand, the out-of-town lawyer's representation will inevitably suffer from a lack of easy access to the relevant actors and knowledge of the local legal culture.

There is no way to know with certainty whether death row inmates generally will be better served by volunteer counsel than by constitutionally required counsel. My guess, however, is that the recognition of the right will advance the interests of death row inmates and of justice. There are great variations among the states that embrace capital punishment as well as between various localities within the same state. We should not make judgments about the advisability of requiring or not requiring counsel as a constitutional matter based upon an image of litigators from a large New York law firm representing a condemned killer before a judge in rural Alabama. The city of Philadelphia has sent just as many men to death row as the entire state of Alabama.106 Moreover, as maligned as they tend to be, the lawyers providing front line representation in capital cases in this country may win about as many sentencing hearings as they lose.107 Jurors impose death in fewer than half of the cases in which a prosecutor seeks it.108

106. See Vick, supra note 21, at 386 (noting that "Philadelphia hands out the second-highest number of death sentences of any American city, and more individuals have been sentenced to death in Philadelphia in the post-Furman era than in twenty-two of the thirty-seven death penalty states combined" (footnotes omitted)); Daniel P. Blank, Book Note, Mumia Abu-Jamal and the "Death Row Phenomenon," 48 STAN. L. REV. 1625, 1636-37 (1996) ("The death row population in Philadelphia County is the third largest of any county's in the nation, close behind Houston's Harris County and Los Angeles County—counties far more populous and murderous than Philadelphia." (quoting Tina Rosenberg, The Deadliest D.A., N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 22)).

107. See Raymond Paternoster, Capital Punishment in America 29 (1991) (noting "the general disinclination of capital juries to sentence most convicted capital offenders to death," and citing a study showing a capital sentencing rate in Georgia of 54%).

108. See Richard Lowell Nygaard, On Death as a Punishment, 57 U. PIT. L. REV. 825, 831 (1996) (discussing the fact that after local prosecutors make the choice to pursue a capital
while the reality of what lawyers do falls far short of the ideal, the accused and condemned are better off with lawyers than without them.

V. Conclusion

Those who are condemned to death should be afforded counsel for purposes of pursuing state collateral relief. Giarratano and Finley notwithstanding, the Constitution requires that counsel be provided as the only practicable means for ensuring that people are not condemned to death inaccurately. There is no feasible way to determine whether the defendant received adequate representation on direct review because there is no way of knowing what it is that counsel did or did not do. There is no feasible way to determine whether the prosecution withheld exculpatory material on direct review because the reviewing court will not know what evidence was not disclosed. Because both kinds of errors create particular risks for innocent individuals who are falsely accused, our professed solicitude for this class of defendants demands that we afford them a meaningful opportunity to demonstrate that their conviction and sentence were flawed.

The Court's doctrinal rationale for rejecting the right to counsel is both unpersuasive and inconsistent with more contemporary decisions. The Court's finality concerns can be accommodated in part without significantly increasing the number or type of issues that can

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sentence, "[l]ocally selected juries are thereafter in control, and sentence but few to die"; Eric Schnapper, The Capital Punishment Conundrum, 84 Mich. L. Rev. 715, 725 (1986) (reviewing Welsh S. White, Life in the Balance: Procedural Safeguards in Capital Cases) ("The available sentencing studies make it possible to delineate the categories of cases in which the likelihood that the death penalty would be imposed is well under half, and in many instances one in ten."); cf. Bright, supra note 80, at 1841 (stating that "the death penalty is imposed, on average, in only 250 cases of the approximately 20,000 homicides that occur each year in the United States").

109. The recognition that representation is necessary to ensure accuracy and fairness goes deep in the Court's capital jurisprudence. In Powell v. Alabama, 287 U.S. 45 (1932), the Court held:

[In a capital case, 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, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

Id. at 71; see also Vick, supra note 21, at 357 (discussing Powell and stating that "the Court recognized that meaningful assistance of counsel in capital cases was indispensable to the procedural fairness of a capital trial").

be raised in federal court on post-conviction review. While the practical effect of mandating representation at this stage may not be quite as dramatic as some of its advocates might assert, it is likely to improve overall the quality of justice. This result justifies the requirement that defendants sentenced to death be represented in collateral proceedings.