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Why Only Gideon?: Martinez v. Ryan and the "Equitable" Right to Counsel in Habeas Corpus

Emily Garcia Uhrig

Why Only *Gideon*?: *Martinez v. Ryan* and the "Equitable" Right to Counsel in Habeas Corpus

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ABSTRACT

In 2012, the U.S. Supreme Court, in Martinez v. Ryan, *recognized for the first time a limited right to assistance of counsel in postconviction proceedings. Unexpectedly, the Court traced this right to equitable, rather than constitutional, authority. Moreover, the right extends only to initial-review postconviction proceedings, i.e., proceedings that offer the first meaningful opportunity for an inmate to raise the claim at issue. Likewise, the right extends only to substantial claims of ineffective assistance of trial counsel.*

The Court's depiction of this limited right to postconviction counsel as "equitable" avoided the pitfalls that would have been posed by the recognition of a constitutional right to counsel. Specifically, as an equitable right, states are not required to provide affirmative assistance of postconviction counsel. Rather, a state may simply implement the right at the back end of postconviction proceedings by waiving any default of a substantial trial ineffective assistance of counsel that arises as a result of the petitioner's pro se status or postconviction counsel error. Additionally, the Court sidestepped the infinite-continuum-of-habeas dilemma that recognition of a constitutional right would present: if an inmate has a constitutional right to counsel in an initial-review collateral proceeding, he or she will also be entitled to effective assistance of counsel. And where constitutionally guaranteed postconviction counsel is constitutionally ineffective, the inmate must have a remedy – i.e., a second round of postconviction proceedings – to cure the prejudice. The same scenario plays out in each subsequent round of postconviction proceedings. The equitable right to counsel carries with it no such baggage. In short, the equitable right to counsel, at least on its face, is presented as the constitutional right's more flexible and much less complicated cousin.

This Article argues, however, that by limiting the relief provided by the equitable right to counsel only to substantial ineffective assistance of trial counsel, the Court drew a line that is unsustainable. The elevation in postconviction enforcement of claims derived from Gideon v. Wainwright *over all other substantial claims of constitutional error finds no support in the history*

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[*] Professor of Law, University of the Pacific, McGeorge School of Law; J.D., Stanford Law School; B.A., University of Pennsylvania. I am very grateful for the helpful comments and input of Amanda Tyler, the participants in the 2014 Federal Courts Conference and the McGeorge Faculty, to whom I presented this Article as a work-in-progress, as well as the invaluable assistance of my research assistants, William Whaley, Theresa Schriever, Drew Wagner-Weir, and Alisa Pinabarasi.

and function of the Great Writ. Rather, if equity requires a remedy where postconviction counsel fails to raise a Sixth Amendment ineffective assistance of trial counsel claim and thus defaults the claim in federal court, it also demands relief where counsel fails to present any other substantial constitutional violation that compromises the fundamental fairness or the accuracy of the criminal process.

INTRODUCTION

In October 2011, in *Martinez v. Ryan*,[1] the U.S. Supreme Court granted certiorari on one of the most significant unresolved issues in right-to-counsel jurisprudence: whether an inmate has a constitutional right to assistance of counsel in postconviction proceedings for claims for which postconviction litigation offers the first meaningful forum for judicial review. But rather than resolve the issue, the Court, in a 7-2 ruling, circumvented it entirely by announcing for the first time a more limited, "equitable" right to postconviction counsel.[2] By design, this equitable right extends only to substantial claims of ineffective assistance of trial counsel, rather than the universe of claims cognizable in postconviction proceedings. Despite the storied role of equity in habeas corpus, the Court's ruling in *Martinez* was both astonishing and unprecedented. Indeed, in a strongly worded dissent, Justice Scalia questioned the majority's attempt at crafting a limited "equitable" right to postconviction counsel for ineffective assistance of trial counsel claims only.[3] He argued, with little explication, that there is no defensible basis for limiting this newly minted right to counsel to ineffective assistance of trial counsel claims.[4] As with its constitutional counsel, if equity demands assistance of counsel for ineffective assistance of trial counsel claims, it likewise demands such assistance for other constitutional claims cognizable in federal habeas. As such, despite the majority's assertion to the contrary, Justice Scalia declared that, in the end, there is no difference between the "equitable" right and the long sought after constitutional right to postconviction counsel.[5] This Article responds to Justice Scalia's provocative critique of the Court's decision in *Martinez* and evaluates whether this equitable right to counsel should extend to other constitutional claims cognizable in federal habeas, at least in the context of procedural default doctrine.

In a prior article, *A Case for a Constitutional Right to Counsel in Habeas Corpus*,[6] I argued that the due process and equal protection interests that underpin the well-established right to counsel on direct appeal also warrant

1. 132 S. Ct. 1309 (2012).
2. *Id.* at 1318–20.
3. *Id.* at 1321.
4. *Id.* at 1326–27.
5. *Id.*
6. Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 (2009).

recognition of a constitutional right to counsel in postconviction proceedings that provide the first opportunity to litigate the claim at issue.[7] The Supreme Court refers to these proceedings as "initial-review collateral proceedings."[8] Typically at issue in such proceedings are claims that derive from facts outside the scope of the trial record, such as allegations of ineffective assistance of counsel and prosecutorial misconduct. The most difficult obstacle to recognition of a constitutional right to counsel in initial-review collateral proceedings is the prospect of an infinite continuum of postconviction proceedings. Specifically, if an inmate has a constitutional right to counsel in an initial-review collateral proceeding,[9] he will also be entitled to *effective* assistance of counsel. And where constitutionally-guaranteed postconviction counsel is constitutionally ineffective, the inmate must have a remedy – i.e., a second round of postconviction proceedings – to cure the prejudice. The same scenario then applies to each subsequent round of postconviction proceedings. In *A Case for a Constitutional Right to Counsel in Habeas Corpus,* I argued that the remote potential of such a scenario does not justify extinguishing an otherwise compelling constitutional right.[10]

In *Martinez v. Ryan*, the U.S. Supreme Court resisted recognition of a constitutional right to counsel in initial-review postconviction proceedings.[11] Instead, the Court recognized a limited "equitable" right to counsel in postconviction proceedings.[12] In so doing, the Court was able to conclude that ineffective assistance of postconviction counsel may provide "cause" to excuse the procedural default of certain claims resulting from attorney error or lack of counsel altogether.[13] The Court limited its holding to substantial, otherwise-defaulted claims of ineffective assistance of trial counsel for which

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7. The second article argues for a right to counsel that is procedural, rather than substantive, in nature. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1220 (2012). Such right derives from the complexity of the procedural requirements erected by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the often insurmountable task of the indigent inmate's attempt to navigate this complexity with sufficient success to obtain merits review of a habeas petition. *Id.* The right itself finds constitutional authority in the access-to-the-courts doctrine. *Id.* at 1219.

8. *See Martinez*, 132 S. Ct. at 1315.

9. I refer throughout this Article to petitioners as "he" for ease of reference only because the vast majority of individuals serving prison time in the United States are men. *See* William J. Sabol et al., *Bureau of Justice Statistics Bulletin: Prisoners in 2006*, U.S. DEP'T JUST. 3–4 (Dec. 2007), http://www.bjs.gov/content/pub/pdf/p06.pdf (stating that the number of men in prison in 2006 was 1,458,363; the number of women was 112,498).

10. Uhrig, *supra* note 6, at 545.

11. *Martinez*, 132 S. Ct. at 1315.

12. *Id.* at 1318.

13. *Id.* The Court remanded the case for further consideration in light of its holding. *Id.* at 1312.

postconviction proceedings provide the first forum for review.[14] On its face, the decision leaves without remedy all other claims defaulted by postconviction attorney error, e.g., those involving allegations of ineffective assistance of counsel on direct appeal or *Brady v. Maryland* violations.

In many respects, what the Court did in *Martinez* was quite ingenious. If recognized, a constitutional right to counsel in initial-review postconviction proceedings would have supplied the requisite cause to excuse a procedural default caused by postconviction counsel's ineffectiveness, as defined by *Strickland v. Washington*.[15] But as discussed, such a right would also generate a freestanding right to effective assistance of counsel, which, if denied, would require another round of postconviction process to remedy. But by starting at the back end analytically, i.e., simply declaring on equitable grounds that the identical ineffectiveness – as defined by constitutional jurisprudence no less – provides "cause" to excuse a default, the Court leapfrogged over finding the constitutional right. In so doing, the Court avoided the infinite-continuum-of-habeas dilemma. This is particularly stunning doctrinally because, in recognizing the equitable right to counsel for initial-review of ineffective assistance of counsel claims, the Court relied entirely on the equitable principles that undergird the *constitutional* right to counsel. Hence, Justice Scalia observed in dissent that there is no meaningful distinction between the substance of this newly recognized equitable right to counsel and a constitutional one.[16]

What remains difficult to reconcile with the role and jurisprudence of the writ of habeas corpus – the Great Writ of Liberty – is the Court's unequivocal limitation of its decision to cases in which the claim sought to be raised in postconviction review is ineffective assistance of trial counsel. In dissent, Justice Scalia dismisses this limitation as unsustainable, arguing that once accepted, the Court's reasoning must necessarily extend to *all* claims for which postconviction proceedings provide the first forum for review.[17] Though Justice Scalia does not fully articulate his position, I agree that the majority's limitation is analytically vulnerable. Inevitably, if equity demands a remedy where postconviction counsel fails to raise a Sixth Amendment ineffective assistance of trial counsel claim and thus defaults the claim in federal court, it should likewise demand a remedy where, for example, counsel fails to argue a substantial *Brady v. Maryland* claim,[18] despite learning postconviction that the prosecutor withheld material exculpatory evidence from the defense.

But to achieve such parity in the availability of relief under the writ of habeas corpus requires assessment of both the role of the writ in common law and the stature and force of a criminal defendant's Sixth Amendment right to

14. *See id.* at 1309.
15. 466 U.S. 648, 654 (1984).
16. *Martinez,* 132 S. Ct. at 1321.
17. *Id.*
18. 373 U.S. 83, 87 (1963).

counsel in the first instance. This Article is the first to offer such an assessment[19] and is structured as follows: Part I briefly reviews the relevant right to counsel jurisprudence prior to *Martinez*. Part II discusses in detail the *Martinez* opinion, and in particular, its articulation of an "equitable" right to counsel and attempt to limit application of that right to substantial ineffective assistance of counsel claims. Part III assesses whether, as Justice Scalia argues in dissent, *Martinez*'s holding inevitably compels recognition of such an equitable right for claims other than ineffective assistance of trial counsel. Within this Part, I examine first, the nature and underpinnings of *Gideon v. Wainwright*'s special status within the pantheon of criminal procedure rights and second, the historical and modern role of the Great Writ, both with respect to *Gideon*, as well as other claims of constitutional error. Lastly, I examine whether the unique status of *Gideon* and its progeny justifies *Martinez*'s special dispensation of a remedy in federal habeas to allow consideration of otherwise-defaulted allegations of ineffective assistance of trial counsel.

Ultimately, I argue that the *Martinez* majority is correct in concluding that ineffective assistance of counsel claims indeed occupy a unique role in habeas corpus. But the elevation in federal habeas proceedings of ineffective assistance above other constitutional violations, such as *Brady v. Maryland* or *Batson* claims, is unsustainable. The Great Writ does not recognize a hierarchy in constitutional violations worthy of vindication. Thus, the Court's narrow holding in *Martinez* should extend to include all cases in which ineffective assistance of counsel during initial-review postconviction proceedings causes the procedural default of a substantial claim of constitutional error.

I. RIGHT TO COUNSEL IN POSTCONVICTION PROCEEDINGS

It is axiomatic that an individual who stands accused of a felony or of any criminal offense that involves the potential loss of physical liberty has a Sixth and Fourteenth Amendment right to assistance of counsel at trial.[20] The

19. *Cf.* Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482 (2013) (noting the possibility of *Martinez*'s rationale applying "with equal force to claims such as [those arising under *Brady*, 373 U.S. 83] or juror misconduct that could not be raised on direct appeal"); Mary Dewey, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269 (2012) (noting the possibility of *Martinez*'s rationale applying to *Brady* claims).

20. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (recognizing the Sixth and Fourteenth Amendment right to counsel in felony cases); Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding, five-four, the right to counsel in criminal cases applies only if the defendant faces some period of incarceration); Nichols v. United States, 511 U.S. 738, 743 n.9 (1994) (citation omitted) (noting in dicta that right to counsel attaches in felony cases regardless of potential incarceration); Alabama v. Shelton, 535 U.S. 654, 674 (2002) (qualifying *Scott* to hold, five-four, that the right to counsel applies in misdemeanor cases even where the court suspends a sentence of incarceration and instead imposes probation).

right to counsel at trial is triggered in the first instance by initiation of adversarial proceedings against the defendant.[21] Trial, moreover, is interpreted broadly to include all "critical stages of the proceeding,"[22] that is, "[W]here counsel's absence might derogate from the accused's right to a fair trial."[23] The Court has deemed the right to counsel essential to safeguarding all of a criminal defendant's legal rights and indeed, the right to a fair trial itself.[24] Hence, in assessing whether the right to counsel attaches to a particular stage of the criminal process, the Court evaluates the nexus between that stage and the ultimate adjudication of guilt at trial.[25] In summary, the Court will:

> scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.[26]

In doing so, the Court will "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[27] Hence, the Court has held the right to counsel attaches to a post-indictment lineup,[28] a preliminary hearing[29]

21. United States v. Gouveia, 467 U.S. 180, 192–93 (1984) (finding no right to counsel during administrative detention in prison before indictment for homicide unrelated to current offense of incarceration); *cf.* Miranda v. Arizona, 384 U.S. 436, 494 (1966) (holding that the privilege against compulsory self-incrimination includes a right to counsel at pretrial custodial interrogation).

22. United States v. Wade, 388 U.S. 218, 224–25 (1967); *Miranda*, 384 U.S. at 514; Escobedo v. Illinois, 378 U.S. 478, 488 (1964); Hamilton v. Alabama, 368 U.S. 52, 54 (1961); Spano v. New York, 360 U.S. 315, 326 (1959).

23. *Wade*, 388 U.S. at 226–27.

24. *See Gideon*, 372 U.S. at 343–44 (noting that the "noble ideal" of "fair trials before impartial tribunals in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him").

25. *Wade*, 388 U.S. at 226–27.

26. *Id.* at 227.

27. *Id.*

28. *Id.* at 235–37; *cf.* United States v. Ash, 413 U.S. 300, 321 (1973) (explaining that Sixth Amendment right to counsel does not require assistance of counsel at post-indictment showing of photospread containing defendant's picture to eyewitness); Gilbert v. California, 388 U.S. 263, 267 (1967) (explaining that pre-indictment taking of handwriting exemplars from defendant is not a critical stage of criminal proceedings at which right to counsel at trial attaches).

29. *See* Coleman v. Alabama, 399 U.S. 1, 8–10 (1970) (holding that Alabama preliminary hearing – the sole purpose of which was to determine whether there was evidence sufficient to present case to grand jury – was critical stage of state's criminal process at which right to counsel attached); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (explaining that regardless of normal function of preliminary hearing under Maryland law, hearing was critical stage of proceeding to which right

or arraignment where certain rights are at stake,[30] and unconditionally, at sentencing.[31]

Similarly, an individual convicted of a felony or crime involving a potential loss of liberty has a right to counsel on direct appeal that derives from the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.[32] The difference, constitutionally, results from the Court's recognition that the right to appeal a criminal conviction is purely a creature of statute, rather than a constitutional imperative.[33] Once a state decides to provide a right of appeal, however, the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments prohibit doing so in a manner that discriminates against the indigent.[34] In light of the essential role counsel plays in litigating an effective appeal, "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, . . . an unconstitutional line has been drawn between rich and poor."[35] In *Penson v. Ohio*, the Court observed that both trial and appellate stages of the prosecution, "although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over."[36]

Moreover, the Supreme Court has held that these constitutional guarantees require *effective* assistance of counsel at trial and on direct appeal.[37] So where counsel's representation is deficient, as objectively assessed, and a petitioner suffers prejudice as a result, the petitioner is entitled to a remedy for violation of his constitutional right.[38] But when an individual is denied counsel altogether at trial or on direct appeal, trial "counsel entirely fails to

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to counsel attached where defendant entered guilty plea and such plea was admitted against him at later trial).

30. *Coleman*, 399 U.S. at 7 (citing Hamilton v. Alabama, 368 U.S. 52, 54 (1961)).

31. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977); Mempa v. Rhay, 389 U.S. 128, 134–37 (1967); Specht v. Patterson, 386 U.S. 605, 608–11 (1967); *see also* Estelle v. Smith, 451 U.S. 454, 469–71 (1981) (holding that prosecution's use of psychiatric evidence, obtained from defendant without notice to defense counsel, at sentencing in capital murder trial to show future dangerousness violated defendant's Sixth and Fourteenth Amendment right to counsel at critical stage of the proceeding); Townsend v. Burke, 334 U.S. 736, 738–41 (1948).

32. Griffin v. Illinois, 351 U.S. 12 (1956).

33. Martinez v. Court of Appeals of Cal., 528 U.S. 152, 159–60 (2000); *Griffin*, 351 U.S. at 18; McKane v. Durston, 153 U.S. 684, 688 (1894).

34. *Griffin*, 351 U.S. at 18–19.

35. Douglas v. California, 372 U.S. 353, 357 (1963).

36. Penson v. Ohio, 488 U.S. 75, 84–85 (1988).

37. Strickland v. Washington, 466 U.S. 668, 687 (1984) (defining Sixth Amendment ineffective assistance of trial counsel claim); United States v. Cronic, 466 U.S. 648 (1984) (finding right to effective assistance of counsel at trial); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (finding right to effective assistance of counsel on first appeal of right).

38. *Strickland*, 466 U.S. 668 (1984); *Cronic*, 466 U.S. 648 (1984).

subject the prosecution's case to meaningful adversarial testing," or trial counsel functions under circumstances making competent representation implausible, prejudice is presumed "without inquiry into counsel's actual performance at trial."[39]

Beyond direct appeal, the Court thus far has resisted recognizing a constitutional right to counsel. In particular, in *Ross v. Moffitt*, the Court held that appellants seeking discretionary review from a state supreme court on direct appeal do not have a right to counsel.[40] Rather, in seeking discretionary review, a pro se litigant can simply parrot the work-product of court-appointed counsel on the first appeal.[41] Likewise, in postconviction proceedings, the Court has declined to recognize a constitutional right to counsel, at least insofar as where the petitioner seeks to raise claims that were raised on direct appeal, when petitioner enjoyed a right to counsel identifying and framing the claims.[42] The rationale is the same as in discretionary review: a petitioner who has had the assistance of counsel on direct appeal in litigating a particular claim can simply import his attorney's work-product into a postconviction petition without undue difficulty.[43] Whether the right to counsel applies to claims for which postconviction proceedings provide the first forum for judicial review – and hence, petitioner has never had the benefit of competent legal assistance in preparing and presenting the claim[44] – remains an open question.[45]

Failure to recognize a constitutional right to counsel in postconviction proceedings has profound consequences in terms of the availability and efficacy of postconviction proceedings for indigent petitioners.[46] Postconviction practice mimics the pre-*Gideon* world of state prosecutions in which indigent litigants must go it alone in seeking relief from final convictions.[47] Moreover, where postconviction counsel's error – or lack of postconviction counsel altogether – causes a petitioner to fail to comply with the myriad procedural strictures of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the remedy available under *Strickland*, *Cronic*, and *Evitts*,

39. *Cronic*, 466 U.S. at 659–62.

40. 417 U.S. 600, 610 (1974).

41. *Id.* at 614–16.

42. Pennsylvania v. Finley, 481 U.S. 551, 559 (1987); Murray v. Giarratano, 492 U.S. 1, 11–12 (1989); Coleman v. Thompson, 501 U.S. 722, 752 (1991).

43. *Finley,* 481 U.S. at 557.

44. 28 U.S.C. § 2254(i) (2012).

45. *See Coleman*, 501 U.S. at 755; Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

46. *See* Uhrig, *supra* note 6; Uhrig, *supra* note 7.

47. *See* Duncan v. Walker, 533 U.S. 167 (2001) (finding state conviction becomes "final" when U.S. Supreme Court denies certiorari or time for seeking such review expires).

which restores the defendant to the position in which he would have been absent counsel's error, is inapplicable.[48]

The Supreme Court has devoted particular attention to the issue in the context of procedural default doctrine, most recently, with the *Martinez v. Ryan* decision. Modern procedural default doctrine provides that, where state courts deny a substantive postconviction claim on the ground that the petitioner failed to comply with a state procedural rule that is both independent of federal law[49] and adequate (i.e., consistently applied by state courts), federal courts, too, will deem the claim procedurally defaulted and hence, barred from review.[50]

Procedural default emphasizes principles of federalism.[51] The doctrine "recognize[s] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."[52]

To escape the death knell of procedural default, a petitioner must demonstrate "cause" for the default and show that he will suffer "prejudice" as a result.[53] "Cause" must be an objective factor external to the defense and thus beyond petitioner's control, which prevented compliance with the procedural rule.[54] "Prejudice" in turn requires more than the "possibility of prejudice,"[55] in that counsel's error must have "worked to [petitioner's] actual and substantial disadvantage."[56] The petitioner may also find relief from the default if he can show that failure to consider the claims will result in a "fundamental miscarriage of justice."[57] A fundamental miscarriage of justice arises when a petitioner can show "actual innocence," i.e., that the constitutional error "has probably resulted in the conviction of one who is actually inno-

48. *Cf.* Holland v. Florida, 130 S. Ct. 2549, 2564 (2010) (finding extraordinary ineffective assistance of counsel may be a basis for equitable tolling of AEDPA's statute of limitations); Maples v. Thomas, 132 S. Ct. 912, 927–28 (2011) (finding counsel's abandonment of petitioner-client may constitute cause to excuse procedural default of claim); Martinez v. Ryan, 132 S. Ct. at 1315 (postconviction counsel's error resulting in procedural default of substantial trial ineffective assistance of counsel claim may constitute cause to excuse default).

49. "[F]ederal courts on habeas corpus review of state prisoner claims . . . will presume that there is no independent and adequate state ground for a state court decision when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Coleman*, 501 U.S. at 734–35 (citing Michigan v. Long, 463 U.S. 1032, 1040–41 (1983)).

50. Wainwright v. Sykes, 433 U.S. 72, 81 (1977); Murray v. Carrier, 477 U.S. 478 (1986).

51. *See, e.g.*, *Coleman*, 501 U.S. at 726.

52. *Id.* at 750.

53. *Wainwright*, 433 U.S. at 87.

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

55. United States v. Frady, 456 U.S. 152, 170 (1982).

56. *Id.*

57. *Coleman*, 501 U.S. at 750.

cent" of the offense of conviction.[58] The probable innocence standard was further defined in *Schlup v. Delo* to be met when a petitioner presents "new facts [that] raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial."[59]

In *Coleman v. Thompson*, the Court concluded that state postconviction counsel's untimely filing of the appeal of petitioner's habeas petition did not constitute "cause" to excuse the resulting procedural default in federal court.[60] The Court observed generally that attorney error only provides cause to excuse a procedural default where counsel's performance was *constitutionally* ineffective.[61] But because "[t]here is no constitutional right to an attorney in state post-conviction proceedings" under *Pennsylvania v. Finley* and *Murray v. Giarratano*, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."[62]

Based on principles of agency, attorney error is not considered a factor external to the petitioner and imputed to the State.[63] As a result, without a *constitutional* right to counsel, the federal courts will attribute such error directly to the petitioner.[64] As in *Finley* and *Giarratano*, *Coleman* involved claims that the petitioner had litigated before the default at issue with the assistance of counsel whose competence was not in dispute.[65] Hence, the Court reserved for another day resolution of the question whether attorney error may constitute cause to excuse a default when the error occurs during a petitioner's first opportunity to litigate the claim at issue.[66]

In my 2009 article, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, I argued that the Due Process and Equal Protection Clause considerations underpinning the right to counsel on a first appeal of right similarly compel recognition of a constitutional right to counsel in postconviction proceedings, where such proceedings provide the first forum for litigation of a particular claim.[67] As with a direct appeal, postconviction litigation requires a high degree of legal skill that a layperson generally lacks.[68] Hence,

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58. *Murray*, 477 U.S. at 494, 496.

59. 513 U.S. 298, 317 (1995).

60. *Coleman*, 501 U.S. at 757.

61. *Id.* at 752–53 (quoting *Murray*, 477 U.S. at 487 (citing Strickland v. Washington, 466 U.S. 668 (1984))).

62. *Id.* at 752 (citing Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989); Wainwright v. Torna, 455 U.S. 586 (1982)).

63. *Id.* at 753–54.

64. *Id.*

65. *Id.* at 755.

66. *Id.*

67. Uhrig, *supra* note 6.

68. *Id.* at 551–52. For example, from my personal experience working as a staff attorney on habeas matters within the Ninth Circuit, attorneys seeking appointment to the panel of attorneys eligible to handle federal habeas appeals must demonstrate expertise within federal habeas, not merely experience in federal appellate criminal practice.

failure to provide the indigent with assistance of counsel discriminates against them, in that the indigent is unable to hire counsel to assist them and they are forced to go it alone. Recognition of such a right to counsel, among other things, would provide the requisite cause under *Coleman* to a petitioner who suffers a default of a claim as a result of ineffective assistance of post-conviction counsel.

In October 2011, the Court granted certiorari on this issue in *Martinez v. Ryan*, but the decision did little to resolve the issue.[69]

II. *MARTINEZ V. RYAN*

Petitioner Luis Martinez was convicted of two counts of sexual conduct with a minor under the age of fifteen – specifically, his eleven-year-old step-daughter.[70] The victim recanted prior to and during her trial testimony.[71] Nonetheless, the prosecution persevered with its case, introducing the victim's nightgown, which contained traces of Martinez's DNA.[72] In addition, a prosecution expert testified that child victim recantations are often due to the mother's failure to support the victim in her allegations.[73] Martinez's lawyer did not object to the expert testimony or call his own expert in rebuttal.[74] The jury convicted Martinez, who was sentenced to two consecutive terms of life imprisonment without the possibility of parole for thirty-five years.[75]

On direct appeal, Martinez received new appointed counsel to represent him.[76] Appellate counsel argued a number of issues on Martinez's behalf, including insufficiency of the evidence and that newly-discovered evidence warranted a new trial.[77] Arizona law precludes raising ineffective assistance of trial counsel claims on direct appeal, even where the trial record by itself supports the claim.[78] Thus, in Arizona, postconviction proceedings provide the first forum for review of such claims.[79] For this reason, it was unremarkable that Martinez's appellate counsel raised no allegations of ineffective assistance of trial counsel on direct appeal.

While the direct appeal was still pending, somewhat inexplicably, appellate counsel also filed a "Notice of Post-Conviction Relief" with the trial court, which, under Arizona law, serves to trigger postconviction proceedings.[80] Counsel made no allegations of ineffective assistance of trial counsel,

69. Martinez v. Ryan, 131 S. Ct. 2960 (2011).
70. Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012).
71. *Id.*
72. *Id.*
73. *Id.* at 1314.
74. *Id.*
75. *Id.* at 1313.
76. *Id.* at 1314.
77. *Id.*
78. *See id.* (citing State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (en banc)).
79. *Id.*
80. *Id.* (citing ARIZ. R. CRIM. P. 32.4(a) (2011)).

despite plausible bases for doing so.[81] Instead, counsel filed a statement with the court that she was unable to identify any colorable claims for postconviction review.[82] The court provided Martinez with forty-five days to file a pro se petition, which he did not do. Martinez, who spoke Spanish and could not read the English-language paperwork that counsel mailed to him, later stated that he was entirely unaware of counsel's initiation of postconviction proceedings and the need to file his own petition.[83] The trial court agreed with counsel's assessment that Martinez lacked grounds for postconviction relief and dismissed the action.[84] The Arizona Court of Appeals affirmed, and the Arizona Supreme Court denied review.[85]

About a year and a half later, Martinez, with new counsel, filed a second notice of postconviction relief in the trial court.[86] In this petition, Martinez alleged that trial counsel was ineffective for both failing to object to the prosecution's expert testimony, which explained in culpable terms the victim's recantations, and failing to call a (readily available) expert to rebut such testimony.[87] In addition, Martinez alleged that counsel was ineffective for failing to pursue an exculpatory explanation for the nightgown DNA evidence.[88] The trial court dismissed the petition, in relevant part, as procedurally barred under state law[89] due to the failure to raise the claims in Martinez's first postconviction proceeding initiated by prior state-appointed counsel.[90] The Arizona Court of Appeals affirmed and the Arizona Supreme Court again denied review.[91]

Martinez filed in federal district court for habeas corpus relief under 28 U.S.C. § 2254, again alleging the ineffective assistance of trial counsel claims raised in his second round of state postconviction proceedings.[92] Martinez recognized that the claim was subject to the procedural default doctrine because he had not raised it in his first state postconviction proceeding.[93] Nonetheless, he argued that he had "cause" to overcome the default.[94] Specifically, Martinez alleged that the ineffectiveness of his first postconviction counsel in failing both to raise the claims in the initial state postconviction pro-

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (citing ARIZ. R. CRIM. P. 32.4(a) (2011)).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1314–15 (citing Wainwright v. Sykes, 433 U.S. 72, 84–85, 90–91 (1977)).

ceeding and to notify Martinez of her actions constituted "cause" to excuse the default.[95]

The district court denied Martinez's petition.[96] The court found that Arizona's preclusion rule was an independent and adequate state ground to bar federal review under procedural default doctrine.[97] The court also concluded that Martinez had not demonstrated cause to excuse the default because, under *Coleman v. Thompson*,[98] attorney errors during postconviction proceedings do not qualify as cause due to the lack of a constitutional right to counsel in such proceedings.[99]

The Ninth Circuit affirmed.[100] In so doing, the court recognized that, where postconviction proceedings provide the first forum for review of a particular claim, the Supreme Court in *Coleman* had noted a possible exception to the general rule that the right to counsel does not extend beyond direct, non-discretionary appeal.[101] But the Ninth Circuit declined to recognize such an exception.[102] The U.S. Supreme Court granted certiorari on the issue.[103]

As a threshold matter, Justice Kennedy, writing for the majority, recognized that *Coleman v. Thompson* left open the issue as to whether an inmate has a constitutional right to effective assistance of counsel in "initial-review collateral proceedings," i.e., postconviction proceedings that provide the first forum for judicial review of a claim challenging a criminal conviction.[104] Rather, at issue in *Coleman* was only whether ineffective assistance of counsel during an appeal from an initial-review collateral proceeding could amount to cause to excuse a procedural default.[105] This observation alone was remarkable because, since deciding *Coleman* in 1991, the Court had made no mention of this significant, open issue.[106] Moreover, lower federal

95. *Id.*

96. *Id.* at 1315.

97. *Id.* Absent a showing of cause and prejudice, a state court's reliance on a procedural rule that is independent of federal law and firmly established and consistently applied precludes federal review of the underlying claim. Walker v. Martin, 131 S. Ct. 1120, 1127–28 (2011).

98. 501 U.S. 722, 753–55 (1991).

99. *Martinez*, 132 S. Ct. at 1315.

100. *Id.*

101. *Id.*

102. *Id.*

103. Martinez v. Ryan, 131 S. Ct. 2960 (order granting certiorari); s*ee also Martinez*, 132 S. Ct. at 1315.

104. *Martinez*, 132 S. Ct. at 1315.

105. Coleman v. Thompson*,* 501 U.S. 722, 755 (emphasis added) ("Coleman contends that it was the ineffectiveness of his counsel during the *appeal* from [the state habeas trial court] that constitutes cause to excuse his default. . . . We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.").

106. *See Martinez*, 132 S. Ct. at 1319 ("[I]n the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one."); *see also* Uhrig, *supra* note 6, at 542.

courts, with few exceptions, had simply assumed that *Coleman*'s holding was not limited to its facts (an appeal from initial-review collateral proceedings), but also extended to an initial-review collateral proceeding itself.[107]

Just as quickly, however, Justice Kennedy concluded that *Martinez* was not the case to resolve this difficult constitutional issue.[108] Rather than address the underlying issue as to whether a right to counsel attaches to claims that an inmate cannot raise until a postconviction proceeding, which in turn would provide cause to excuse the procedural default in Martinez's case, the Court took a narrower approach. Specifically, Justice Kennedy merely qualified *Coleman*'s holding on *equitable* grounds to find that attorney error during initial-review collateral proceedings may constitute "cause" to excuse an inmate's procedural default of an ineffective assistance of trial counsel claim.[109]

First, Justice Kennedy noted that initial-review collateral proceedings function in many respects as a direct appeal.[110] Thus, as with a direct appeal, "When an attorney errs in [such] proceedings, it is likely that no state court at any level will hear the prisoner's claim."[111] Moreover, the Court observed that "'defendants pursuing first-tier review . . . are generally ill equipped to represent themselves' because they do not have a brief from counsel or an opinion of the court addressing their claim of error."[112] The Court appreciated that "[t]he prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law."[113] In addition, an inmate is unequipped to develop the factual basis for claims that rely on evidence outside the trial record.[114]

Additionally, the Court found the problem to be particularly acute where the claim is one of ineffective assistance of counsel.[115] To make a viable Sixth Amendment claim under *Strickland v. Washington*, the inmate must proffer facts and present an intact argument that trial counsel was deficient,

107. *See* Uhrig, *supra* note 6, at 542.

108. *Martinez*, 132 S. Ct. at 1315, 1319 ("This is not the case, however, to resolve whether [a right to counsel in initial-review collateral proceedings] exists as a constitutional matter.").

109. *Id.* ("This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

110. *Id.* at 1316–17 ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.").

111. *Id.* at 1316.

112. *Id.* at 1317 (quoting Halbert v. Michigan, 545 U.S. 605, 617 (2005)).

113. *Id.*

114. *Id.*

115. *Id.*

and that the inmate suffered prejudice as a result.[116] To frame the issue properly, the inmate must understand trial strategy and the potential consequences of specific decisions by counsel in the context of the overall proceedings.[117] This presents a tall task for any layperson, let alone one behind bars.

But the Court placed the greatest emphasis on the nature of the right to effective assistance of counsel at trial, itself, describing it as "a bedrock principle in our justice system."[118] Invoking *Gideon*'s assessment as an "'obvious truth' the idea that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,'"[119] Justice Kennedy observed that "the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged."[120]

The Court also noted the critical role defense counsel plays in preserving issues for direct appellate review and postconviction proceedings.[121] Thus, by requiring an inmate to raise ineffective assistance of counsel claims outside of the direct appeal process, where there is no constitutional right to counsel, the inmate is more likely to litigate his claims pro se and the state "significantly diminishes [his] ability to file such claims."[122]

After invoking precedent informing the constitutional right to counsel at trial, the Court returned to procedural default doctrine:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial review collateral proceeding acknowledges, *as an equitable matter*, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.[123]

Thus, where the state appoints counsel who renders ineffective assistance as measured under the standards of *Strickland* or fails to appoint coun-

116. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

117. *Martinez*, 132 S. Ct. at 1317.

118. *Id.*

119. *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

120. *Id.*

121. *Id.* at 1317–18.

122. *Id.* at 1318.

123. *Id.* at 1312 (emphasis added).

sel altogether, and a substantial ineffective assistance of trial counsel claim is not raised in an initial-review collateral proceeding as a result, an inmate may establish cause for a resulting procedural default.[124]

In casting the right to assistance of counsel as equitable, rather than constitutional, the Court offered a solution to the infinite continuum of habeas dilemmas posited by a constitutional right to counsel:

> A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.[125]

In dissent, Justice Scalia, joined by Justice Thomas, excoriated the majority's attempt at crafting a more limited basis for relief for Martinez.[126] First, Justice Scalia describes the majority's casting of Martinez's right to initial-review postconviction counsel as equitable in nature, rather than constitutional, to be a distinction without a difference.[127] Under either rubric, the result is the same: Martinez's default of the claim at issue is excused, and federal courts are able to consider its merit.[128] Moreover, Justice Scalia dismissed as fiction the majority's attempt to cast its holding in limited terms:

> [N]o one really believes that the newly announced "equitable" rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised, [such as claims alleging prosecutorial withholding of exculpatory evidence, newly discovered impeachment evidence, and claims of ineffective assistance of appellate counsel].[129]

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124. *Id.*
125. *Id.* at 1319–20.
126. *See id.* at 1321 (Scalia, J., dissenting).
127. *Id.*
128. *Id.*
129. *Id.*

Justice Scalia further described the majority's "soothing assertion" to the contrary as "insult[ing] the reader's intelligence."[130]

The following term, in *Trevino v. Thaler*, the Court clarified that its holding extended to jurisdictions where state law, on its face, permits inmates to raise a substantial ineffective assistance of counsel on direct appeal, but in practice, the structure of the state system makes it virtually impossible to do so.[131]

This Article takes up Justice Scalia's dismissal of the majority's logic and evaluates the sustainability of its limited holding. How, if at all, can *Martinez*'s holding – that petitioners have an equitable right to assistance of counsel in initial-review collateral proceedings raising trial ineffective assistance of counsel claims – remain limited to trial ineffective assistance of counsel?

Ultimately, this Article argues that, despite the relative and uncontroverted gravitas of *Gideon v. Wainwright*, such limitation is unsustainable in light of the historical and modern function of habeas corpus. To start, I assess the nature of *Gideon* to evaluate what precisely it is that makes *Gideon* such a storied criminal procedure right. With that understanding, I then consider the history and role of the Great Writ. Finally, I evaluate whether *Gideon* deserves the unique protection *Martinez* sanctions for it under the writ, which in the context of procedural default, enables a remedy for violations of *Gideon*'s mandate (as enforced through *Strickland v. Washington*), but none for any other claims of constitutional violations.

III. DOES *MARTINEZ* COMPEL RECOGNITION OF AN EQUITABLE RIGHT TO COUNSEL IN PROCEDURAL DEFAULT DOCTRINE FOR CLAIMS OTHER THAN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

A. What Makes Gideon v. Wainwright *So Special?*

Since *Gideon*'s trumpet sounded,[132] the Court has made clear that the right to assistance of counsel at trial is a fundamental one,[133] which functions as a necessary corollary to the right to a fair trial itself.[134] Indeed, in *Gideon*,

130. *Id.*

131. Trevino v. Thaler, 133 S. Ct. 1914–15 (2013).

132. *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (providing a history of Clarence Earl Gideon's triumphant battle to achieve recognition of a right to counsel at trial for individuals facing felony charges).

133. *See* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("The right to counsel is a fundamental right of criminal defendants. . . ."); United States v. Cronic, 466 U.S. 648, 653 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system."); Penson v. Ohio, 488 U.S. 75, 84 (1988) ("It bears emphasis that the right to be represented by counsel is among the most fundamental of rights.").

134. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[The] right to counsel exists, and is needed, in order to protect the fundamental right to a fair tri-

the Court observed that "[the assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."[135] *Martinez* reiterated the sentiment: "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . [and] is the foundation for our adversary system."[136]

From all the accolades emerge several themes regarding *Gideon*'s status as a fundamental criminal procedure right. First, the Court has observed that the right to counsel is essential to protect the accused's remaining constitutional and legal rights.[137] Left to fend for himself, a criminal defendant lacking literacy in the law and legal process will be unable to assert his myriad constitutional and legal rights.[138] In *Penson*, the Court noted:

> As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[139]

A second characteristic underpinning *Gideon*'s special status is that the right to counsel is necessary to ensure the successful functioning of the adversarial system. Without pushback from competent defense counsel, the criminal process in effect devolves into a unilateral, un-resisted prosecution. Again in *Penson*, the Court noted:

> [The adversarial system] is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question. . . . Absent representation, however, it is unlikely that a criminal defendant will be able to test the government's case, for . . . even the intelligent and educated layman has small and sometimes no skill in the science of the law.[140]

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al."); Brescia v. New Jersey, 417 U.S. 921 (1974) (Marshall, J., dissenting) ("The centrality of the right to counsel among the rights accorded a criminal defendant is self-evident . . . .").

135. 372 U.S. 335, 343 (1963) (alteration in original) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

136. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012); *see also Kimmelman*, 477 U.S. at 374 (stating the right to counsel "assures the fairness, and thus the legitimacy, of our adversary process").

137. *Martinez*, 132 S. Ct. at 1317.

138. *Id.*

139. Penson v. Ohio, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); *see also Kimmelman*, 477 U.S. at 377 (quoting Schaefer, *supra*); *Cronic*, 466 U.S. at 654 (quoting Schaefer, *supra*).

140. 488 U.S. at 84 (internal citations and quotations omitted).

In elaborating on counsel's role, the Court, in *McCoy v. Court of Appeals of Wisconsin, District 1*, noted:

> The guiding hand of counsel is essential for the evaluation of the prosecution's case, the determination of trial strategy, the possible negotiation of a plea bargain and, if the case goes to trial, making sure that the prosecution can prove the State's case with evidence that was lawfully obtained and may lawfully be considered by the trier of fact.[141]

In short, the right to counsel is crucial to enable the criminally accused to meet and respond to the prosecution's case effectively.[142]

The inability to respond with professional competency to criminal charges in turn increases the risk that the innocent will be convicted of crimes they did not in fact commit. Hence, the Court has also observed that the right to counsel at trial is essential to guard against this risk.[143] In *Gideon*, the Court noted that "[w]ithout [the right to counsel], though he not be guilty, [a defendant] faces the danger of conviction because he does not know how to establish his innocence."[144] Similarly, in *Whorton v. Bockting*, decided in 2007, the Court underscored, "When a defendant who wishes to be represented by counsel is denied representation . . . the risk of an unreliable verdict is intolerably high."[145]

A third interest behind the right to trial counsel is equal access to justice. Again, returning to *Gideon* itself, the Court observed:

> [I]n our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[146]

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141. 486 U.S. 429, 435 (1988) (internal citations and quotations omitted).

142. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) (internal citations and quotations omitted) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.").

143. The first interest – in being able to respond effectively to the prosecution's charges – affects *all* criminal defendants. This second interest, though closely related to the first, impacts only those who are in fact actually innocent.

144. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). *See also* Rose v. Clark, 478 U.S. 570, 577–78 (1986) ("Without [the right to counsel and other constitutional protections], a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.").

145. 549 U.S. 406, 419 (2007).

146. *Gideon*, 372 U.S. at 344.

Noting the procedural and substantive aspirations of the state and federal criminal process "to assure fair trials before impartial tribunals in which every defendant stands equal before the law[,]" the Court warned, "This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[147]

Lastly, as a result of the above interests, the right to counsel stands alone among the constitutional rights that protect the criminally accused in that it functions to ensure fairness – and hence, reliability – at every step of the criminal process. Thus, the Court has noted that without a right to counsel, "[A] serious risk of injustice infects the trial itself."[148]

B. The History and Role of the Great Writ of Habeas Corpus

1. The Historical Role of the Writ

Since its inception in English common law, the writ of habeas corpus – the Great Writ of Liberty – has functioned, to varying degrees,[149] as the means by which an individual may challenge the legality of his detention. Historian Paul Halliday describes "the central fact of habeas corpus" as "that a judge should hear the sighs of all prisoners, regardless of where, how, or by whom they were held."[150] Indeed, the Great Writ found its English common law roots in the Magna Carta's general decree that "no man would be imprisoned contrary to the law of the land."[151] Over time, "[T]he writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled."[152]

With the Suspension Clause, the Framers of the U.S. Constitution gave the writ "prominent sanction."[153] Written as a negative directive, the Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public

147. *Id.*

148. United States v. Cronic, 466 U.S. 648, 656 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

149. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010) (describing the vacillating power of the writ in English common law, with the historical apex of its muscle coinciding with its incorporation into U.S. Constitution).

150. *Id.* (tracing and analyzing history of Great Writ in English common law).

151. Boumediene v. Bush, 553 U.S. 723, 740 (2008) (citing Art. 39, *in* SOURCES OF OUR LIBERTIES 17 (R. Perry & J. Cooper eds. 1959)).

152. *Id.* at 740 (citing WILLIAM SEARLE HOLDSWORTH, 9 A HISTORY OF ENGLISH LAW 112 (1926)). *See also Ex parte* Yerger, 75 U.S. 85, 95 (1868) (noting the Habeas Corpus Act of May 27, 1679 firmly guaranteed habeas corpus "'for the better securing of the liberty of the subject,' which, as Blackstone says, 'is frequently considered as another Magna Charta'"); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 129 (6th ed. 1775) (describing the writ as "efficacious . . . in all manner of illegal confinement").

153. *Ex parte* Yerger, 75 U.S. at 95.

Safety may require it."[154] For centuries now, the U.S. Supreme Court has interpreted the Suspension Clause as constitutionalizing the writ's fundamental role in ensuring the legality of executive detentions.[155] Indeed, until the 1980s, the scope and vigor of habeas corpus had gradually expanded throughout the history of the United States, peaking with the Warren Court in the 1960s.[156] But even with the dramatic restrictions to the writ effected by *Teague v. Lane*[157] and AEDPA[158] over the past fifteen years, the purpose of the writ has, at least in theory, remained unwavering.[159]

In *Ex parte McCardle*, decided in 1867, the Court expansively described the writ as providing a judicial remedy for "every possible case of privation of liberty contrary to" the U.S. Constitution, treaty, and federal statutory law.[160] In the early twentieth century, the Court described the writ as offering a judicial remedy for state prisoners whose custody results from a violation of the Fourteenth Amendment's right to due process or equal protection of the law.[161] Similarly, in 1910, the Court observed that the writ's function is to assess whether a detention contravenes legal authority or whether "a denial of a right secured under the Federal Constitution" has occurred.[162] The Court has invoked similar rhetoric to describe the writ's function on many subsequent occasions.[163] Likewise, for state prisoners, since enactment of the Ju-

154. U.S. CONST. art. I, § 9, cl. 2.

155. *See, e.g.*, *Boumediene*, 553 U.S. 723; *Ex parte* Watkins, 28 U.S. 193, 202–03 (1830) (describing the statutory writ of habeas corpus as "in the nature of a writ of error, to examine the legality of the commitment" and "to liberate an individual from unlawful imprisonment").

156. This article does not attempt a thorough summary of this historical progression, which witnessed an evolution of habeas corpus from permitting challenges to federal court jurisdiction only to approximately mimicking the scope of direct appeal. For such a summary, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4 (6th ed. 2014).

157. 489 U.S. 288 (1989) (subject to two limited exceptions, prohibiting recognition of new rules of law in federal habeas proceedings).

158. *See* 28 U.S.C. § 2254 (2012).

159. *See* HERTZ & LIEBMAN, *supra* note 156, at 22–29.

160. 73 U.S. 318, 325–26 (1868).

161. *See* Felts v. Murphy, 201 U.S. 123, 129 (1906)

162. Harlan v. McGourin, 218 U.S. 442, 447 (1910).

163. *See* Moore v. Dempsey, 261 U.S. 86, 87–88, 91 (1923) (describing the writ as the judicial vehicle for "securing to the petitioners their constitutional rights"); McNally v. Hill, 293 U.S. 131, 136 (1934) (describing the writ as the mechanism "by which the legality of the detention of one in the custody of another [court] could be tested judicially"); Daniels v. Allen, 344 U.S. 443, 510 (1953) (describing the writ as providing "final say" to the federal courts regarding whether "State Supreme Courts have denied rights guaranteed by the United States Constitution"); Fay v. Noia, 372 U.S. 391, 426 (1963) (describing the writ as a basis for federal judicial relief "conferred by the allegation of an unconstitutional restraint [that] is not defeated by anything that may occur in the state court proceedings"); Stone v. Powell, 428 U.S. 465, 494 n.37 (describing the writ as providing a forum "for litigating constitutional claims

diciary Act of 1867,[164] the Court has described the writ as the means "to test the constitutional validity of a conviction for crime."[165]

More recently, with its 2008 decision in *Boumediene v. Bush*, the Court thwarted Congress's attempt to strip the habeas corpus remedy from alien detainees at Guantanamo Bay, Cuba.[166] In so doing, the Court again emphasized the crucial role of habeas corpus throughout both English common law and American history:

> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.[167]

With this function in mind, the Framers adopted the Suspension Clause as part of the U.S. Constitution.[168] The Suspension Clause "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is

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generally"); Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (describing as "always fair game" the writ to enable "a state prisoner's challenge [in federal court] to the trial court's resolution of dispositive federal issues"); Reed v. Ross, 468 U.S. 1, 10 (1984) (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)) (describing the function of the writ "to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action'"); McCleskey v. Zant, 499 U.S. 467, 479 (1991) (describing the writ as the vehicle for resolving "all dispositive constitutional claims presented in a proper procedural manner"); Withrow v. Williams, 507 U.S. 680, 697–98 (1993) (O'Connor, J., concurring in part and dissenting in part) (quoting Fay v. Noia, 372 U.S. 391, 449 (1963) (Harlan, J., dissenting), *abrogated by* Coleman v. Thompson, 522 U.S. 722 (1991)) (noting "today, as it has always been, [the writ is] a fundamental safeguard against unlawful custody . . . [that can remedy any detention] in violation of the Constitution or laws or treaties of the United States"); O'Neal v. McAninch, 513 U.S. 432, 442 (1995) (describing the writ as a remedy whose "most basic traditions and purposes" are to "avoid a grievous wrong – holding a person in custody in violation of the Constitution . . . of the United States" and "thereby both [to] protect[] individuals from unconstitutional convictions and [to] help[] to guarantee the integrity of the criminal process by assuring that trials are fundamentally unfair"). *See generally* HERTZ & LIEBMAN, *supra* note 156, at 24–26.

164. *See* Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–87 (expanding the writ to enable challenges to state criminal convictions).

165. Waley v. Johnston, 316 U.S. 101, 104–05 (1942) (per curiam).

166. Boumediene v. Bush, 553 U.S. 723 (2008).

167. *Id.* 732.

168. *Id.* at 745.

itself the surest safeguard of liberty."[169] The Court in *Boumediene* emphasized that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."[170] Justice Kennedy, writing for the majority, further observed:

> The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be part of that framework, a part of that law.[171]

Despite this consistently articulated aim, in recent decades the Court has sanctioned substantial restrictions on the parameters for relief under the Great Writ. But in so doing, until *Martinez,* neither the Court nor Congress had done so by differentiating between constitutional violations and elevating some rights over others. Rather, limits on available relief stem from: (1) excising *Mapp v. Ohio*'s exclusionary rule from the underlying Fourth Amendment violation; (2) common law[172] and statutory[173] prohibitions on retroactive application of new rules of constitutional law to antecedent convictions and imposing a heightened standard for harmless error review in postconviction proceedings; (3) imposition of an elevated harmless error test for claims raised in federal habeas; and (4) the myriad procedural restrictions under the common law and AEDPA. As I will discuss, none of these limitations turn on the *nature* of the constitutional violation that a petitioner alleges. Rather, the Court has consistently and emphatically maintained that federal habeas remains the forum for *all* state detainee claims of a constitutional nature.

2. *Stone v. Powell* and the Unenforceable Fourth Amendment Exclusionary Rule

In *Stone v. Powell*, the Court held that Fourth Amendment violations – or more precisely, the applicability of the exclusionary rule to evidence seized as a result of Fourth Amendment violations – are not cognizable in habeas as long as the petitioner had an adequate opportunity to litigate the claim in state court.[174] The basis for this holding was not, however, to relegate the Fourth Amendment to second-tier status for purposes of enforceability. Rather, the decision stems directly from the Court's ongoing skepticism regarding the constitutional justifications of the exclusionary rule, as established in *Mapp v.*

169. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion)).

170. *Id.* at 745.

171. *Id.* at 798.

172. *See* Teague v. Lane, 489 U.S. 288, 328 (1989).

173. *See* 28 U.S.C. §§ 2244, 2254 (2012).

174. 428 U.S. 465 (1976).

Ohio.[175] Fourth Amendment violations occur at the moment of an illegal search and seizure.[176] Hence, the Court has described the Fourth Amendment exclusionary rule as prophylactic in nature in that, at best, it can only deter future violations against other individuals.[177] Indeed, in reaching its decision in *Stone*, the Court emphasized that it was "not concerned with the scope of the habeas corpus statute as authority for litigating *constitutional* claims," but rather only with the extent to which the writ is available to litigate claims based on "the exclusionary rule[, which] is a judicially created remedy rather than a personal constitutional right."[178] Thus, *Stone* is entirely consistent with the Court's jurisprudence regarding the cognizability of *all* constitutional claims in federal habeas.

Since *Stone*, the Court has stood firm in refusing to apply the case to bar review of any *constitutional* claims[179] and at least some "merely prophylactic" rules with constitutional underpinnings of a more fundamental nature than the exclusionary rule in *Mapp v. Ohio*. In *Withrow v. Williams*,[180] the Court rejected the State's argument that *Stone*'s rule should extend to claims alleging violations of *Miranda v. Arizona*.[181] In contrast to the Fourth Amendment's exclusionary rule, *Miranda* protects – and importantly, prevents violations of – an individual's Fifth Amendment privilege against self-incrimination.[182] Specifically, the Court has held that the State does not violate the Fifth Amendment privilege against self-incrimination until it introduces at trial statements obtained in violation of *Miranda*.[183] Thus, application of the Fifth Amendment exclusionary rule in fact *does* prevent violation of the privilege against self-incrimination.[184] As a result, the Court held *Miranda* violations to be cognizable in federal habeas.[185]

175. 367 U.S. 643 (1961).

176. *Stone*, 428 U.S. at 479.

177. *Id.* (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)) ("[T]he exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.").

178. *Id*. at 477 n.37 (emphasis added).

179. *See* Reed v. Farley, 512 U.S. 339, 348 n.7 (1994) (summarizing relevant cases).

180. 507 U.S. 680, 688 (1993).

181. 384 U.S. 436 (1966).

182. *Withrow*, 507 U.S. at 708–09.

183. *See* United States v. Patane, 542 U.S. 630, 641 (2004).

184. *See Withrow*, 507 U.S. at 689–91.

185. *Id.* at 682.

3. Retroactivity Analysis

a. The Common Law: Teague v. Lane

More categorically, in *Teague v. Lane*, decided in 1989, a plurality of the Court substantially limited the scope of relief available in habeas.[186] Prior to *Teague*, the Court regularly announced new rules of criminal procedure in habeas.[187] The *Teague* doctrine, as it has come to be known, prohibits petitioners from using the writ to enforce new rules of constitutional criminal procedure that come into force after the petitioner's conviction has become final on direct appeal.[188] Likewise, petitioners may no longer use the writ as a vehicle to establish a new rule of criminal procedure or to apply settled case law in a manner sufficiently novel to result in the creation of a new rule.[189]

There are two exceptions to the *Teague* bar on retroactive application of new rules of criminal procedure. First, petitioners may seek enforcement of a new rule of criminal law that, in effect, decriminalizes the conduct underlying their conviction or prohibits certain punishment for a category of defendants due to their status or offense.[190] Examples have included Court decisions holding that the Eighth Amendment prohibits execution of juveniles and the mentally ill.[191]

Second, notwithstanding the *Teague* bar, petitioners may seek enforcement of a new rule of criminal procedure that affects fact-finding reliability and qualifies as "fundamental," "bedrock," or "watershed," i.e., "implicit in the concept of ordered liberty."[192] To qualify, the new rule must be "essential to the accuracy and fairness of the criminal process."[193]

The Court has deemed *Gideon v. Wainwright* to be the paradigm example of this exception.[194] Such designation was illustrative only in that *Gideon* had been precedent for over twenty-five years prior to *Teague*. Hence, when *Teague* was decided, petitioners were no longer seeking its *retroactive* enforcement. Instead, the Court cited the decision as an example of the requisite gravitas a new rule of criminal procedure would need to qualify under the

186. 489 U.S. 288, 308 (1989).

187. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1966).

188. *Teague*, 489 U.S. at 292.

189. *Id.*

190. *Id.* at 307. *Accord* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989); Graham v. Collins, 506 U.S. 461, 477 (1993).

191. *See* Atkins v. Virginia, 536 U.S. 304, 306 (2002) (finding Eight Amendment prohibits executing the mentally retarded); Roper v. Simmons, 542 U.S. 551, 555 (2005) (finding that the Eight Amendment prohibits executing individuals who were under the age of 18 at the time of commission of the capital offense).

192. *Teague*, 489 U.S. at 292. *Accord* Bousley v. United States, 523 U.S. 614, 620 (1998); O'Dell v. Netherland, 521 U.S. 151, 157, 167 (1997); Lambrix v. Singletary, 520 U.S. 518, 540 (1997); Gray v. Netherland, 518 U.S. 152, 170 (1996).

193. Sawyer v. Smith, 497 U.S. 227, 243 (1990).

194. *See* Whorton v. Bockting, 549 U.S. 406, 417–21 (2007).

second *Teague* bar exception.[195] Since *Teague*, the Court has yet to identify a new rule of criminal procedure that qualifies under its second exception.[196] Indeed, in *Teague* itself, the Court expressed doubt as to whether such a rule has yet to emerge in criminal procedure.[197]

Aside from *Teague*'s second exception, which to date the Court has never applied to an actual claim raised in an actual case, *Teague* does nothing to differentiate between constitutional violations. Rather, the doctrine functions to limit the timeframe within which a petitioner may identify the law governing particular constitutional claims for habeas litigation. The Court's hypothetical invocation of *Gideon* as an example of the second *Teague* exception does not establish a hierarchy of enforcement value within habeas corpus.

Indeed, pre-*Teague*, the Court underscored that retroactivity analysis in no way reflects the Court's assessment of the relative value of criminal procedure rights:

> We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. The right to be represented by counsel at trial, applied retroactively in *Gideon v. Wainwright* . . . has been described . . . as 'by far the most pervasive [o]f all of the rights that an accused person has.' Yet Justice Brandeis even more boldly characterized the immunity from unjustifiable intrusions upon privacy, which was denied retroactive enforcement in *Linkletter* [v. Walker, 381 U.S. 618 (1965)] as 'the most comprehensive of rights and the right most valued by civilized

195. *Id*.

196. *See id.* at 409 (holding *Crawford v. Washington*, 541 U.S. 36 (2004), was not a watershed rule of criminal procedure); Beard v. Banks, 542 U.S. 406, 408 (2004) (holding *Mills v. Maryland*, 486 U.S. 367 (1988) was not a watershed rule of criminal procedure); Schriro v. Summerlin, 542 U.S. 348, 355 (2004) (noting the new rule under *Ring v. Arizona*, 536 U.S. 584, 588 (2002) that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" does not qualify under *Teague*'s second exception); *O'Dell*, 521 U.S. at 168 (Stevens, J., dissenting) (finding a new rule under *Simmons v. South Carolina*, 512 U.S. 154 (1994) requiring jurors in capital case deciding whether future dangerousness warrants death sentence be instructed that the only statutory alternative to death was life without the possibility of parole does not qualify under second *Teague* bar exception). *See also* Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to* Teague*'s Collateral Review Killer*, 74 MO. L. REV. 1, 10–12 (2009) (discussing the Court's failure to identify any case other than *Gideon* as qualifying under the second exception to the *Teague* bar).

197. *See Sawyer*, 497 U.S. at 243 (quoting *Teague*, 489 U.S. at 313) (noting "because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge'"); Graham v. Collins, 506 U.S. 461, 478 (1993) (noting second *Teague* exception applies "only to a small core of rules," most of which have long since been enshrined in the law).

> men.' To reiterate what was said in *Linkletter*, we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively.[198]

b. Statutory Limitations Under 28 U.S.C. § 2254(d)

In 1996, with enactment of AEDPA, Congress codified, and expanded upon, the legal sentiment behind *Teague*. As amended, § 2254(d)(1) of AEDPA provides that the writ:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[199]

As with *Teague*, § 2254(d)(1) limits petitioners to rules of criminal procedure already in existence at the time that the state adjudicated the merits of a particular claim.[200] Unlike *Teague*, however, there are no exceptions to § 2254(d)(1)'s limited scope.[201] Moreover, its effect is even more restrictive in that federal courts can only consider U.S. Supreme Court precedent in evaluating whether a constitutional violation has occurred. Hence, whereas *Teague* permits courts to consider circuit court case law in evaluating the state of the law at the time of a state court's adjudication, § 2254(d)(1) limits that consideration to U.S. Supreme Court decisions only.[202]

Undoubtedly, § 2254(d)(1) substantially limits the availability of relief in federal habeas by narrowly defining the constitutional law that determines whether a violation has occurred. But as with *Teague*, this provision in no way enables consideration of some constitutional claims while prohibiting evaluation of others. Rather, all claims of constitutional error are subject to the same heightened standard of review. And indeed, despite AEDPA's narrowing of the bases for relief in federal habeas, the Court has continued to underscore the writ's "vital role in protecting constitutional rights."[203]

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198. Johnson v. New Jersey, 384 U.S. 719, 728 (1966) (holding *Miranda* to be not retroactive).

199. 28 U.S.C. § 2254(d) (2012).

200. *Id.*

201. *Id.*

202. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000). In one respect, § 2254(d)(1) is less restrictive than *Teague*. *See id.* Under § 2254(d)(1), federal courts evaluate the state court decision, whether rendered on direct appeal or during state postconviction proceedings, denying the merits of a particular claim. *Id.* In contrast, under *Teague*, federal courts may only consider rules of law in existence at the time the petitioner's conviction becomes final on direct appeal. *Id.*

203. Slack v. McDaniel, 529 U.S. 473, 483 (2000); Holland v. Florida, 560 U.S. 631 (2010) (quoting *Slack*, 529 U.S. at 483).

4. Harmless Error Analysis Under *Brecht v. Abrahamson*

Under both *Teague* and § 2254(d) of AEDPA, merits analysis of claims in federal habeas also requires application of the standard of review that the Court articulated in *Brecht v. Abrahamson* for assessing "harmless error."[204] In *Brecht*, the Court adopted for federal habeas review the standard for assessing harmlessness of *nonconstitutional* errors set forth in 1946 in *Kotteakos v. United States*.[205] Once a federal court determines that a constitutional error occurred in the prosecution of a petitioner, such error will be deemed harmless unless it "had a substantial and injurious effect or influence in determining the jury's verdict."[206] The State bears the burden of persuading the court that an error was harmless.[207] This standard is more stringent than the harmless error test applied on direct appeal (and that, pre-*Brecht*, also governed habeas review), which permits relief for constitutional violations unless the prosecution proves the error harmless beyond a reasonable doubt.[208] The Court justified the elevated standard for federal habeas review based on "the State's interest in the finality of convictions that have survived direct review within the state court system" and "comity and federalism."[209]

Here, the Court's approach differs analytically depending on the *type* of constitutional violation at issue. Even after *Brecht*, constitutional errors of a "structural" nature are deemed per se prejudicial and hence, not subject to harmless error analysis.[210]

> Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." At the other end of

204. Brecht v. Abrahamson, 507 U.S. 619, 622 (1993). The Supreme Court has not directly addressed whether *Brecht*, a pre-AEDPA decision, applies intact to claims brought under AEDPA. *See, e.g.*, Gutierrez v. McGinnis, 389 F.3d 300, 304 (2d Cir. 2004) ("AEDPA may not overrule *Brecht* directly but the statute's implications do call *Brecht*'s continuing viability into question."); Sanna v. DiPaolo, 265 F.3d 1, 14 (1st Cir. 2001) (finding that *Brecht* applies in conjunction with amended § 2254(d) but noting that "there is some disagreement as to whether the *Brecht* standard survives the passage of the AEDPA"). But the Court has inferred that harmless error analysis remains unchanged post-AEDPA by applying *Brecht* unmodified to cases governed by AEDPA. *See* Early v. Packer, 537 U.S. 3, 10–11 (2002) (per curiam); Penry v. Johnson, 532 U.S. 782, 795–96 (2001). *See also* HERTZ & LIEBMAN, *supra* note 156, at § 30.2 n.19, § 31.1 n.12 (discussing unsettled nature of the issue).

205. *See Brecht*, 507 U.S. at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

206. *Kotteakos*, 328 U.S. at 776.

207. *See* O'Neal v. McAninch, 513 U.S. 432, 435–36 (1995).

208. *See* Chapman v. California, 386 U.S. 18 (1967).

209. *Brecht*, 507 U.S. at 635. This observation provoked harsh critique from the dissent. *Id.* at 656 (O'Connor, J., dissenting).

210. *Id.* at 629–30 (majority opinion).

> the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." The existence of such defects – deprivation of the right to counsel, for example – requires automatic reversal of the conviction because they infect the entire trial process.[211]

The list of constitutional errors that the Court has deemed structural at this point is long and includes the right to counsel/counsel of choice at critical stages of the proceedings at trial and on direct appeal;[212] the right to represent oneself;[213] the right to prosecutorial disclosure of material exculpatory evidence, where materiality is defined as at minimum a "reasonable probability" that had disclosure occurred, the outcome of the proceeding would have been different;[214] other due process or speedy trial violations requiring proof of prejudice, which in turn is defined as at least a reasonable probability that but for the error, the result of the trial would have been different;[215] the right to an impartial judge;[216] the right to a trial by an impartial jury,[217] including a capital sentencing jury;[218] the right to a grand and petit jury selected in a manner free of racial discrimination;[219] the right to a public trial;[220] the right to a jury verdict based on proof beyond a reasonable doubt;[221] in capital cases, the right to a sentencing process that properly limits the categories of offenses and offenders eligible for the death penalty[222] and accords proper weighing of aggravating and mitigating factors;[223] and the right to a direct appeal.[224]

The Court has identified three bases on which it has categorized an error as structural.[225] First, there are errors that render a trial fundamentally unfair and deprive a defendant of the basic protections required for a trial to reliably

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211. *Id.* at 629–30, 638 (quoting Arizona v. Fulminante, 499 U.S. 271, 307–08, 309 (1991)).

212. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 152 (2006); Bell v. Cone, 535 U.S. 685, 695–96 (2002); Mickens v. Taylor, 535 U.S. 162, 166 (2002); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000); Johnson v. United States, 520 U.S. 461, 469 (1997); *Fulminante*, 499 U.S. 294; Penson v. Ohio, 488 U.S. 75, 88–89 (1988).

213. *See Gonzalez-Lopez*, 548 U.S. at 148–49.

214. Kyles v. Whitley, 514 U.S. 419 (1995).

215. *See id.* at 435.

216. *See, e.g.*, Neder v. United States, 527 U.S. 1, 8 (1999); Edwards v. Balisok, 520 U.S. 641, 647 (1997).

217. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 577–78 (1986).

218. *See, e.g.*, Gray v. Mississippi, 481 U.S. 648, 668 (1987) (plurality opinion).

219. *See, e.g.*, *Neder*, 527 U.S. at 8.

220. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. at 148–49.

221. Sullivan v. Louisiana, 508 U.S. 275, 279–81 (1993).

222. *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356, 362–63, 365–66 (1988).

223. *See, e.g.*, Brown v. Sanders, 546 U.S. 212 (2006).

224. *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

225. *See* HERTZ & LIEBMAN, *supra* note 156, at § 31.3.

determine guilt or innocence.[226] Included in this category are complete deprivation of counsel and trial before a biased judge.[227]

A second category of structural error are those errors for which it is simply too difficult to assess the effect of the error, i.e., actual prejudice.[228] Errors in this category include improper deprivation of one's counsel of choice; deprivation of the right to a public trial; selection of a petit jury based "upon improper criteria;" and "exposure [of a petit jury] to prejudicial publicity."[229]

The third category of structural error applies where harmlessness is irrelevant, and accordingly, *Brecht* analysis is futile.[230] An example would be denial of the right to self-representation at trial, which usually *improves* a defendant's chances of achieving a favorable outcome.[231]

As such, there is an analytic differentiation between constitutional violations. But the difference in treatment in no way translates to what *Martinez*, read on its face, accomplishes: a basis for only salvaging merits consideration of substantial ineffective assistance of trial counsel claims otherwise forfeited by postconviction counsel error (or lack of postconviction counsel altogether). Rather, the difference in harmless error analysis merely reflects differences in the nature of the respective constitutional errors and the harm that accompanies each one.

5. Procedural Restrictions Under AEDPA

Additionally, Congress and the Court have imposed procedural hurdles on petitioners who seek habeas corpus relief. But again, the applicability of these rules in no way turns on the nature of the substantive constitutional claims that the petitioner seeks to raise.

Section 2244(d) sets forth a one-year statute of limitations for filing a federal petition once a conviction becomes final on direct appeal.[232] With complicated statutory and, since *Holland v. Florida*,[233] equitable tolling provisions, the one-year time period ceases to run when state courts have control of the case or where extraordinary circumstances aside from the petitioner's due diligence make it impossible to file in a timely fashion.[234] At no time, however, does the *nature of* the constitutional claims raised in the federal petition dictate the timeliness calculation.[235]

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226. Neder v. United States, 527 U.S. 1, 8–9 (1999).

227. *Id.* at 8.

228. United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

229. *Id.* at 148, 149 n.4.

230. *Id.* at 149 n.4.

231. *Id*.

232. 28 U.S.C. § 2244(d) (2012).

233. 560 U.S. 631 (2010).

234. *See* Uhrig, *supra* note 7, at 1229–45.

235. The Supreme Court recently held that a claim of actual innocence may toll the statute of limitations Under AEDPA. *See* McQuiggin v. Perkins, 133 S. Ct. 1924

Likewise, as discussed in Part I, under the common law and AEDPA, a petitioner is required to exhaust any claim he seeks to raise in a federal petition by presenting the claim to the highest available state court. If he is foreclosed from doing so by state procedural rules, and such rules are independent of federal law and consistently applied in state court, the claim will be deemed procedurally defaulted in federal court unless he can demonstrate cause and prejudice to excuse the default. Until *Martinez*, the Court had never distinguished between otherwise defaulted constitutional claims in defining "cause." Likewise, "prejudice" depended only on the effect, rather than the nature, of the error at issue on the outcome of the case.

Lastly, AEDPA's bar on second or successive petitions also in no way depends on the nature of the claim a petitioner seeks to raise.[236] Under AEDPA, a petitioner may file one federal habeas petition, which must contain all claims he wishes the court to consider.[237] The circumstances for circumventing the ban on second or successive petitions are extremely limited.[238] Specifically, the petitioner must show that the claim he seeks to raise in the second subsequent petition relies on a new rule of constitutional law that the U.S. Supreme Court has already held to be retroactive to cases on collateral review; that the claim turns on newly discovered facts that the petitioner could not have identified with due diligence; or actual innocence of the offense of conviction.[239] Once again, none of these bases turn on the nature of the claim(s) that the petitioner seeks to present in the successive petition.

In short, neither the law governing substantive consideration of claims in federal habeas nor the many procedural doctrines that govern that consideration provide support for the Court's elevation of right-to-trial-counsel claims over all other constitutional errors in *Martinez*.

(2013). But actual innocence is not a substantive constitutional claim; rather, it is a factual and legal condition that can arise independent of any actual constitutional violations. *See* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001).

236. *See See* Uhrig, *supra* note 7, at 1249–50.

237. 28 U.S.C. § 2244(b)(3)(A)–(C).

238. *Id.* § 2244(b)(2).

239. § 2244(b)(2) provides that the petitioner must show either:

> (A) . . . that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense [i.e., actual innocence].

Id.

C. The Special, Protected Status Martinez *Confers on* Gideon v. Wainwright *Is Unsustainable.*

The Sixth Amendment right to effective assistance of counsel is undisputedly a fundamental one that occupies the core of the criminal process in the United States. After all, defense counsel is charged with defending all other constitutional rights that protect the criminally accused. Where counsel is deficient, those rights may go unprotected. As such, the right to counsel permeates every aspect of the criminal process. As an essential component of the adversarial system, constitutionally competent counsel plays a critical role in ensuring the integrity of the criminal justice system. In addition, *Gideon*'s right to counsel is a prerequisite to a constitutionally fair trial, regardless of the weight of evidence against the defendant.[240] Hence, a petitioner who is denied his right to a lawyer at trial is entitled to a new trial even in cases where his guilt beyond a reasonable doubt appears to be unassailable.[241]

Moreover, Justice Kennedy noted in *Martinez* that "[w]hen an attorney errs in initial-review collateral proceedings" in litigating a substantial ineffective assistance of trial counsel claim, or when petitioner, himself errs because he lacks counsel altogether, "[I]t is likely that no state court at any level will hear the prisoner's claim."[242] The result is a thread of ineffective assistance that binds the inmate to his prison cell. Thus, by excusing the resulting default in this circumstance, *Martinez* infuses muscle into the right to effective assistance of trial counsel by ensuring the availability of federal habeas corpus to enforce that right. But the decision leaves unresuscitated other constitutional rights that also protect the integrity of the criminal process but that may be defaulted as a result of inadequate assistance of initial-review, postconviction counsel.

Even accepting that the Sixth Amendment's right to effective assistance of trial counsel sits at the helm of the pantheon of constitutional rights that protect the criminally accused, *Martinez*'s elevation of its enforcement above the rest of those rights is hard to defend. After all, what, if anything, is the difference in constitutional enforcement value between a Sixth Amendment ineffective assistance of counsel claim and for example, a *Brady v. Maryland/Giglio v. United States* claim based on the State's failure to disclose material, exculpatory evidence to the defense? *Martinez* turns on *equitable* considerations.[243] It is hard to see how the equitable demand for federal court review of an ineffective assistance of trial counsel claim exceeds the demand that applies to other claims of constitutional error substantial enough to survive *Brecht v. Abrahamson*'s harmless error analysis.[244]

240. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
241. *Id*.
242. Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).
243. *Id.* at 1318.
244. 507 U.S. 619 (1993).

This issue is perhaps best illustrated by example. Consider the facts of *Milke v. Ryan*,[245] which like *Martinez*, emerged in recent years from the Arizona criminal justice system.[246] Debra Milke was convicted in 1990 of murdering her four-year-old son and was sentenced to death.[247] The prosecution's theory was that Milke had conspired with two others (her roommate, Styers, and Styers's friend, Scott) to commit the murder, which Styers, with Scott's assistance, in turn carried out. Scott confessed soon after the boy's disappearance and led authorities to the boy's body.[248]

The only evidence at trial connecting Milke to the crime was Phoenix Police Detective Saldate's testimony that Milke had confessed to him during an interview soon after the murder.[249] Milke, on the other hand, consistently denied any involvement in her son's murder, let alone that she had confessed to police.[250] Instead, she testified that Detective Saldate ignored her request for an attorney at the beginning of his interrogation and then altered her actual statements to render them inculpatory.[251]

The State had nothing to corroborate Detective Saldate's testimony, as he had ignored a supervisor's instruction to record the interrogation, had not requested that anyone witness it, and had never procured a signed *Miranda* waiver from Milke.[252] Similarly, Saldate could not produce his own interview notes at trial, which he testified he destroyed after preparing the official police report three days after Milke's interrogation.[253] The State had no physical evidence connecting Milke to the crime, and her alleged co-conspirators, Styers and Scott, would not testify against her.[254] Nonetheless, the jury and trial judge credited the detective's testimony over Milke's, and she was convicted and sentenced to death.[255]

Milke sought postconviction relief, alleging *inter alia* that her due process rights were violated under *Brady v. Maryland*[256] and *Giglio v. United States*[257] based on the State's failure to disclose to the defense material exculpatory evidence, including impeachment evidence, pertaining to Detective Saldate.[258] Specifically, the State withheld from the defense a treasure trove of impeachment evidence that would have cast serious doubt on Detective

245. *See* Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).
246. *See id*. at 1001.
247. *Id.* at 1000–02.
248. *Id.* at 1001.
249. *Id.* at 1002.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 1003.
255. *Id.*
256. 373 U.S. 83 (1963).
257. 405 U.S. 150 (1972).
258. *Milke,* 711 F.3d at 1006.

Saldate's credibility as a witness.[259] This evidence included a prior suspension for taking "liberties" with a female motorist and then lying about it to supervisors; numerous cases in which courts had thrown out confessions or indictments because Saldate had lied under oath; and more cases still where courts had suppressed confessions or vacated convictions because Saldate had violated a suspect's Fifth or Fourth Amendment rights, "often egregiously,"[260] during interrogations.[261]

Brady and its progeny provide that the due process clause requires the prosecution to disclose to the defense before trial all material exculpatory evidence.[262] The good faith of the prosecutor is irrelevant.[263] In *Giglio*, the Court held *Brady* includes witness impeachment evidence.[264] In both *Brady* and *Giglio*, the Court observed that withholding material exculpatory evidence violates a defendant's right to a fair trial.[265] Thus, in a lengthy, strongly worded opinion, the Ninth Circuit in *Milke* granted the writ based in part on the substantial *Brady* and *Giglio* violations.[266]

In *Milke*, trial counsel's competency was not at issue: the constitutional error that denied Milke her right to a fair trial stemmed from the State's withholding of material, exculpatory evidence. Postconviction counsel performed with professional competence by effectively excavating the facts underpinning the *Brady/Giglio* claims and then framing the prosecutor's failure to disclose the evidence at issue as due process violations. As a result, the Great Writ functioned as intended, and Milke received a new trial.

Now suppose instead that Milke's postconviction counsel had been less than competent, i.e., failed to investigate and raise the *Brady*/*Giglio* claims in the first postconviction petition filed on her behalf, which state courts then denied on the merits. After the state courts' denial of relief, Milke is able to secure new postconviction counsel, who in turn performs competently, as competently as postconviction counsel in the actual case, and effectively raises the *Brady/Giglio* claims in a *second* postconviction petition. But now, due to state procedural rules prohibiting second or successive petitions, the state courts refuse to consider the merits of the claims and instead simply deny the petition as an abuse of the writ. If Milke were to turn to *federal* court for relief under 28 U.S.C. § 2254, procedural default doctrine would bar merits review. Because the attorney error at issue is postconviction counsel's, rather than trial counsel's, *Martinez*, on its face, would provide no procedural relief: as written, the only postconviction counsel error that defaults substantial ineffective assistance of *trial* counsel claims provide "cause" to excuse a proce-

259. *Id.* at 1002–03.

260. In one case, Detective Saldate interrogated a suspect "who was strapped to a hospital bed, incoherent after apparently suffering a skull fracture." *Id*. at 1004.

261. *Id.* at 1003, 1005.

262. 373 U.S. 83, 87 (1963).

263. *Id.*

264. 405 U.S. 150, 153–55 (1972).

265. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 153–55.

266. *Milke*, 711 F.3d 998.

dural default. Thus, however righteous the claims, Milke would have no remedy in federal habeas proceedings. Her claims would remain unreviewed by any court, state or federal. The State's conduct, egregious as it was, would remain unchecked, and Milke's conviction and death sentence would remain intact.

Now imagine a second hypothetical scenario under *Milke*'s facts where the State in fact *had* disclosed the substantial impeachment evidence, as required by *Brady* and *Giglio*. Due to professional incompetency, however, Milke's trial counsel failed to use the evidence properly during cross-examination of Detective Saldate. As a result, the jury was never able to consider the impeachment evidence in evaluating Saldate's testimony. As such, under *Martinez*, Milke would have a viable, and substantial, ineffective assistance of trial counsel claim. As above, again assume Milke's first post-conviction counsel performs incompetently and fails to litigate the ineffective assistance of trial counsel claims. As a result, state courts deny her first round of postconviction petitions on the merits. Later, with new, competent postconviction counsel, Milke presents the ineffective assistance of trial counsel claim in state court in a *second* round of postconviction petitions. As in the first hypothetical, the state courts deny the second round of petitions as an abuse of the writ. Again, Milke turns next to the federal court for issuance of the writ. This time, because postconviction counsel's error, left unremedied, would procedurally default substantial ineffective assistance of *trial* counsel claims, under *Martinez* the error supplies "cause" to excuse the default.

Is the harm in the first hypothetical circumstance to the petitioner any different than what occurred in the actual case or what occurs in the second hypothetical? In Milke's actual case, the harm stemmed from state action and, hence, violated the due process clause. In the first hypothetical, the harm derives from both state action and first postconviction counsel's incompetency in failing to investigate and frame in constitutional terms the State's action. And in the second hypothetical scenario, the harm emerges from both trial counsel's and first postconviction counsel's incompetency. The result, however, is identical: as a result of constitutional error, the jury is denied crucial evidence in evaluating the credibility of the prosecution's key witness, and Milke stands convicted of a capital crime that is in all likelihood unsupported by the evidence. And yet, under *Martinez*, if the due process and Sixth Amendment claims, respectively, are later procedurally defaulted due to attorney error during initial-review postconviction proceedings, only the latter Sixth Amendment claims will receive federal review. It is hard to discern how this is equitable.

Nor is this result consistent with federal habeas corpus doctrine. The historical and modern function of the writ of habeas corpus, even as substan-

tially hamstrung by AEDPA, has never played constitutional favorites.[267] Rather, as discussed at length in Part III.B., the Great Writ provides the legal mechanism by which an individual in custody can challenge the constitutionality of his detention in federal court. Not only is federal habeas corpus central to separation of powers doctrine,[268] but with rare exception,[269] it stands as enforcer of the entire panoply of constitutional rights that protect a criminal defendant.

Gideon is not overrated, far from it. Indeed, many a voice has been appropriately raised in recent years calling for its reinforcement.[270] But the remaining constitutional rights that protect the criminally accused deserve equal footing in their enforcement. If anything, such other violations are the reality, whereas *Gideon* is the proxy. *Gideon* reassures us of the integrity of the criminal process. If a defendant is denied assistance of counsel, we presume prejudice and that a new trial is warranted, but a substantial, identifiable constitutional violation like what occurred in *Milke* tells us definitively that justice has been denied.

Indeed, the power of the Sixth Amendment right to counsel stems from counsel's crucial role in ensuring enforcement of constitutional rights such as due process. Thus, where a petitioner makes the difficult case of showing that due process has in fact been denied to him, it is hard to see how this is less worthy of federal review than an ineffective assistance of trial counsel claim. Instead, *Martinez*'s holding should extend to *all* substantial claims of constitutional error that impact fundamental fairness or the accuracy of the

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267. *See* Uhrig, *supra* note 7 (arguing that the inordinate procedural complexity of AEDPA denies pro se inmates their constitutionally guaranteed right to access to the courts).

268. *See* Boumediene v. Bush, 553 U.S. 723 (2008) (invalidating section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e) under the Suspension Clause for its attempt to strip the writ of habeas corpus from alien detainees at Guantanamo Bay, Cuba).

269. *See* Stone v. Powell, 428 U.S. 465 (1976) (finding Fourth Amendment violations to be uncognizable in federal habeas unless the petitioner was denied either his Sixth Amendment right to counsel at trial or the opportunity to assert the violation in state court).

270. *See, e.g.*, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731–32 (2005); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Note, *The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 540 (2005); E.E. Edwards, *Getting Around Gideon: The Illusion of Effective Assistance of Counsel*, THE CHAMPION (Jan./Feb. 2004).

guilt/innocence determination.[271] Equitable relief should not be obtained merely for those claims that involve allegations of ineffective assistance of trial counsel. Where inadequate assistance of initial-review, postconviction counsel causes an inmate to default in federal habeas corpus proceedings such a substantial[272] claim of constitutional error, equitable relief should apply. The universe of claims that should excuse a procedural default necessarily includes allegations of a substantial denial of the Fifth and Fourteenth Amendments' Due Process Clause guarantees of fundamental fairness;[273] the Fifth Amendment privilege against self-incrimination[274] and the Double Jeopardy Clause;[275] the Sixth Amendment's trial-related rights, including, as recognized by the U.S. Supreme Court, the right to present a defense;[276] and the Eighth Amendment's protection against cruel and unusual punishment.[277]

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271. *See* David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 757–59 (1994); Gary Peller, *In Defense of Federal Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 589–92 (Winter 1982).

272. "Substantial," in turn, should be defined consistent with *Brecht v. Abrahamson*'s harmless error doctrine. *See* 507 U.S. 619, 622 (1993). In that way, we can achieve synchronicity between this new, equitable right to counsel doctrine and the role of the Great Writ of Liberty. *See id.*

273. U.S. CONST. amend. V (providing that no person shall be "deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV (no State shall "deprive any person of life, liberty, or property, without due process of law"). *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (Due Process Clause requires states to disclose to criminal defendants material, exculpatory evidence relevant to guilt or punishment); Brown v. Mississippi, 297 U.S. 278 (1936) (Due Process Clause prohibits use in evidence of involuntary confessions).

274. U.S. CONST. amend. V (providing that no person "shall be compelled in any criminal case to be a witness against himself"). *See* Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against self-incrimination requires police, before subjecting a person to custodial interrogation, to advise of right to remain silent and consequences of waiving that right and right to assistance of counsel during such interrogation).

275. U.S. CONST. amend. V (providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"). *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (holding Double Jeopardy Clause applies to both successive punishment and successive prosecution for the same criminal offense).

276. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."). *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975) (Sixth Amendment constitutionalizes the right in an adversarial criminal trial to present a defense); Crawford v. Washington, 541 U.S. 36 (2004) (Confrontation Clause requires criminal defendant have opportunity to cross-examine adverse witnesses who offer testimonial evidence against him).

277. U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishment"). *See* Robinson v. California, 370 U.S. 660, 667 (1962) (applying Eighth Amendment to states via the Fourteenth Amendment).

Constitutionally competent counsel may play a critical role in assuring us of the integrity of the criminal justice system. But it has good company in the balance of rights enshrined in criminal procedure that guarantee fundamental fairness and the accuracy of the criminal process.

CONCLUSION

The U.S. Supreme Court's recognition of an "equitable" right to assistance of postconviction counsel in litigating substantial ineffective assistance of trial counsel claims offers a practical solution to the infinite continuum of habeas dilemma. But the Court's limitation of this right to cases in which a petitioner seeks to raise an otherwise-defaulted, substantial ineffective assistance of trial counsel claim in initial review collateral proceedings is unsustainable. The elevation in postconviction enforcement of claims derived from *Gideon v. Wainwright* over all other substantial claims of constitutional error finds no support in the history and function of the Great Writ. Rather, if equity demands a remedy where postconviction counsel fails to raise a Sixth Amendment ineffective assistance of trial counsel claim, and thus defaults the claim in federal court, it should likewise demand a remedy where counsel fails to argue any other substantial constitutional violation that compromises the fundamental fairness and the accuracy of the criminal process.