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## Enforcing Effective Assistance After Martinez

Nancy J. King

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# THE YALE LAW JOURNAL

NANCY J. KING

## Enforcing Effective Assistance After *Martinez*

**ABSTRACT.** This Essay argues that the Court's effort to expand habeas review of ineffective assistance of counsel claims in *Martinez v. Ryan* will make little difference in either the enforcement of the right to the effective assistance of counsel or the provision of competent representation in state criminal cases. Drawing upon statistics about habeas litigation and emerging case law, the Essay first explains why *Martinez* is not likely to lead to more federal habeas grants of relief. It then presents new empirical information about state postconviction review (cases filed, counsel, hearings, and relief rates), post-*Martinez* decisions, and anecdotal reports from the states to explain why, even if federal habeas grants increase, state courts and legislatures are unlikely to respond by invigorating state collateral review. The Essay concludes that alternative means, other than case-by-case postconviction review, will be needed to ensure the provision of effective assistance.

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## INTRODUCTION

Last Term the Supreme Court unexpectedly expanded postconviction review of claims of ineffective assistance of trial counsel in three decisions: *Martinez v. Ryan*,<sup>1</sup> *Lafler v. Cooper*,<sup>2</sup> and *Missouri v. Frye*.<sup>3</sup> In *Martinez*, the Court announced a new equitable rule for federal habeas corpus cases, allowing merits review of a substantial claim of ineffective assistance of trial counsel that was not addressed during a petitioner's attack on his conviction or sentence in state court, if the petitioner lacked the effective assistance of counsel to raise it there.<sup>4</sup> In *Lafler* and *Frye*, the Court enlarged the definition of ineffective assistance itself, declaring that bad advice during plea negotiations can amount to ineffective assistance if it deprives the defendant of a favorable plea deal,<sup>5</sup> allowing more petitioners than ever before to raise a ineffectiveness challenge to their convictions in state postconviction and federal habeas proceedings.

All three cases have attracted attention, but this Essay addresses the consequences of *Martinez* in particular. Commentators have documented how feeble postconviction review has turned out to be in ensuring competent representation.<sup>6</sup> Some hope that the *Martinez* ruling will increase federal oversight of effective assistance in the states and enhance procedural protections in state postconviction review.<sup>7</sup> Justices Scalia and Thomas predicted in dissent that the decision would leave states no choice but to

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1. 132 S. Ct. 1309 (2012).

2. 132 S. Ct. 1376 (2012).

3. 132 S. Ct. 1399 (2012).

4. *Martinez*, 132 S. Ct. at 1320.

5. *Frye*, 132 S. Ct. at 1410-11; *Lafler*, 132 S. Ct. at 1390-91.

6. E.g., Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2608-11 (2013).

7. See, e.g., Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. (forthcoming 2013); Primus, *supra* note 6, at 2607 (characterizing *Martinez* as "the first step down a path toward reinvigorating *Gideon*"); Gray R. Proctor, *Habeas Review Under 28 U.S.C. § 2254 After Martinez v. Ryan: Federalization and Forum Shopping for Ineffective-Assistance Claims*, 92 Crim. L. Rep. (BNA) 279 (Dec. 5, 2012) (concluding that *Martinez* "clearly helps" federal habeas petitioners and "very likely . . . will prove to be more important than" other recent right-to-counsel cases); Mary Schmid Mergler, *Supreme Court Sets Critical New Precedents on Right to Counsel*, ACSBLOG (Mar. 26, 2012), <http://www.acslaw.org/acsblog/supreme-court-sets-critical-new-precedents-on-right-to-counsel>.

appoint counsel for all indigent petitioners in postconviction proceedings.<sup>8</sup> Others have warned that states may eliminate state postconviction review rather than take that step.<sup>9</sup> In this Essay I question these predictions and argue that the Court's effort to expand habeas review of ineffective assistance of counsel claims in *Martinez* will make little difference in either the enforcement of the right to the effective assistance of counsel or the provision of competent representation in state criminal cases.

Drawing upon statistics about habeas litigation and emerging case law, Part I explains why *Martinez* is not likely to lead to more federal habeas grants of relief. Using new empirical information about state postconviction review, as well as post-*Martinez* decisions and anecdotal reports from the states, Part II further explains why, even if federal habeas grants increase, state courts and legislatures are unlikely to respond by invigorating state collateral review. The Conclusion argues that the limitations of postconviction review as a regulatory approach suggest the need to consider alternatives.

## I. MARTINEZ AND FEDERAL HABEAS REVIEW

The rule in *Martinez* is not likely to raise the notoriously low rate of relief in federal habeas. Before *Martinez* was decided, less than 1% of noncapital habeas petitions were granted for *any* claim.<sup>10</sup> This is unlikely to change after *Martinez*

8. *Martinez*, 132 S. Ct. at 1327 (Scalia, J., dissenting).

9. Brief for the States of Wisconsin et al. as Amici Curiae Supporting Respondent at 36 n.22, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 4072899 at \*36 (urging the Court not to “articulate a rule that would encourage a State to curtail an avenue of review that it might otherwise make available to its citizens in order to thwart meddling by the federal courts that undermine the finality of state court decisions”).

10. See Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 310 (2012) (reporting final outcomes of more than 2,300 randomly selected federal habeas cases from among those filed nationwide by state prisoners in 2003 and 2004). Even though an estimated half of the study cases raised some sort of ineffectiveness claim, see NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>, in only two of those cases did a court eventually grant relief for the ineffective assistance of trial counsel, see King, *supra*, at 315.

A survey of even more recent cases from Michigan confirms just how rarely ineffective assistance of trial counsel (IATC) claims raised by state prisoners succeed. The Attorney General's Office reported that of the 3,605 federal habeas petitions that it defended in the

for two reasons: few additional petitioners will receive merits review, and those that do remain unlikely to win.

*Martinez* expands only slightly a narrow exception to the “state procedural default” doctrine, which generally requires a federal court to dismiss, without addressing the merits, any constitutional claim that a state court has refused to address because of the petitioner’s failure to comply with state rules.<sup>11</sup> *Martinez* allows a federal court to reach the merits of such “defaulted” claims, but only if the claim alleges the ineffective assistance of trial counsel (IATC), is “substantial,” and was raised improperly or not at all in the petitioner’s initial collateral review proceeding in state court.<sup>12</sup> But the exception is narrow indeed. As lower court decisions applying *Martinez* demonstrate, if a

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six-year period from 2005 to 2010, only 100 were granted by federal district courts for any claim. Letter from Joel D. McGormley, Div. Chief, Appellate Div., Mich. Dep’t of Att’y Gen., to Ronald J. Schafer, Ionia Cnty. Prosecuting Att’y 3-4 (Jan. 23, 2012) (on file with author). Only 45 of those grants were for an IATC claim, at least 17 of which were reversed by the federal courts of appeals. *Id.* Federal judges, in other words, granted relief to approximately 1.3% of habeas petitioners raising IATC claims.

I rely on two assumptions in calculating this figure: First, I assume that during the same period Michigan prisoners filed about 1,800 additional petitions that federal courts dismissed or denied without asking the state to respond, resulting in approximately 5,400 total petitions. This assumption is based in part on data initially gathered for KING ET AL., *supra*, showing that approximately one-third of habeas petitions filed by Michigan prisoners were dismissed without a filing by the state, but it is also supported by federal caseload statistics. See *Federal Judicial Caseload Statistics*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (showing, in Table C-3, 5,655 total habeas suits filed in Michigan district courts from March 2005 to March 2011). Second, I assume approximately 2,100 (39%) of those 5,400 petitions included an IATC claim. This assumption is also based in part on data initially gathered for KING ET AL., *supra*, showing that approximately 39% of Michigan habeas petitions raised an ineffectiveness claim, but it is also close to the percentage of *state* postconviction challenges that include this claim. See Memorandum from Dawn Van Hoek, Dir., Mich. State Appellate Defender Office 5 (Dec. 2, 2011) (on file with author) (noting IATC claims are raised in about 35-37% of the *state* postconviction cases litigated by the state appellate defender office, which represents one-quarter of the state’s indigent defendants seeking appellate review). The 28 petitions granted by federal courts thus represent 1.3% of the estimated 2,100 petitions that included IATC claims.

11. For more on the defense of procedural default and the details of the *Martinez* case, see 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.4 (3d ed. 2007 & Supp. 2012); and Primus, *supra* note 6, at 2608-18.
12. *Martinez*, 132 S. Ct. at 1320. Lower courts have also refused to apply *Martinez* in cases from states that permit petitioners to raise IATC claims based on the record on direct appeal, Primus, *supra* note 6, at 2618-20, but the Court may address this particular issue this Term. See *Trevino v. Thaler*, 449 F. App’x 415 (5th Cir. 2011), *cert. granted*, 133 S. Ct. 524 (2012).

petitioner's claim was filed in federal court beyond the statute of limitations<sup>13</sup> or in a successive petition,<sup>14</sup> was defaulted on direct or collateral appeal rather than at the initial collateral proceeding,<sup>15</sup> or was raised by a petitioner who never sought state postconviction relief<sup>16</sup> or declined representation when he did,<sup>17</sup> the *Martinez* gateway to merits review remains closed.

More importantly, securing merits review in federal habeas is no magic bullet. Before *Martinez*, federal district courts were considering the merits of constitutional claims in approximately half of all noncapital habeas cases, and denying more than 99% of them.<sup>18</sup> And *Martinez* has not changed the reasons why federal judges deny almost all of the IATC claims they review on the merits.

Assume, arguendo, that petitioners lose at least some IATC claims on the merits because they lack counsel (only 7% have attorneys)<sup>19</sup> and do not receive evidentiary hearings (less than 1% receive hearings).<sup>20</sup> There is no sign in post-

13. See, e.g., *Adams v. Thaler*, 679 F.3d 312, 322 n.6 (5th Cir. 2012); *Sudduth v. Clements*, No. 12-CV-00645, 2012 WL 5289592 (D. Colo. Oct. 26, 2012); *Hines v. Hobbs*, No. 5:12CV00321, 2012 WL 5416920 (E.D. Ark. Oct. 24, 2012); *Capers v. Walsh*, No. CIV.A. 12-4780, 2012 WL 5389513 (E.D. Pa. Oct. 5, 2012).
14. See, e.g., *Osborne v. Purkett*, No. 03-653-CV-W, 2012 WL 5511676 (W.D. Mo. Nov. 14, 2012); *Gale v. Wetzel*, No. 1:12-CV-1315, 2012 WL 5467540 (M.D. Pa. Sept. 27, 2012); see also KING ET AL., *supra* note 10, at 46-48 (reporting that 29% of noncapital cases were dismissed as either time-barred or successive, and that only 13% were dismissed at least in part as defaulted).
15. See, e.g., *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012).
16. See, e.g., *Jones v. Pa. Bd. of Prob. & Parole*, 492 F. App'x 242 (3d Cir. 2012); *Uptegrove v. Villmer*, No. 12-0456-CV-W, 2012 WL 3637707 (W.D. Mo. Aug. 22, 2012); *Bland v. Hobbs*, No. 5:11-CV-00286, 2012 WL 2389904 (E.D. Ark. June 12, 2012).
17. See, e.g., *Bender v. Wynder*, No. 05-998, 2012 WL 6737840 (W.D. Pa. Dec. 28, 2012); *Thompson v. Varano*, No. 12-1479, 2012 WL 3740622 (E.D. Pa. May 17, 2012).
18. KING ET AL., *supra* note 10, at 45, 56. The study found that federal courts did not reach the merits in between 42% and 58% of terminated noncapital cases. See NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 205 n.44 (2011).
19. King, *supra* note 10, at 315-16 (finding also that, of those petitioners from the 2007 study who succeeded in the district courts, 67%, or eight of twelve, had attorneys); see also Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 132 (2012) (arguing that the rate of relief in noncapital cases would be much higher if petitioners had a right to counsel).
20. KING ET AL., *supra* note 10, at 36. These two features are linked. See RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 8(c) (2010),



*Martinez* decisions that *Martinez* has deterred judges from rejecting IATC claims without first providing counsel or hearings. *Martinez* did not lessen the fiscal pressures on the judicial branch, which pays for appointed counsel in habeas cases, nor did it create any right to counsel. And even though it is within a judge's discretion to permit a petitioner to develop new facts for claims dismissed rather than denied in state court,<sup>21</sup> federal judges after *Martinez* continue to deny IATC claims on their merits and without hearings when the petitioner was not diligent in developing the record in state court,<sup>22</sup> when his allegations are refuted by the record,<sup>23</sup> or when those allegations

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<http://www.uscourts.gov/uscourts/rules/2254-2255.pdf> ("If an evidentiary hearing is warranted, the judge must appoint an attorney to represent [an indigent petitioner].").

21. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); see also *Banks v. Workman*, 692 F.3d 1133, 1144 n.4 (10th Cir. 2012) ("[A]n evidentiary hearing is not a fishing expedition. Instead, its function is to resolve disputed facts. And for that reason, a habeas court . . . 'is required to conduct the evidentiary hearing only if the admissible evidence presented by petitioner, if accepted as true, would warrant relief as a matter of law.'" (quoting *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007))).
22. See, e.g., *Gallow v. Cooper*, No. 10-30861, 2012 WL 3641520 (5th Cir. Aug. 24, 2012) (applying § 2254(e)); *Halvorsen v. Parker*, No. 08-484, 2012 WL 5866620 (E.D. Ky. Nov. 19, 2012); *Williams v. Mitchell*, No. 1:09 CV 2246, 2012 WL 4505181 at \*6 (N.D. Ohio Sept. 28, 2012) (rejecting a request to allow claims of ineffective assistance of postconviction counsel to establish "cause" for a "default" of the factual development of claims for relief in state court, finding "nothing in *Martinez* that suggests the Supreme Court intended its limited holding to apply so broadly and in such a different context"). But see *Proctor*, *supra* note 7, at 279 (arguing that the "reasoning of *Martinez* would seem to require that the Supreme Court redefine 'failure' to exclude cases where counsel is responsible for the undeveloped state of the record," and that petitioners "bringing *Martinez*-excused claims are very likely to meet this lower standard for an evidentiary hearing").
23. See, e.g., *Walker v. Kerestes*, No. 10-2009, 2012 WL 5494683, at \*9 (E.D. Pa. Oct. 25, 2012) (reviewing a pro se petitioner's defaulted IATC claim on its merits and concluding that the petitioner failed "to come forward with some factual matter beyond his own bald assertions"); *Woodson v. Sec'y, Dep't of Corr.*, No. 6:10-cv-649, 2012 WL 5199614 (M.D. Fla. Oct. 22, 2012) (rejecting, based on the record, a defaulted IATC claim raised by a pro se petitioner and finding that the claim is not substantial because the petitioner cannot show prejudice); *Boseman v. Warden of Lee Corr. Inst.*, No. 2:11-3265, 2012 WL 5380636 (D.S.C. Sept. 24, 2012) (rejecting a new IATC claim on the merits without counsel or a hearing when one allegation was refuted by the record and another lacked prejudice); *Glenn v. Wynder*, No. Civ.A. 06-513, 2012 WL 4107827 (W.D. Pa. Sept. 19, 2012) (finding that a represented petitioner's defaulted IATC claim was not substantial and denying a hearing); *Haley v. Sauers*, No. 10-5061, 2012 WL 3163951, at \*12 (E.D. Pa. July 31, 2012) (rejecting multiple new IATC claims without a hearing or counsel, and noting that an unsupported assertion "does not represent a substantial claim of trial counsel's ineffectiveness"); *Etenburn v. Norman*, No. 4:11 CV 1181, 2012 WL 3027923 (E.D. Mo. July 24, 2012) (finding a claim not substantial, as it was refuted by the record); *Madison v. Sec'y, Fla. Dep't of*

would be futile if believed.<sup>24</sup> Indeed, this was the outcome of Martinez's own claim on remand.<sup>25</sup>

Some have also predicted that by allowing judges to apply de novo review rather than "reasonableness" review for these otherwise defaulted claims, *Martinez* might increase the rate of relief.<sup>26</sup> But judges applying de novo review after *Martinez* are continuing to find allegations of ineffective assistance unsupported, implausible, and insubstantial,<sup>27</sup> just as they do when denying

Corr., No. 3:09-CV-444, 2012 WL 2680041 (M.D. Fla. July 6, 2012) (denying a hearing and counsel and finding that an IATC claim was meritless even under de novo review).

The record before a federal judge may include trial counsel's affidavit, submitted either by the state or the petitioner. See, e.g., *Horonzy v. Smith*, No. 1:11-CV-00235, 2012 WL 4017927 (D. Idaho Sept. 12, 2012) (ordering an unrepresented petitioner to submit portions of his trial attorney's file, letters the attorney had written to him about the status of the case, and/or an affidavit from her regarding the extent and nature of her work on his case); *Rogers v. Pearson*, No. 1:11cv1281, 2012 WL 3691085 (E.D. Va. Aug. 27, 2012) (denying discovery and hearing and rejecting an IATC claim on the merits when conflicts between affidavits and testimony were insufficient to establish prejudice).

24. E.g., *Suber v. Kerestes*, No. 09-1049, 2012 WL 6681696 (W.D. Pa. Dec. 21, 2012) (denying a pro se petitioner's defaulted IATC claim as meritless, without a hearing); *Johnson v. Denny*, No. 12-0960-CV-W-BP-P, 2012 WL 5904321, at \*8 (W.D. Mo. Nov. 26, 2012) (denying a pro se petitioner's IATC claim in part because "there was no reasonable probability that the outcome of the trial would have been different"); *Cooper v. Warden of Lebanon Corr. Inst.*, No. 3:12cv00059, 2012 WL 5511320 (S.D. Ohio Nov. 14, 2012) (recommending that a pro se petitioner's IATC claim be denied without a hearing); *McCormack v. Baldrige*, No. 1:10-CV-00289, 2012 WL 4138479 (D. Idaho Sept. 19, 2012) (denying discovery, a hearing, and counsel, and denying an IATC claim, finding no prejudice possible); *Anderson v. Hobbs*, No. 5:10CV00258, 2012 WL 3111680 (E.D. Ark. July 9, 2012) (recommending the denial and dismissal of a pro se petition and finding that claims defaulted in state court where the prisoner had no counsel and no hearing were not substantial); *Sinyard v. Mitchim*, No. 3:11-CV-01398, 2012 WL 3502374 (N.D. Ala. June 13, 2012) (denying a pro se petitioner's IATC claim without a hearing and noting that there was no evidence of prejudice, after the state court also denied hearing and counsel).
25. *Martinez v. Schriro*, No. CV 08-785, 2012 WL 5936566, at \*6-13 (D. Ariz. Nov. 27, 2012).
26. See *Proctor*, *supra* note 7, at 279 (also noting that district courts addressing the merits of otherwise defaulted IATC claims after *Martinez* will be able to apply circuit precedent, not just Supreme Court precedent); see also Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 118 (2012) (arguing that granting *Strickland* claims when the reasonableness standard does not apply carries less "sting" for state courts and does not weaken the reasonableness standard for other cases).
27. See, e.g., *Jacobs v. Clements*, No. 12-cv-01884, 2012 WL 6217388, at \*7 (D. Colo. Dec 13, 2012) (finding, without a hearing, that a pro se petitioner's claims of ineffective assistance of counsel were not substantial); *Woodson v. Sec'y, Dep't of Corr.*, 6:10-cv-649, 2012 WL 5199614 (M.D. Fla. Oct. 22, 2012) (finding an IATC claim insubstantial); *Rogers v. Pearson*,

IATC claims raised by pro se federal prisoners in § 2255 cases using de novo review.<sup>28</sup> *Strickland*, as many have noted, is a very high bar, and *Martinez* did not lower it one notch.

Two other developments suggest that for those petitioners who make it through the *Martinez* gateway to merits review, winning IATC claims may become more difficult, not easier, in the years to come. The first is the creeping acceptance of negotiated waivers of the right to seek postconviction review of ineffective assistance of counsel claims. Judges are finding that such waivers bar later claims that an attorney provided constitutionally deficient representation both leading up to a guilty plea and after an agreement has been reached, and it is reasonable to assume prosecutors will embrace such a useful cost-saver whenever they can.<sup>29</sup>

Second, the *Frye* and *Lafler* decisions, announced shortly after *Martinez* and widely hailed as victories for indigent defendants, may, ironically, make it more difficult for prisoners to win IATC claims. Some judges have enthusiastically accepted the Court's invitation in *Frye* to "establish[]" at the plea colloquy "that the defendant has been given proper advice,"<sup>30</sup> finding new ways to secure on-the-record statements from defense counsel that all plea offers were explained to the defendant and that the defendant was satisfied with his counsel's advice.<sup>31</sup> In courtrooms where judges are wary of either intruding into

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1:11CV1281, 2012 WL 3691085 (E.D. Va. Aug. 27, 2012) (denying requests for discovery and an evidentiary hearing, and addressing an IATC claim and rejecting it on the merits while noting that "conflicts between the affidavits and Detective Harris' testimony are insufficient to establish that Rogers' defense was prejudiced"); *Parker v. Curley*, No. Civ.A. 10-5569, 2012 WL 4931029 (E.D. Pa. July 20, 2012) (finding IATC claims meritless based on the record, as an alternative ground, after the state court had rejected them as meritless without a hearing). This is no surprise. Federal judges before *Martinez* applied de novo rather than reasonableness review to a significant portion of claims and denied relief anyway. See KING ET AL., *supra* note 10, at 50.

28. See, e.g., *United States v. Gorham-Bey*, Nos. CR 7-442, CV 12-366, 2012 WL 3155652 (W.D. Pa. Aug. 2, 2012) (rejecting pro se allegations of IATC without a hearing and finding no prejudice); *United States v. Rodriguez-Rivera*, No. 07-CR-0026, 2012 WL 2277784, at \*2 (D. Minn. June 18, 2012) (denying counsel and finding allegations of coercion and prejudice refuted by the defendant's record admission that she pleaded guilty "voluntarily and of [her] own free will" because she "committed a crime").

29. See Nancy J. King, *Waiving Effective Assistance*, 51 DUQ. L. REV. (forthcoming 2013).

30. *Missouri v. Frye*, 132 S. Ct. 1399, 1406-07 (2012).

31. Norman L. Reimer, *Frye and Lafler: Much Ado About What We Do—And What Prosecutors and Judges Should Not Do*, CHAMPION, Apr. 2012, at 7, 7-8; D. Brock Hornby, Script of Proceeding, Rule 11—Guilty Plea (May 15, 2012), <http://www.med.uscourts.gov/pdf/dbhscript.rule11.pdf> (asking the defendant, as part of a federal district judge's script for a

privileged communications or participating in plea negotiations,<sup>32</sup> prosecutors may obtain such proof on their own. After *Lafler* and *Frye*, some prosecutors in Tennessee report that they will not make any offer at all unless defense counsel agrees to sign a new form that states the offer terms and that the offer was conveyed to the defendant.<sup>33</sup> Before agreeing to any trial date, the defendant himself must sign that he “knowingly rejects the State’s previous offer(s) and elects to set his/her case for trial,” and defense counsel must sign that the defendant “has been advised of the State’s offer(s) and the benefits and disadvantages of proceeding to trial.”<sup>34</sup> Other prosecutors ask each defendant to sign a statement of satisfaction with his representation, or insist that all offers and responses be in writing with copies to the defendant. Armed with such proof, prosecutors can more easily repel any later IATC attack on its merits.<sup>35</sup>

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plea colloquy, whether he has “consulted with your lawyer in detail on this subject” and whether he is “satisfied with” his lawyer’s advice); see also Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 165, 167-68 (2012) (discussing ways in which prosecutors and judges can “make clean records to bulletproof their convictions”).

32. See Petition for a Writ of Certiorari at 20-21, *United States v. Davila*, No. 12-167 (U.S. Aug. 13, 2012), <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-167-Petition.pdf> (noting the difficulty of complying with the suggestion in *Frye* without inadvertently “participating” in negotiations). The Court will review this Term whether a violation of Rule 11’s ban on judicial participation requires reversal without regard to prejudice. *United States v. Davila*, 664 F.3d 1355 (11th Cir. 2011), cert. granted, 133 S. Ct. 831 (2013).
33. Office of the Dist. Att’y Gen., Metro. Nashville & Davidson Cnty., Plea Negotiation Memorandum [hereinafter Plea Negotiation Memorandum] (on file with author). As one prosecutor explained: “If a defendant refuses to sign, then he doesn’t get the offer. Defense attorneys love it because it protects them from ineffectiveness claims. And judges are happy to do anything that helps in [postconviction review].” E-mail from Pamela Anderson, Assistant Dist. Att’y Gen., Metro. Nashville & Davidson Cnty., to author (Nov. 28, 2012, 7:31 PM) (on file with author).
34. Plea Negotiation Memorandum, *supra* note 33.
35. See, e.g., *Capers v. Walsh*, No. 12-4780, 2012 WL 5389513 (E.D. Pa. Oct. 5, 2012), adopted by No. 12-4780, 2012 WL 5395797 (E.D. Pa. Nov. 5, 2012) (noting that one reason the state court rejected the petitioner’s IATC allegation for failing to call alibi witnesses was that the defendant had “waived his ineffectiveness claims by stating during an on-the-record colloquy that he was satisfied with his attorney’s representation and he did not want to call any witnesses at trial”); *Ellis v. Wengler*, No. 1:10-CV-00405, 2012 WL 4009565 (D. Idaho Sept. 12, 2012) (finding an IATC claim insubstantial when the “plea questionnaire” completed by the petitioner before his sentencing hearing refuted his allegation that he was misled by his attorney and his own admissions precluded a finding of prejudice); *Breeden v. State*, No. 2011-CP-00437, 2012 WL 3665049 (Miss. App. Aug. 28, 2012) (finding that

## II. MARTINEZ AND STATE POSTCONVICTION REVIEW

Even if federal courts do begin to grant more IATC claims after *Martinez*, there is little reason to expect *state* courts to provide more attorneys, hearings, or relief for these claims in their postconviction proceedings. Nor are states likely to withhold postconviction review and turn over enforcement to federal courts. Section II.A provides a preliminary empirical baseline for measuring potential changes in state postconviction litigation, and Section II.B explains why no such changes are likely to occur.

### A. State Postconviction Review Before *Martinez*

State postconviction review is beginning to attract the attention of legal scholars.<sup>36</sup> Yet there has been no attempt to find out how many noncapital prisoners seek postconviction relief in state courts each year, much less how many of these cases actually involve counsel, a state response, fact-finding, or relief.<sup>37</sup> Without data, one can only guess what really goes on during this phase of the criminal process, and what effect a decision like *Martinez* might have on that process. The dearth of information is understandable: in some states, a request for postconviction relief is docketed like any other motion in a criminal case, and so even counting how many requests are filed would require an inspection of each docket sheet. Nevertheless, I was able to obtain some

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allegations of IATC were contradicted by sworn testimony that the petitioner had been thoroughly advised and was satisfied with his attorneys' services).

36. E.g., Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT'G REP. 298, 298 (2012) ("[T]he adequacy of state postconviction proceedings will be a centrally contested issue in the years ahead."); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 146-56, 166-76 (2011); O'Hear, *supra* note 26, at 110, 120 (emphasizing the need for state postconviction courts to take the lead in developing and enforcing effective assistance standards); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 12 (2010) (advocating a "focus on systemic state practices"); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 972-86 (2012) (discussing potential challenges to fact-finding procedures in state proceedings).
37. Neither the National Center for State Courts nor the Bureau of Justice Statistics attempts to collect information on state postconviction proceedings. The latest effort to do so was two decades ago, examining cases in four states. See Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237 (1995) (reporting a study of cases filed between 1990 and 1992 in Alabama, California, New York, and Texas).

aggregate information about these proceedings from fifteen of the thirty states with the largest prison populations (10,000 or more in 2010). The summary below provides the first empirical snapshot of contemporary state postconviction review, one that, albeit incomplete, might serve as a baseline for measuring potential change.

### 1. Filing Rates

Table 1 reports, for fifteen states, the number of requests for relief filed using each state's primary postconviction remedy during the years 2008 to 2011. Tables 2A and 2B compare these filings with convictions, for those states with conviction data available. The number of defendants who seek postconviction relief is surprisingly small—roughly 3% of the total number of convictions from the state's trial court of general jurisdiction, or 3-4% of felony convictions. If these states are representative, postconviction review is irrelevant for more than 96% of cases in our nation's criminal courts.<sup>38</sup>

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38. See also Memorandum from Dawn Van Hoek, *supra* note 10, at 3 (reporting that in Michigan, where postconviction claims are raised on direct appeal, 7% of those convicted of felonies and eligible to appeal seek review, and about 23% of those withdraw their appeals, for an appeal rate of just over 5%).

Even less is known about how many of the petitioners who do seek review raise IATC claims, but it is likely near 40%. Twenty years ago, approximately 40% of state postconviction petitioners in the four states examined by Flango and McKenna were raising some sort of ineffectiveness claim, including appellate as well as trial counsel. Flango & McKenna, *supra* note 37, at 249-50. Michigan prisoners have raised trial-counsel ineffectiveness claims at approximately the same rate in recent years. See Memorandum from Dawn Van Hoek, *supra* note 10, at 5. About half of those filing federal petitions ten years ago raised either a trial or appellate counsel ineffectiveness claim. *Id.*

Table 1.

## INITIAL COLLATERAL REVIEW FILINGS, NONCAPITAL CASES, BY STATE AND YEAR

STATE	2008	2009	2010	2011
AR	181	154	182	177
AZ	2,257	1,875	1,746	2,192
CA	8,233	8,550	8,707	8,767
FL	17,750	17,866	15,757	17,506
GA	n/a	n/a	n/a	1175
IN <sup>39</sup>	992	1,049	1,207	1,362
MO	963	1,066	1,033	998
MS	420	381	444	499
NJ	n/a	801	907	1,005
OR	501	596	580	494
PA <sup>40</sup>	693	1,621	1,980	1,944
SC	732	828	770	n/a
TN	535	496	427	531
TX <sup>41</sup>	5,035	4,791	4,275	4,229
WA	1,084	1,053	978	873

39. Data from Indiana and South Carolina included death penalty cases.

40. These figures include amended petitions, so the totals overstate the actual number of cases filed. See *infra* text accompanying note 72.

41. Data from Texas and Washington included filings in the court of appeals.

Table 2A.

RATIO OF POST-CONVICTION FILINGS TO TOTAL CONVICTIONS FROM GENERAL JURISDICTION TRIAL COURTS, BY STATE, 2010-2011

POST-CONVICTION FILINGS YEAR	2011			2010	
	2010	2009	2008	2009	2008
Divided by total convictions from general jurisdiction court year <sup>42</sup>					
STATE					
AR	0.004	0.004	0.004	0.004	0.004
AZ	0.050	0.045	0.045	0.036	0.036
CA	0.046	0.051	0.053	0.051	0.053
CO <sup>43</sup>	0.008	0.007	0.007	n/a	n/a
FL	0.114	0.102	0.092	0.092	0.083
MO	0.008	0.008	n/a	0.008	n/a
NJ	0.026	0.025	0.025	0.023	0.023
PA	0.014	0.014	n/a	n/a	n/a
SC	n/a	n/a	n/a	0.015	0.016
TN	0.006	0.006	0.006	0.005	0.005
TX	0.036	0.035	0.036	0.036	0.036
WA	0.031	0.028	0.025	0.031	0.028
MEDIAN	0.026	0.025	0.026	0.028	0.030
MEAN	0.031	0.030	0.033	0.030	0.032

42. This method is designed to examine differing time lags between conviction and postconviction filing. Total convictions include both felonies and misdemeanors.

43. These figures compare total postconviction review filings in 4 of 22 judicial districts between November 1, 2011, and April 30, 2012 ( $n = 79$ ), to half the number of annual convictions from those districts.



Table 2B.

RATIO OF POST-CONVICTION FILINGS TO FELONY CONVICTIONS, BY STATE, 2010-2011

POST-CONVICTION FILINGS YEAR Divided by felony convictions from general jurisdiction court year <sup>44</sup>	2011			2010	
	2010	2009	2008	2009	2008
STATE					
AR	0.006	0.005	0.006	0.005	0.006
AZ	0.051	0.045	0.046	0.036	0.037
CA	0.053	0.062	0.064	0.062	0.064
CO <sup>45</sup>	0.020	0.018	0.018	n/a	n/a
MO	0.025	0.024	n/a	0.025	n/a
TX	0.039	0.036	0.036	0.036	0.037
WA	0.036	0.033	0.029	0.038	0.032
MEDIAN	0.036	0.033	0.033	0.036	0.037
MEAN	0.033	0.032	0.033	0.034	0.035

## 2. Counsel and Hearings

Even fewer states collect information about counsel or hearings in state postconviction proceedings. Based on available information, the provision of counsel and hearings varies from almost always to nearly never. In all but the handful of states with public defender offices specifically tasked with postconviction representation,<sup>46</sup> organized defender offices are often conflicted out of postconviction cases because of IATC claims against them. That means that when attorneys are appointed in these cases, they are more likely to be

44. This method is designed to examine differing time lags between conviction and postconviction filing.

45. These figures compare total postconviction review filings in 4 of 22 judicial districts between November 1, 2011, and April 30, 2012 ( $n = 79$ ), to half the number of annual felony convictions from those districts.

46. See Holly R. Stevens et al., Standing Comm. on Legal Aid & Indigent Defendants, *State, County and Local Expenditures for Indigent Defense Services: Fiscal Year 2008*, A.B.A. (Nov. 2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fyo8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fyo8.authcheckdam.pdf) (surveying funding for indigent defense state by state).

private attorneys rather than public defenders,<sup>47</sup> and private attorneys tend to have fewer resources and face more difficult incentives than their public defender counterparts.<sup>48</sup> In some states, judges reportedly consider postconviction cases good training for novice attorneys.<sup>49</sup>

A minority of states do routinely appoint counsel in postconviction cases. In Michigan, Oklahoma, and Wisconsin, IATC and other postconviction claims are included with the defendant's direct appeal (where all defendants receive representation), with remand ordered by the appellate court when necessary for record development.<sup>50</sup> Judges in Missouri and Maryland, both states with postconviction defender offices, reportedly appoint counsel regularly for postconviction cases.<sup>51</sup> The Court in *Martinez* listed a number of additional states that it asserted "appoint counsel in every first collateral proceeding."<sup>52</sup> In four of those states, however, some portion of pro se petitions are actually dismissed without appointment because they are either beyond the filing deadline or successive.<sup>53</sup> And appointed counsel in other states, such as

47. E.g., Memorandum from Dawn Van Hoek, *supra* note 10, at 2 (noting that 83% of indigent appeals are handled by private assigned counsel paid by counties).

48. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L. J. 154, 188-200 (2012).

49. Telephone Interview with Roger Moore, Assistant Dist. Att'y, Metro. Nashville & Davidson Cnty., (Oct. 24, 2012); see also Donald J. Harris, Kim Nieves & Thomas M. Place, *Dispatch and Delay: Post Conviction Relief Act Litigation in Non-Capital Cases*, 41 DUQ. L. REV. 467, 482 (2003) (noting "the inexperience of many of the attorneys appointed to PCRA cases" in Pennsylvania); *Harris District Courts Plan*, HARRIS COUNTY DISTRICT CTS. (Jan. 28, 2011), <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=294> (imposing the least stringent experience requirements on lawyers appointed to postconviction cases).

50. See Brief for the States of Wisconsin et al., *supra* note 9, at 25.

51. Telephone Interview with Greg Mermelstein, Division Dir., Mo. State Pub. Defender (Nov. 20, 2012) (reporting that in Missouri, timely filed postconviction cases are not dismissed before appointment and that all indigent petitioners are provided attorneys); Telephone Interview with Scott Whitney, Chief Att'y, Collateral Rev. Div., Off. of the Pub. Defender for Md. (Nov. 19, 2012) (noting that most postconviction cases in Maryland receive counsel, but that a case may be dismissed without hearing or counsel if the petition is complete gibberish, is filed without complying with the rules, is filed more than ten years after sentencing unless "extraordinary cause" is established, or seeks to reopen earlier postconviction proceedings).

52. *Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012) (listing Alaska, Arizona, Connecticut, Maine, North Carolina, New Jersey, Rhode Island, and Tennessee).

53. See ALASKA STAT. § 18.85.100(c)(1) (2010); TENN. CODE ANN. § 8-14-205 (2011); ARIZ. R. CRIM. P. 32.4(c)(2) (2011); N.J. CT. R. 3:22-6(b) (2011); see also Telephone Interview with Roger Moore, *supra* note 49 ("We only get the [post-conviction] case if the judge finds a

Pennsylvania,<sup>54</sup> may be able to withdraw after filing an *Anders* brief.<sup>55</sup>

Most states authorize the appointment of counsel for noncapital petitioners only if a judge first decides the case has merit or orders a hearing or discovery. In such states, only a small portion of petitioners appear to receive counsel. For example, court records for postconviction cases filed in Mississippi between 2008 and 2011 show that in only 15% did any counsel appear for the petitioner.<sup>56</sup> In Texas, over the same period, the proportion is even smaller—about 10-12% of noncapital habeas petitioners receive counsel.<sup>57</sup> In Colorado, in a forthcoming study of cases filed between November 2011 and April 2012 in four judicial districts that produce approximately 30% of the state's felony convictions, roughly a quarter of those seeking postconviction relief were ultimately represented by counsel.<sup>58</sup> In Georgia, no law authorizes payment for

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colorable claim and assigns a lawyer. Most of them do here unless it is clear that the statute's run. Anything that's within the statute and remotely sounds like [ineffective assistance of counsel], we get.”).

54. *E.g.*, *Commonwealth v. Rykard*, 55 A.3d 1177, 1184 (Pa. 2012); *see also* Harris et al., *supra* note 49, at 474 (noting right to appointment of counsel for initial petitions and withdrawal procedure).
55. *See Anders v. California*, 386 U.S. 738 (1967) (permitting attorneys to withdraw if they determine that no nonfrivolous issues exist on appeal).
56. Case statistics provided by the Mississippi Administrative Office of the Courts (on file with author).
57. Noncapital state habeas petitions in Texas are filed in the trial courts, typically without counsel, and then forwarded to the Court of Criminal Appeals for resolution. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2007); TEX. R. APP. P. 73.3 (2012); 43B GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 58:14 (3d ed. 2011 & Supp. 2012) (“[O]nly the Court of Criminal Appeals may grant relief in those cases within the statute. . . . While the district courts have a role in the process, it is not that of decision maker.”); Telephone Interview with Kelley Reyes, Chief Deputy Clerk, Tex. Court of Criminal Appeals (Oct. 3 & 17, 2012). That court orders appointment of counsel for petitioners whose state habeas petitions are “filed and set” for further consideration in the Court of Criminal Appeals, and also for those petitioners whose cases it remands for factfinding in the trial courts. After remand, the case returns to the Court of Criminal Appeals for resolution. Interview with Kelley Reyes, *supra*. Cases “filed and set” and cases remanded for factfinding together represent approximately 11-12% of the noncapital habeas petitions filed each year. *See* Office of Court Admin., *Annual Reports*, TEX. CTS., <http://www.txcourts.gov/pubs/annual-reports.asp> (last updated Nov. 30, 2012) (documenting annual Court of Criminal Appeals activity) [hereinafter *Texas Annual Reports*].
58. E-mail from Veronica Marceny, Policy Analyst, Div. of Planning & Analysis, Co. Office of the State Court Adm’r, to author (Nov. 28, 2012, 5:27 PM) (on file with author) (describing the study and its results).

indigent defense representation in postconviction cases.<sup>59</sup>

In at least some states where postconviction petitioners usually do receive counsel—such as Alaska, Maryland, and Missouri—live witness hearings are reportedly routine.<sup>60</sup> Conversely, in states where counsel is *not* the norm, neither are live witness hearings. In Washington state, where prisoners must file their “personal restraint petitions” initially in the Court of Appeals, only about 4.5% of those who filed in 2008 through 2011 received remands to the trial court for any reason, including factual development.<sup>61</sup> In Texas, where petitions are forwarded to the Court of Criminal Appeals for resolution, about 7-8% of those filed each year are remanded by the Court of Criminal Appeals for factual development in the trial court, but very few receive “live” hearings. In 2011, of 347 remands, only two were for a hearing with live witnesses.<sup>62</sup> “Paper hearings” are also the norm in Oregon, where petitions are filed in the trial courts.<sup>63</sup> In California, approximately 10% of the noncapital habeas cases terminated in the trial courts receive hearings, but there is little consistency among counties. In one California county, hearings are held in every single case, while in others, courts dispose of hundreds of cases each year with no

59. See *Gibson v. Turpin*, 513 S.E.2d 186, 191 (Ga. 1999); see also *Wilson v. State*, 686 S.E.2d 104, 108-09 (Ga. 2009) (Hunstein, C.J., concurring in part and dissenting in part) (citing *Gibson*, 513 S.E.2d 186).

60. See *Jones v. State*, 284 P.3d 853, 860 (Alaska Ct. App. 2012); Telephone Interview with Scott Whitney, *supra* note 51 (stating that most cases in Maryland receive hearings, which involve live testimony, not “paper hearings”); E-mail from Greg Mermelstein, Div. Dir., Mo. State Pub. Defender, to author (Dec. 10, 2012, 4:07 PM) (on file with author) (“In general, you have to have a hearing to win an [ineffective assistance of counsel] claim here in Missouri, so the attorneys testify ‘live’ at hearings (when you get a hearing).”).

61. Case statistics provided by the Washington State Administrative Office of the Courts (on file with author).

62. *Court of Criminal Appeals Activity: FY 2011*, TEX. CTS. 2 (Jan. 2012), <http://www.txcourts.gov/pubs/AR2011/cca/2-cca-activity.pdf>. Prior years’ activity reports do not report the number of live hearings granted.

63. See *PDSC Service Delivery Plan for Post Conviction Relief Cases*, PUB. DEF. SERV. COMMISSION 22 (June 18, 2009), <http://www.oregon.gov/OPDS/docs/Reports/postconvictionrelief609.pdf> (summarizing testimony of Judge James Hargreaves of the Oregon Circuit Court) (“Only occasionally is live testimony presented at the hearing except for brief testimony by the petitioner. It is a paper trial and that is the only way these cases can get done.”) [hereinafter *PDSC Plan*]; *id.* at 19 (summarizing the testimony of postconviction attorney Noel Grefenson) (“Although there is a hearing in every case, most of the time [Mr. Grefenson] does not call live witnesses.”).

hearings at all.<sup>64</sup>

### 3. Relief

What scarce information is available on wins and losses in these cases suggests that relief, too, varies by state, but that in most states, petitioners rarely succeed in challenging their convictions, even when represented by counsel. Statistics were available from six states: Michigan, Texas, Washington, South Carolina, Colorado, and Pennsylvania.

In Michigan, where IATC claims are raised with counsel on direct appeal and remanded for a hearing if factfinding is required, the Wayne County Prosecutor's Office, which handles about a quarter of the state's criminal caseload, reported that in only 5 out of the over 1,200 court of appeals decisions it received from 2008 to 2011 did a court order relief for an IATC claim.<sup>65</sup> If Wayne County defendants raised IATC claims at the same rate (approximately 36%) as defendants from other Michigan counties,<sup>66</sup> the grant rate for IATC claims brought by represented prisoners in state court was less than 1%. (The Michigan Attorney General, defending cases on behalf of county prosecutors in the 56 smallest counties in the state, reported that in *none* of the 582 cases it

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64. 2012 *Court Statistics Report: Statewide Caseload Trends*, JUD. COUNCIL OF CAL. 153 tbl.12f (2012), <http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf>. In a study of petitions for postconviction relief filed in Pennsylvania trial courts between 1998 and 2001, hearing rates varied by county and judge as well. See Harris et al., *supra* note 49, at 487-89 (reporting that at least 88 of 230 cases (38%) were dismissed without a hearing in Allegheny County, Pennsylvania, but also noting that some judges reported granting a hearing for every timely petition); see also Wiseman, *supra* note 36, at 974-76 (surveying rules for postconviction "fact development" in state courts).

65. Letter from Timothy A. Baughman, Chief, Research, Training, and Appeals, Wayne Cnty. Office of the Prosecuting Att'y, to Ronald Schafer, Prosecuting Att'y, Ionia Cnty. Prosecutor's Office 1 (Feb. 14, 2012) (on file with author). Four of the five cases involved retained, not appointed, counsel, *id.* at 2, and one was later reversed for reconsideration under *Lafler*, *People v. McCauley*, 821 N.W.2d 569 (Mich. 2012). It is possible that this actually *overstates* the grant rate. Approximately 7,000 criminal appeals (appeals of right and discretionary appeals from guilty-plea convictions) were filed statewide, in the years 2008 through 2011. E-mail from Larry Royster, Chief Clerk/Research Dir., Mich. Court of Appeals, to author (Dec. 12, 2012, 3:13 PM) (on file with author). If Wayne County prisoners filed 25% of these appeals, that would represent over 1,700, not 1,200, total appeals during that period.

66. Memorandum from Dawn Van Hoek, *supra* note 10, at 5 (reporting data from 2009 and 2010).

litigated between 2005 and 2010 did the state courts grant an IATC claim.<sup>67)</sup>

In Texas, where only the Court of Criminal Appeals (not the trial court) is authorized to resolve these cases, approximately 4% of the noncapital state habeas petitions filed result in a grant of any form of relief.<sup>68</sup>

In Washington, where petitioners initially file in the Court of Appeals, which may either resolve the case or remand for resolution in the trial court, the Court of Appeals has granted relief in about 1% of petitions filed between 2008 and 2011. Another 4.5% were remanded to the trial courts for unknown resolution.<sup>69</sup>

In South Carolina, of 1,727 capital and noncapital postconviction cases resolved by the trial courts in 2010 and 2011, at most 2.4% were granted relief of any kind.<sup>70</sup>

Of the 79 postconviction motions filed in Colorado's four-district study of cases filed in early 2012, only 2 received relief (in the form of resentencing), 11 are still pending, and the rest were denied or dismissed, resulting in a grant rate of 2-16% depending upon the pending cases.<sup>71</sup>

Pennsylvania court statistics indicated a somewhat higher rate of relief.

67. Letter from Joel D. McGormley, *supra* note 10, at 2.

68. See *Texas Annual Reports*, *supra* note 57.

69. Of the 3,801 total cases terminated between 2008 and 2011 (including capital cases), the court granted relief in 1.2%. See case statistics provided by the Washington State Administrative Office of the Courts (on file with author).

70. A list of postconviction case numbers with disposition codes was provided to me by the South Carolina Office of Court Administration in response to a statistics request. For each case showing a disposition code of anything other than "dismissed" or "withdrawn," I obtained additional docket information from the state court's webpage. See *Case Records Search*, S.C. JUD. DEP'T, <http://www.sccourts.org/caseSearch> (last visited Apr. 2, 2013). Only 42 of these 1,727 cases included an entry indicating that the final order was something other than denial or dismissal. Of those 42, in 17 the docket entry indicated that the court had ordered that the petitioner be allowed to file a belated appeal of a previous order rejecting postconviction relief (no information was available on the outcome of any subsequent appeal), and in 9 cases there were conflicting docket entries suggesting that relief was not granted after all (that is, the docket showed either that the judgment was appealed by the state or that the case status was "dismissal," or both). If these 26 cases are omitted, the grant rate for these two years is less than 1%. Capital cases were included in the South Carolina statistics, as they could not be distinguished from noncapital cases based on docket information, but the state has sentenced four or fewer defendants to death each year since 2005. *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Apr. 2, 2013).

71. E-mail from Veronica Marceny, *supra* note 58.

Court of Common Pleas judges granted these petitions, at least in part, in approximately 18% of the 1,377 cases in which a petition for postconviction relief was filed in 2011 and terminated by February 2013. Of those cases in which a postconviction petition was granted, approximately 44% resulted only in the reinstatement of the right to file a direct appeal or postsentence motion. Another 22% of the grants involved some sort of sentencing relief, including recalculation of sentencing credits. Only 10% of the grants (less than 2% of the cases) clearly involved the withdrawal of a guilty plea, or a new trial.<sup>72</sup>

Attorneys in several other states also estimated that relief from *conviction* was granted in a small percentage of cases, although the rate for other types of claims (a chance at belated appeal, for example) varied.<sup>73</sup>

72. Case statistics provided by the Administrative Office of Pennsylvania Courts (on file with author). The type of relief granted could not be determined in 24% of cases.
73. *PDSC Plan*, *supra* note 63, at 21 (reporting an Oregon judge's testimony that "only three to five percent have merit"); Telephone Interview with Jay A. Macke, Supervisor, Appeals/Postconviction, Office of the Ohio Pub. Defender (Nov. 13, 2012) (on file with author) (stating that so few cases succeed, "it is like a dead remedy"); Telephone Interview with Greg Mermelstein, *supra* note 51 (reporting that in Missouri, approximately 2-10% of cases filed result in some relief, many including sentencing reductions); E-mail from Scott Whitney, Chief Att'y, Collateral Rev. Div., Office of the Pub. Defender for Md., to author (Nov. 27, 2012, 4:55 PM) (on file with author) ("We [public defenders] win relief in about 25% of our cases. Often it is minor [claims] and the major allegations are denied. (For example, the petitioner is granted the opportunity to file a belated appeal but his claims that would require reversal of his conviction are denied.) . . . Most of the post conviction relief granted in Maryland is the opportunity to file a belated motion for modification or reduction of sentence. . . . [Out of] 600 petitions filed in a 12 month period . . . we do win about 15-20 new trials each year.").

A comparison of the number of postconviction *appeals* in 2009-2011 with the number of trial court filings from the preceding year, in four states—Arizona, California, Florida, and Tennessee—suggests that on average appeal rates differ by state (ranging from 25% to 66%), with a median overall rate of 45%. Only a tiny percentage of those who lose in state court petition the United States Supreme Court for a writ of certiorari. See Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 249, 255-58 (2008) (reporting that only 4% of criminal certiorari petitions during the Supreme Court's 2006 Term sought review of state postconviction decisions, and offering explanations from survey responses indicating why so few are filed).

For relief statistics from prior studies, see Flango & McKenna, *supra* note 37, at 259 (reporting an 8% relief rate for ineffective assistance claims); John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265, 343 (1994) (reporting that a new trial was ordered in only 2% of 342 published opinions in appeals of adverse decisions); and Stephen J. Perrello & Albert N. Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T.

### B. State Postconviction Review After Martinez: The Forecast for Change

This snapshot of state postconviction review reveals that before *Martinez*, many prisoners had only the slimmest hope of securing counsel or a hearing, much less relief, for a claim of ineffective assistance of trial counsel. There is no reason to expect that *Martinez* will change this. Even expanded federal review of ineffectiveness claims is unlikely to prompt an increase in the number of filings, hearings, appointed counsel, or grants in state postconviction cases.

#### 1. Filing Rates

Better prospects of securing relief in federal court won't encourage many more state prisoners to file IATC claims in state court, for at least three reasons. First, all but a few states now postpone consideration of IATC challenges until after direct appeal,<sup>74</sup> and many have recently taken steps to reduce terms of incarceration.<sup>75</sup> Both policies reduce postconviction filings because prisoners who would file if still incarcerated will be released before they have the chance.<sup>76</sup>

Second, even those who *are* still incarcerated when it is time to file may be deterred by the possibility that filing could delay their release on parole. Prisoners with indeterminate sentences may worry that challenging their criminal judgments will jeopardize their chances for discretionary release if the attack is seen as evidence of failure to take full responsibility for their crimes.<sup>77</sup>

JEFFERSON L. REV. 283, at 294 (1997) (reporting a 2% relief rate). In addition, a study of approximately 4,000 petitions filed between 1998 and 2001 in three large counties in Pennsylvania found that less than 2% resulted in a grant of either a new trial or a sentencing hearing. An additional 9% of petitioners had their appellate rights restored. Harris et al., *supra* note 49, at 490.

74. See *State v. Johnson*, 784 N.W.2d 192 (Iowa 2010) (overruling an earlier requirement that a defendant demonstrate the potential viability of any ineffective assistance claim raised on direct appeal in order to preserve the claim for postconviction relief); LAFAVE ET AL., *supra* note 11, §§ 11.7(e), 28.4; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007).
75. Steps have included reducing minimum terms of incarceration, accelerating parole eligibility, and expanding good time credits. See generally LAFAVE ET AL., *supra* note 11, § 26.1(c) n.39.4 (collecting authority).
76. See, e.g., KING & HOFFMANN, *supra* note 18, at 73-76.
77. Telephone Interview with Jay A. Macke, *supra* note 73 (stating that the parole board takes a collateral attack on the conviction as evidence that a prisoner has not taken full responsibility for his crime, but noting that only a portion of Ohio prisoners get discretionary release); Telephone Interview with Roger Moore, *supra* note 49 ("If a prisoner



Third, a prisoner who has negotiated a plea bargain is not going to file once he learns that seeking postconviction relief may cost him his deal,<sup>78</sup> and the Court's decisions in *Martinez*, *Frye*, and *Lafler* did nothing to dispel this apprehension. Rather, in state courts where plea negotiations had previously been conducted informally, the Court's suggestion in *Frye* that every deal be recorded in writing<sup>79</sup> will *strengthen* this disinclination to file because it will make even more clear to a defendant each and every charge and sentencing concession he stands to lose by upending his plea bargain.<sup>80</sup> Formalizing bargaining and creating records demonstrating that defendants have received and understood specified information may help to prevent misunderstandings between overworked prosecutors, overworked defenders, and those accused of crimes, but it may also mean that even more defendants will be reluctant to challenge the resulting deals.<sup>81</sup>

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has a parole date coming up, he doesn't want to file a [postconviction claim]—filing a [claim] may defer his parole. Not automatic, but the board may think, 'You're still fighting this case, why should we parole you if you are asking for a trial?'). *But see* Telephone Interview with Edward L. Marshall, Chief, Postconviction Litig. Div., Office of the Att'y Gen. of Tex. (Nov. 9, 2012) (doubting that the parole board would ever consider whether a prisoner filed a postconviction challenge, but noting that "an inmate is going to believe what he wants to believe, and if you're gambling on parole release you are not going to be filing petitions").

78. 2 JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL: TRIAL 374 (2d ed. 2012), [http://www.ncids.org/Def%20Manual%20Info/Text\\_Vol\\_2.htm](http://www.ncids.org/Def%20Manual%20Info/Text_Vol_2.htm) (warning against challenging pleas to lesser offenses); *PDSC Plan*, *supra* note 63, at 19 (noting that "[s]ome cases are resolved quickly when the inmate realizes that if he is successful in overturning his plea agreement the result will not be a dismissal of the case but a return to court to face all of the charges again, including those that were dismissed"); Memorandum from Dawn Van Hoek, *supra* note 10, at 3 (reporting that approximately 23% of cases are withdrawn "due to the risk that vacating a plea-based conviction would expose them to original, higher, charges"); Telephone Interview with Jay A. Macke, *supra* note 73 ("We've had cases where the guy wins and then gets a worse sentence."); Telephone Interview with Roger Moore, *supra* note 49 ("In one capital case I remember, the guy pled guilty and got life, and we told him if you get this [postconviction motion] granted we'll file the death request—he started crying and decided not to do it.").
79. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012).
80. To avoid *Frye* and *Lafler* claims in state court, prosecutors who have in the past "charged low" and added charges if a plea offer was refused may now decide to spell out the foregone charges in more detail, or even "charge high" and reduce charges after a plea. In Texas, the prospect of having to defend *Frye* challenges in state court has prompted some prosecutors to avoid both serial negotiations and open-ended offers and instead make a single offer with a firm deadline. Telephone Interview with Edward L. Marshall, *supra* note 77.
81. Also, as one prosecutor reported, it may also create more pressure on defendants to plead guilty even earlier. Telephone Interview with Roger Moore, *supra* note 49 ("A lot of

## 2. Counsel and Hearings

*Martinez* is also unlikely to increase the provision of counsel and hearings in those state postconviction cases that *are* filed. Even if a state's attorney general hires more lawyers to defend habeas petitions in federal court after *Martinez*, state trial judges responsible for appointing counsel and ordering hearings in state postconviction proceedings won't feel the pinch unless federal judges start sending more cases back for *retrial*. Federal habeas might then provide resource-strapped courts an incentive to appoint more counsel and order more hearings, but only if judges are convinced both that those additional resources are needed in order to lower the likelihood of federal grants and that the benefits of avoiding federal grants are worth the cost. Both are unlikely.

State judges need not provide either counsel or evidentiary hearings in order to ensure that their decisions denying *Strickland* claims survive de novo review in federal court. If a petitioner's allegations, once proved, would not entitle him to relief, are contradicted by the record, or are inherently incredible, state judges may reasonably expect federal judges to uphold their practice of denying IATC claims without hearing or counsel, which they have continued after *Martinez*.<sup>82</sup> After all, federal judges themselves continue, after *Martinez*, to follow the same procedure when reviewing IATC claims raised for the first time by federal petitioners.<sup>83</sup>

State judges know that strategies far less expensive than hearings and counsel are available to help deflect later attacks in federal habeas. Issuing an alternative ruling on the merits, for example, may allow a state to invoke *Pinholster* in federal court,<sup>84</sup> and issuing a summary denial when claims would otherwise be rejected solely on procedural grounds may allow it to invoke

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attorneys tell me that they think asking the defendants to sign is making a difference. They say, 'When I ask a defendant to sign off, he thinks maybe he should take the offer after all.'"); cf. Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 *YALE L.J. ONLINE* 25, 26-27 (2012), <http://yalelawjournal.org/2012/06/18/rakoff.html> (arguing that *Frye* and *Lafler* will lead to earlier pleas); Reimer, *supra* note 31, at 8 ("[T]he practice of offering and demanding an immediate plea . . . [is a] root cause of systemically deficient representation.").

82. See, e.g., cases collected *supra* notes 22-24.

83. See, e.g., cases collected *supra* notes 27-28.

84. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (holding that review under 28 U.S.C. § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits").

*Richter*.<sup>85</sup> As post-*Martinez* decisions confirm, obtaining an affidavit from the petitioner's trial counsel can provide a basis for a finding by the state judge that the alleged conduct didn't happen, was strategic, or, if error, was not prejudicial.<sup>86</sup> An affidavit may also serve as a basis for a federal judge to find that new claims based on different allegations are not "substantial" or lack merit.<sup>87</sup> Defenders will have difficulty convincing state judges they must invest more resources in state postconviction proceedings in noncapital cases in order to avoid reversal in federal court.

Even less plausible is the argument that the costs saved by avoiding grants in federal court are worth investing more resources in state postconviction procedures. Elected county judges and prosecutors do not necessarily suffer politically when federal judges order do-overs in state criminal cases, especially if the cause of the reversal is the defendant's own lawyer. Indeed, most of the *Strickland* violations in Michigan were committed by private counsel retained by the defendants themselves, not attorneys appointed and paid with public funds.<sup>88</sup> Voters, victims, and county commissioners are unlikely to blame their state judges for that.

From a fiscal perspective, most noncapital cases receiving federal habeas relief have been, and will continue to be, cheap to fix. New trial orders are uncommon. A large portion of IATC claims themselves seek only a sentence

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85. See *Harrington v. Richter*, 131 S. Ct. 770 (2011) (ruling relief is unavailable under § 2254(d) if any reasonable application of established Supreme Court precedent supports summary denial).
86. E.g., *State v. Johnson*, No. 9904015635, 2012 WL 5364693 at \*5 (Del. Super. Ct. Oct. 31, 2012) (finding that "allegations were either reasonably discounted as not supported by the record, persuasively rebutted by counsel's Affidavit, or not" relevant); see also Doug Lieb, *Regulating Through Habeas: A Bad Incentive for Bad Lawyers?*, 65 STAN. L. REV. ONLINE 7, 11 (2012), <http://www.stanfordlawreview.org/online/regulating-through-habeas> ("[H]abeas lawyers often find themselves competing with the state attorney general's office . . . to quickly secure trial counsel's cooperation and her commitment to submit a favorable affidavit."); Telephone Interview with Edward L. Marshall, *supra* note 77 (stating that, in Texas, the court will often order the trial attorney to file an affidavit answering the allegations the inmate has made, and that defense counsel accused of ineffective assistance will often provide an affidavit rebutting petitioner's claims when asked to do so by the state, even if not ordered to do so by the court).
87. E.g., *Parker v. Curley*, No. Civ.A. 10-5569, 2012 WL 4931029 (E.D. Pa. July 20, 2012).
88. Letter from Joel D. McGormley, *supra* note 10, at 5 (reviewing federal habeas cases decided between 2005 and 2010).

reduction or an opportunity to appeal.<sup>89</sup> Even relief for a *Lafler* or *Frye* claim only requires amending the judgment to reflect the foregone deal, not a new trial. And when a federal court does vacate a conviction for ineffective assistance, the order simply puts the defendant and the prosecutor back at square one, with at least as much incentive to avoid trial and make a deal as they had the first time around, with maybe a little more leverage on the defense side of the table.<sup>90</sup>

Furthermore, *Martinez* does not change the reasons that state trial judges may be wary of ordering costly hearings and counsel when they don't have to, particularly where the costs must be borne by the county and not the state.<sup>91</sup> In many states, where postconviction representation in state trial courts is not already delegated to a separate appellate or postconviction defender office, judges must enlist appointed counsel from the same pool of attorneys available to represent defendants before conviction or on direct appeal, and pay them from the same funds. If a state is already having difficulty providing any

89. See, e.g., Telephone Interview with Roger Moore, *supra* note 49 (“Most of the time we’ve had a [postconviction claim] granted for [ineffectiveness of counsel], the attorney abandoned the defendant after trial, never filed a motion for new trial or appeal, or missed the date. That’s the majority of the [successful postconviction claims] – someone has messed up the appeal process.”); Telephone Interview with Scott Whitney, *supra* note 51.
90. King, *supra* note 10, at 314-16 (detailing the disposition of cases in which federal relief had been granted and noting that only one of fourteen cases involved a retrial); Telephone Interview with Jay A. Macke, *supra* note 73 (“[T]he grants of relief are too rare. [Prosecutors] don’t even care about federal habeas. When we do get some sort of relief, the A.G. will say to the D.A., ‘You should settle this case,’ and they do it.”); see also Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 23, 28 (2006) (noting that habeas settlements are “very rare” and “are typically exchanges of habeas claims for sentence reductions”).
91. Telephone Interview with Edward L. Marshall, *supra* note 77 (reporting that county commissioners keep track of attorney appointment spending by judge, and that “a judge who spends a lot of money on appointments will hear about it” and “may get in trouble for that the next time he runs for office”); see also David Ovalle, *Law Governing Legal Fees Unconstitutional, Miami-Dade Judge Says*, MIAMI HERALD, Oct. 29, 2012, <http://www.miamiherald.com/2012/10/29/3073244/law-governing-legal-fees-unconstitutional.html> (describing a challenge to a bill that charges appointment overruns to the courts’ budgets, and quoting an attorney’s claim that the bill “makes judges think twice about paying a lawyer, knowing that he or she has to also think about paying his secretary or buying copier paper”); Ken Malkin, Pub. Defender for Bay Cnty., Mich., *Testimony Before the Michigan Indigent Defense Commission*, MICH. CAMPAIGN FOR JUST. (Dec. 16, 2011), <http://www.michigancampaignforjustice.org/docs/Ken%20Malkin%20indigent%20defense%20commission%20testimony.docx> (stating that whenever a public defender needs an investigator or expert witness, she must ask the court for funds, but that “often a judge can be more concerned about the fiscal impact on the county than the impact on a client’s defense”).

counsel at all in its misdemeanor cases, for example,<sup>92</sup> adding more representation responsibilities in postconviction proceedings is a likely nonstarter. An uptick in appointments may even encounter resistance from the defender community itself. As an important feature of sustainable indigent defense reform, states are struggling to find ways to *shrink* rather than expand the demands on public defenders.<sup>93</sup>

Even if state judges decided to safeguard their convictions against federal review by appointing counsel in postconviction cases, they could safely restrict this strategy to only those petitioners challenging their *convictions* (not their sentences), after a trial (not a plea), and who are serving particularly lengthy sentences. The *Martinez* dissenters' prediction that states will have no choice but to provide counsel in every case is absurd.

Also farfetched is the opposite prediction: that if federal courts start granting relief in more cases, state legislatures will refuse to spend any more money on state postconviction review and will just let the federal courts deal with it.<sup>94</sup> Abandoning state postconviction review would forfeit one of a state's most effective tools for reducing postconviction litigation in federal court: delay. States also use their own postconviction remedies to address changes in state criminal law, to consider new evidence of innocence, and to facilitate quick responses tailored to local criminal justice problems. If there is a flaw in a case that is going to require retrial, all would agree it is better to find that out sooner rather than later.<sup>95</sup> Besides, many state prosecutors prefer their chances

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92. See, e.g., Erica Hashimoto, *Abandoning Misdemeanor Defendants*, 25 FED. SENT'G REP. 103 (2012) (collecting and discussing authority documenting the denial of counsel to misdemeanor defendants in several states).
93. One public defender in Maryland, for example, complained that a recent appellate court decision, reversed by legislation, which would have required counsel at initial bail hearings, would have stretched his office's resources to the breaking point. See Tricia Bishop, *State Lawmakers Reverse High Court Ruling on Public Defenders*, BALTIMORE SUN, Apr. 13, 2012, [http://articles.baltimoresun.com/2012-04-13/news/bs-md-public-defender-bills-20120413\\_1\\_high-court-ruling-public-defenders-hearings](http://articles.baltimoresun.com/2012-04-13/news/bs-md-public-defender-bills-20120413_1_high-court-ruling-public-defenders-hearings) (quoting a public defender stating that the decision "would have decimated the ability to do the work that we already do"); see also Brief for the States of Wisconsin et al., *supra* note 9, at 15-16 (arguing that a right to postconviction counsel would "stretch[]" public defender offices "even thinner" and direct resources away from trial and direct appeal).
94. See Brief for the States of Wisconsin et al., *supra* note 9, at 36 n.22 (urging the Court not to "articulate a rule that would encourage a State to curtail an avenue of review that it might otherwise make available to its citizens in order to thwart meddling by the federal courts that undermine the finality of state court decisions").
95. See Freedman, *supra* note 36, at 298 (noting that "states have sound reasons for not abandoning their systems of collateral attack").

before state rather than federal judges.<sup>96</sup>

### 3. Relief

Finally, even if more state judges *do* decide to provide counsel and hearings to postconviction petitioners, the low grant rates in states where this is already common suggest that relief rates would not change. Consider Ohio, where the state public defenders have for years taken a uniquely proactive approach to postconviction representation in noncapital cases. At each of the state's three intake prisons, a public defender interviews every arriving inmate who was convicted after a trial, looking for potential nonrecord claims such as ineffective assistance of trial counsel. One supervising defender estimated that only about 10% of these interviews produce a potential claim that is referred to the office for further action, which includes the possible assignment of one of their investigators, and review of the trial transcript. Only about 10% of those referrals pan out as viable claims to file, yielding a total of about twenty petitions per year. Yet almost all of these cherry-picked cases, ably litigated by dedicated and experienced defenders, are rejected by the state courts.<sup>97</sup>

## CONCLUSION: THE DISCONNECT BETWEEN POSTCONVICTION REVIEW AND INDIGENT DEFENSE REFORM

*Gideon's* promise is that every person accused of a crime will have competent representation when he needs it the most—before he is convicted. In states still struggling to meet this goal, expanding federal habeas review is unlikely to help. Reformers may be getting the message.

Consider Michigan's recent experience. A groundbreaking reform shifting funding to the state and earmarking millions for indigent defense was proposed by an Indigent Defense Advisory Commission appointed by a

96. Telephone Interview with Roger Moore, *supra* note 49 (“Should we get rid of state [postconviction review] and just let them go to federal court? No—Tennessee added state [postconviction review] so the state can have the first say, and the legislature took that to heart. It would be unwise not to have a state ‘buffer.’ The person in the best position to review the claim is the trial judge, not some other judge.”).

97. Telephone Interview with Jay A. Macke, *supra* note 73. Twenty inmates is approximately 0.5-2% of the number of inmates committed to Ohio prisons each year after conviction at trial. See *DRC DataSource Reports—DRC Annual Report*, OH. DEP’T OF REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/web/Reports/reports2.asp> (last visited Apr. 2, 2013) (providing commitment data from 2001 to 2011).

Republican governor and approved by the Republican-controlled House last fall.<sup>98</sup> Prosecutors argued that the tiny number of cases in which state or federal courts found ineffective assistance, and the fact that most involved *retained* counsel, showed that any problem with the quality of indigent defense in Michigan is not systemic.<sup>99</sup> For their part, reform advocates did not rely on an earlier (and somewhat implausible) claim that 50 *Strickland* wins in over 25 years was itself proof of a serious crisis.<sup>100</sup> Instead, they pitched to the Commission an argument about fiscal responsibility that depended upon the inability of postconviction review to identify bad lawyering. They argued that postconviction relief is no measure of the extent of the problem, but that other evidence is: the rate at which errors in sentencing are established on appeal and the number of exonerees freed after unsuccessfully claiming ineffective assistance. Millions of dollars are wasted imprisoning those who would not be in prison at all or who would have received shorter sentences if they had received competent representation, the reformers maintained.<sup>101</sup>

With litigation lurking over its shoulder,<sup>102</sup> Michigan's Commission agreed. "[I]neffective assistance of trial counsel claims . . . are not necessarily the only indicator of a well-functioning system," the Commission reported. "The current delivery of indigent defense results in a public defense system that is too often subject to errors at the trial level, and at its worst, results in a

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98. *Michigan House OKs Overhaul of Indigent Defense*, CBS DETROIT, Nov. 8, 2012, <http://detroit.cbslocal.com/2012/11/08/michigan-house-oks-overhaul-of-indigent-defense>. The bill is expected to be taken up by the Michigan Senate in 2013. See David Carroll, *The Clock Runs Out on Michigan Reform for This Year*, PLEADING THE SIXTH (Dec. 19, 2012), <http://sixthamendment.org/?p=1081>.

99. Letter from Joel D. McGormley, *supra* note 10.

100. See *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?* Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 108, 120 (2009) (statement of Dawn Van Hoek, Dir., Mich. State Appellate Defender Office) [hereinafter Van Hoek Testimony].

101. See, e.g., Memorandum from Dawn Van Hoek, *supra* note 10; William Fleener, Staff Att'y, Cooley Innocence Project, *Testimony to the Indigent Defense Advisory Commission*, MICH. CAMPAIGN FOR JUST. (Dec. 16, 2011), <http://www.michigancampaignforjustice.org/docs/Fleener%20Testimony%20to%20the%20Indigent%20Defense%20Advisory%20Commission%20final.doc>.

102. See *Duncan v. State*, No. 307790 (Mich. Ct. App. Dec. 12, 2011) (alleging that the state had abdicated its constitutional and statutory responsibility by delegating responsibility for indigent defense to individual counties and failing to fund or provide oversight for such services).

wrongful conviction.”<sup>103</sup> No one seemed interested in improving postconviction review for IATC claims. Indeed, defenders argued that better representation at trial could reduce the high cost of postconviction review.<sup>104</sup> If Michigan’s experience is any guide, lasting structural reform in indigent defense may gain better traction if the rate of postconviction relief for IATC claims remains negligible and petitioners continue to lose.

In Michigan, as elsewhere, disagreement about the extent of constitutional compliance and the efficacy of postconviction review is rooted in a fundamental dispute about what the Sixth Amendment requires. Does it guarantee reasonably competent representation, but condition relief upon a finding of prejudice? Or does it instead guarantee, as the Court has explained,<sup>105</sup> only an attorney who does not make prejudicial mistakes? Redefining the right to effective assistance as independent from its impact on the outcome of proceedings would probably make violations easier to detect. But this approach poses at least two problems: the list of acts or omissions that would necessarily be against the best interests of any client in any case would be extremely short;<sup>106</sup> and the inherent weaknesses of enforcement through postconviction review would remain.

Courts could order legislatures to fund more sweeping system-wide reform if the Sixth Amendment were interpreted to prohibit deficiencies in delivery systems that pose a high probability of compromising effective assistance—a claim for which “existing law,” as Professor William Stuntz lamented fifteen

103. *Report of the Michigan Advisory Commission on Indigent Defense*, MICH. ADVISORY COMMISSION ON INDIGENT DEF. 8 (June 22, 2012), [http://www.michigan.gov/documents/snyder/Indigent\\_Defense\\_Advisory\\_Comm\\_Rpt\\_390212\\_7.pdf](http://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf).

104. Van Hoek Testimony, *supra* note 100, at 120; Memorandum from Dawn Van Hoek, *supra* note 10, at 5. The same argument has been made in other states as support for funding indigent defense. See, e.g., *PDSC Plan*, *supra* note 63.

105. See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (“The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be ‘ineffective’ unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not ‘complete’ until the defendant is prejudiced.”); *Mickens v. Taylor*, 535 U.S. 162, 166 (2001) (“[D]efects in assistance that have no probable effect upon the [case’s] outcome do not establish a constitutional violation.”).

106. E.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20-21 (1997) (noting the difficulty of “separat[ing] low-activity but good representation from laziness or incompetence”).



years ago, still “leaves no room.”<sup>107</sup> Litigation such as the ongoing class action case in Michigan is attempting to move courts in this direction.<sup>108</sup> But we are a long way from consensus about what deficiencies are most salient, or when they become constitutionally intolerable when applied to defenders’ offices, to appointed counsel, or, most perplexing of all, to retained counsel.

Fortunately, the Court’s jurisprudence regarding the indigent defendant’s right to counsel in state criminal cases is not grounded in originalist interpretations of the Sixth Amendment, and has instead looked to evolving standards. *Gideon* itself abandoned a case-by-case approach to the provision of counsel to indigents in felony cases only after most of the states had already proven the feasibility of compliance with a blanket rule. In the decades to come, lower courts, state legislatures, or even voters<sup>109</sup> might once again move out ahead of the Court, toward a rough consensus about the conditions that so disable the provision of effective assistance to those accused in our “system of pleas”<sup>110</sup> that a Sixth Amendment violation should be presumed. Along the way, system-wide litigation might succeed in grabbing state legislators’ attention, but case-by-case postconviction review under the unforgiving *Strickland* standard never will.

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107. *Id.* at 21.

108. See *Duncan v. State*, No. 307790 (Mich. Ct. App. Dec. 12, 2011); see generally Cara H. Drinan, Lafler and Frye: Good News for Public Defense Litigation, 25 FED. SENT’G REP. 138, 138-39 (2012) (discussing recent litigation in the Supreme Court on the right to counsel); Lauren Sudeall Lucas, *Unintended Consequences: The Impact of the Court’s Recent Cases on Structural Ineffective Assistance of Counsel Claims*, 25 FED. SENT’G REP. 106 (2012) (same).

109. See Milan Simonich, *Constitutional Amendment 5 Would Establish Public Defender Department*, LAS CRUCES SUN-NEWS (N.M.), Oct. 8, 2012, [http://www.lcsun-news.com/ci\\_21719567/las\\_crucis-financial](http://www.lcsun-news.com/ci_21719567/las_crucis-financial) (describing an amendment to increase the independence of the state public defender, which ultimately passed with 62% of the vote).

110. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

