Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases

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I. INTRODUCTION

Recognition of the fact that there is a right to the effective assistance of counsel in state capital post-conviction proceedings is long overdue.[1] Of the many reasons for the legal system to acknowledge the right, one is perhaps counter-intuitive: to do so is very much in the narrow self-interests of the affected governments, both state and federal. In the discussion that follows I first sketch the factual and legal background (Part II), then elaborate on the benefits governments gain and costs they avoid by acting now (Parts III–V), and conclude by putting the issue into the context of system-wide considerations (Part VI).

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[1] I have suggested this previously. *See* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006) [hereinafter Freedman, Giarratano]; Eric M. Freedman, *The Revised ABA Guidelines and The Duties of Lawyers and Judges in Capital Post-conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 327 (2003) [hereinafter Freedman, *The Revised ABA Guidelines*]; *see also* AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913, 919–38 (2003) [hereinafter GUIDELINES] (Guideline 1.1 and accompanying Commentary). The present essay draws upon those efforts.

II. BACKGROUND

For two decades after the revival of capital punishment in 1976,[2] state post-conviction review was a small but tactically important outpost in the campaign to correct legal and factual error. The most comprehensive available data shows that of every hundred death sentences imposed through 1995, sixty-eight percent did not survive post-conviction review; forty-seven percent were reversed at the state level (roughly forty-one percent on direct appeal and six percent on state collateral attack); and a further twenty-one percent on federal habeas corpus[3] (which, however, could occur only after the petitioners had successfully run the gauntlet of state post-conviction proceedings).[4]

In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted; that turned state capital post-conviction review from an outpost to a critical strategic location.[5] Because federal habeas corpus courts were limited in their review of the factual and legal determinations of the state courts,[6] those courts' final pronouncements on questions of both guilt and sentence routinely became authoritative.

State courts speak their last word in post-conviction proceedings. If it is to be one that can be relied upon, the prisoner must have the assistance not just of counsel,[7] but of competent counsel. "Counsel's obligations in state collateral review proceedings are demanding. Counsel must be prepared to thoroughly reinvestigate the

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[2] *See* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty does not violate the Eighth and Fourteenth Amendments in all circumstances).

[3] *See* GUIDELINES, *supra* note 1, at 932 n.46 (Commentary to Guideline 1.1) (citing James S. Liebman, Jeffrey A. Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, pt. I, app. A, at 5–6 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/). The statistics from the comprehensive empirical study by Professor Liebman and his colleagues have been distilled in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000). A fuller discussion is contained in Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

[4] *See* 28 U.S.C. § 2254(b)(1) (2000).

[5] As described more fully *infra* text accompanying notes 29–31, last term in *Rhines v. Weber*, 544 U.S. 269 (2005), the Court quite appropriately relaxed the rule of *Rose v. Lundy*, 455 U.S. 509 (1982) (requiring dismissal of federal habeas corpus petitions containing claims that had not been exhausted in state court) in light of its recognition that, "[t]he enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." *Rhines*, 544 U.S. at 274.

[6] *See* 28 U.S.C. § 2254(d)–(e) (providing that writ may not be granted unless state proceedings resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts").

[7] *See* Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55 (1999).

entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law."[8]

To date the Supreme Court has weighed in only once, in a 1989 inkblot entitled *Murray v. Giarratano*.[9] Although it is commonly said that *Giarratano* held that there is no federal constitutional right to counsel in post-conviction proceedings in capital cases,[10] that is not true.[11] Four Justices did indeed reject petitioner's claim.[12] But Justice Kennedy concurred in the judgment only and wrote separately stating that:

> The requirement of meaningful access can be satisfied in various ways. . . . While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief. I am not prepared to say that this scheme violates the Constitution. On the facts and record of this case, I concur in the judgment of the Court.[13]

Intriguingly, Justice O'Connor joined this opinion, as well as that of the plurality, writing that she did not view the two as inconsistent.[14]

Whatever may be gleaned from all this, one fact is clear enough: the judgment of the Court turned on the conclusion of Justice Kennedy that "on the facts and records of this case" Virginia had met its constitutional responsibilities. *Giarratano* did not rule that no constitutional duty existed.[15] On the contrary, five, and perhaps six, Justices believed that one did.

III. FROM PAST TO PRESENT

Quite apart from any constitutional obligation, for a decade Chapter 154 of the AEDPA has given states a statutory incentive to provide effective post-conviction defense counsel in capital cases. Those that have mechanisms for the provision of

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[8] GUIDELINES, *supra* note 1, at 932–33 (Commentary to Guideline 1.1) (footnote omitted). *See id.* at 935 (elaborating on these duties).

[9] 492 U.S. 1 (1989).

[10] *See, e.g.*, Morris v. Dretke, 90 F. App'x 62, 72 (5th Cir. 2004); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002).

[11] For a fuller discussion, see Freedman, Giarratano, *supra* note 1, Parts I, III.

[12] *See Giarratano*, 492 U.S. at 10 (Rehnquist, C.J., joined by White, O'Connor & Scalia, JJ.).

[13] *Id.* at 14–15 (Kennedy, J., concurring).

[14] *Id.* at 13 (O'Connor, J., concurring).

[15] *Cf.* GUIDELINES, *supra* note 1, at 933 n.47 (Commentary to Guideline 1.1) (encouraging counsel "to test the boundaries of *Murray v. Giarratano*").

"competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal"[16] are entitled to a number of significant procedural advantages in federal habeas corpus litigation. Yet no state has created a qualifying system.[17]

Whether this outcome reflects political cynicism[18] or a rational cost-benefit analysis,[19] the undeniable bottom line is that Chapter 154 standing alone has proved insufficient to persuade the states that their own best interests would be served by the provision of effective post-conviction counsel in death penalty cases.

But Chapter 154 does not stand alone. In recent years there has been a steady trend in the states towards granting such assistance; all but one of the significant death penalty states do so, and, more importantly, fourteen of those thirty-seven states have a state law requirement that counsel be effective.[20] There is every reason to expect that, as a result of pressure from the bar,[21] the press,[22] and the judiciary,[23] the number of states with this requirement will grow[24] and that the current unsatisfactory realities on the ground[25] will increasingly conform to the legal ideal.

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[16] 28 U.S.C. § 2261(b) (2000). A state which does this is said to have "opted-in" under Chapter 154 of the statute. For a summary of the advantages to the states of opting-in, see GUIDELINES, *supra* note 1, at 931 n.40 (Commentary to Guideline 1.1).

[17] *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 274–75 (2006).

[18] *See* Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1099–1100 (2003).

[19] *See* Blume, *supra* note 17, at 276 n.98.

[20] The details can be found in Freedman, Giarratano, *supra* note 1, Part II.

[21] *See, e.g.*, American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report*, 2006 A.B.A. DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT REP. 3–6, 147–52 (finding that the Georgia system for provision of counsel in capital cases is in "a situation where this critical constitutional safeguard is so undermined as to be ineffective"), *available at* http://www.abanet.org/moratorium/assessmentproject/georgia/finalreport.doc; Leigh Jones, *ABA Launches Effort to Improve Capital Case Defense*, N.Y.L.J., Oct. 27, 2003, at 1.

[22] *See, e.g.*, Editorial, *Breathing Life into a Moratorium*, BIRMINGHAM NEWS, March 1, 2006, at 8A (opining that if Alabama is to retain death penalty it should at least implement ABA Guidelines); Leonard Post, *On Their Own: In Alabama, Some Inmates Don't Have Lawyers as They Near the Last Bid for Life*, NAT'L. L.J., Dec. 1, 2003, at 1; *Agency Claims Death Row Inmates Without Lawyers a Growing Problem*, CHATTANOOGA TIMES FREE PRESS, Mar. 26, 2001, at B8 (describing effects of absence of state funding for post-conviction capital representation in Alabama)[hereinafter *Agency Claims*].

[23] *See, e.g.*, GUIDELINES, *supra* note 1, at 928–29 (Commentary to Guideline 1.1) (quoting concerns of several Justices about quality of capital defense representation).

[24] *See generally* Sarah L. Thomas, Comment, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1167 (2005) (urging state legislatures not to "passively stand by and wait for their state courts or the U.S. Supreme Court to take action . . . [but rather] utilize their resources to implement a statutory right to counsel for indigent habeas corpus petitioners").

[25] *See* GUIDELINES, *supra* note 1, at 932 n.47 (Commentary to Guideline 1.1). For an overview of the landscape, see Andrew Hammel, *Effective Performance Guarantees for Capital State Post-*

Unless Congress intervenes in a disruptive way, as it is currently threatening to do,[26] these developments could alter the cost-benefit calculus. As the states review their situations in response to pressures for improvements in their death penalty systems, they may well realize that with the investment of relatively small increments of resources they could achieve significant gains. Having already waded waist-deep into the sea by providing some counsel, taking the plunge to full immersion by requiring competent counsel should appear less daunting both politically and economically and the Chapter 154 inducements correspondingly more enticing.

IV. FROM PRESENT TO FUTURE

A. *State Issues*

Even if the federal courts do not directly recognize a right to the effective assistance of post-conviction counsel in capital cases as a matter of federal statutory or constitutional law, the states are running significant litigation risks if they fail to provide such assistance.

The Association of the Bar of the City of New York suggested some time ago that "if post-conviction counsel is found to have been ineffective, then, with respect to any proceedings in which that attorney participated, the state should not be entitled to the benefits of" any presumptions of correctness of factual findings, failures to exhaust issues, or procedural defaults.[27] Today, states that fail to provide competent post-conviction counsel in capital cases may well forfeit the benefits of these three habeas corpus doctrines. I consider each in turn.

The City Bar's proposition with respect to factual findings is easily supportable by existing case authority.[28]

The proposal concerning exhaustion has been adopted in a suggestive opinion by the District Court whose ruling was vindicated by a unanimous Supreme Court in *Rhines v. Weber*.[29] The Supreme Court had acted against the background of its 1982 holding in *Rose v. Lundy*[30] that a federal habeas corpus court faced with a petition containing both exhausted and unexhausted claims could not entertain it but was

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Conviction Counsel: Cutting the Gordian Knot, 5 J. APP. PRAC. & PROCESS 347, 353–80 (2003).

[26] *See* Blume, *supra* note 17, at 276 n.99. *See also infra* text accompanying note 54.

[27] *See* Comm. on Civil Rights, Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF THE CITY OF N.Y. 848, 855 (1989) (footnote omitted). I served as the principal drafter of this report.

[28] *See, e.g.*, Lane v. Henderson, 480 F.2d 544, 545 (5th Cir. 1973). This rule is simply a specific application of the general principle that the greater the procedural unreliability of state fact-finding processes, the less the deference their results will be given on federal habeas corpus. *See, e.g.*, Parker v. Woodford, 168 F. App'x 152 (9th Cir. 2006); Hopkinson v. Shillinger, 866 F.2d 1185, 1220 (10th Cir. 1989).

[29] 544 U.S. 269 (2005).

[30] 455 U.S. 509 (1982).

required to dismiss the entire petition unless the petitioner agreed to proceed only on the exhausted claims. At the time, the only consequence of a District Court following this procedure would be to delay the ultimate vindication of the petitioner's rights in federal courts. But "[t]he enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions."[31] AEDPA not only "preserved *Lundy*'s total exhaustion requirement, see 28 U.S.C. § 2254(b)(1)(A) . . . but it also imposed a 1-year statute of limitations on the filing of federal petitions, § 2244(d). . . . As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing any federal review of their unexhausted claims."[32]

Responding to these changed circumstances, the Supreme Court in *Rhines* upheld what the District Court had done (and the Eighth Circuit had reversed), namely to hold the exhausted claims in abeyance while allowing the petitioner to return to state court to exhaust the remaining ones.[33] In approving this procedure, the Supreme Court said that "stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court."[34]

The case returned to the District Court for application of this requirement. There, the petitioner contended that he had "good cause for his failure to exhaust his claims in state court because his post-conviction counsel was ineffective."[35] Relying on *Coleman v. Thompson*, a bastard spawn of *Giarratano*,[36] the state "argue[d] that alleged ineffective assistance of counsel cannot serve as good cause for failure to exhaust [the] claims in state court, just as ineffective assistance of counsel is not good cause to excuse a procedural default."[37]

Noting that the exhaustion doctrine is designed to affect the timing of relief rather than to preclude it altogether, and that the Supreme Court had embraced a broader definition of good cause in the exhaustion context than in that of procedural default,[38] the District Court rejected the government's argument. It concluded that

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[31] *Rhines*, 544 U.S. at 274.

[32] *Id.*

[33] *See* Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003).

[34] *Rhines*, 544 U.S. at 277.

[35] Rhines v. Weber, 408 F. Supp. 2d 844, 847 (D.S.D. 2005).

[36] *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (holding capital petitioner to have forfeited review of federal claims because appellate papers in state post-conviction proceedings filed three days late and rejecting an attack on effectiveness of counsel because "There is no constitutional right to an attorney in state post-conviction proceedings . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."); Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 553, 568 (James R. Acker et al. eds., 2d ed. 2003) (describing result as intellectually and practically untenable and "morally indefensible").

[37] *Rhines*, 408 F. Supp. 2d, at 847.

[38] *Id.* at 849 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416–17 (2005) and relying upon the fact that the Court had remanded this very case).

permitting petitioner to return to state court would comply "with the principles of comity and federalism that underlie the exhaustion doctrine."[39] The result was that the state suffered a litigation delay and the cost of an additional round of state litigation that it would have prevented by providing the petitioner competent post-conviction counsel at the outset.[40]

The City Bar's third suggestion, that the ineffectiveness of post-conviction counsel should preclude states in federal habeas proceedings from reliance upon procedural defaults, may well find judicial acceptance soon. Capital litigators have begun to build upon on the longstanding provision of the habeas corpus statute excusing the exhaustion requirement where "there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant."[41]

Extending this principle from exhaustion to preclusion, it is entirely sensible that a state post-conviction remedy that is no more than a delusive hope, for example one that cannot be effectually employed without the assistance of a competent attorney, should not generate a procedural default that the federal courts are bound to respect[42] any more than do other forfeitures arising from state rules that fail to provide litigants with a fair opportunity to assert their federal claims.[43] Indeed, the unconscionable failure of Alabama to provide any pre-filing assistance at all to its capital post-conviction petitioners[44] has already caused the federal courts to refuse to find procedural default in contexts in which they might otherwise have done so.[45]

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[39] *Id.* The court also relied upon several cases from other districts which it characterized as having "found that alleged ineffective assistance of counsel during post-conviction proceedings did constitute good cause for failure to exhaust claims in state proceedings," *id.* at 7, but did not distinguish in its citation between cases in which the asserted ineffectiveness took place on direct appeal and on collateral review. *Cf.* Velasquez v. Grace, 2006 WL 89214 at *3–4 (M.D. Pa. Jan. 11, 2006) (non-exhaustion excused and merits reached in non-capital case where counsel was ineffective on direct appeal and state-post-conviction, notwithstanding absence of a constitutional right to counsel in the latter context).

[40] The federal government for its part had to pay for competent appointed counsel to assert the position that petitioner should be allowed to return to state court. *See infra* Part IV.B.

[41] 28 U.S.C. § 2254(b)(1)(B)(i)–(ii) (2000). Ample authority supports the proposition that the terms of the section are met where "the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief." Granberry v. Greer, 481 U.S. 129, 136 n.8 (1987). *See, e.g.*, Bartone v. United States, 375 U.S. 52, 54 (1963); Carter v. Estelle, 677 F.2d 427, 446–47 (5th Cir. 1982); Galtieri v. Wainwright, 582 F.2d 348, 354 n.12 (5th Cir. 1978) (*en banc*).

[42] This claim is being actively litigated in *Grayson v. Epps*, No. 1:04CV708 (S.D. Miss. filed Apr. 25, 2005).

[43] *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2d, at notes 45–47 and accompanying text (5th ed. 2005) (collecting extensive authority).

[44] *See* GUIDELINES, *supra* note 1, at 932 n.47, 1081 n.333 (singling out Alabama as engaging in "irresponsible behavior" and encouraging counsel to litigate constitutional challenges).

[45] *See* Dallas v. Haley, 228 F. Supp. 2d 1317 (M.D. Ala. 2002) (staying execution two days before it was to occur for inmate who had been appointed counsel by court after filing of post-conviction petition but whose appeal from the dismissal of that petition had been dismissed as untimely); Barbour v.

Of course, if the flaws in the state procedure rise to the level of a constitutional violation then the argument becomes essentially impregnable; a state is not entitled to benefit in federal court from prior proceedings that fall below constitutional minima.[46] There is a strong case to be made that the states are now seeking to do precisely that. Having created post-conviction remedies, the states are constitutionally required to provide litigants a fair opportunity to pursue them.[47] Specifically, under longstanding doctrines of procedural due process, a capital prisoner in post-conviction litigation should be entitled to the provision of competent counsel.[48] This line of reasoning poses a significant risk to the states: the danger that they will increasingly be unable to rely in federal habeas corpus proceedings upon the defense of procedural default, a defense that has to date been one of their most effective.

In light of these three distinct threats to its litigation interests arising from the failure to provide competent post-conviction counsel in capital cases, a state concerned with maximizing the likelihood that its capital convictions will be expeditiously upheld on federal habeas corpus review would be well advised to provide such counsel.

B. *Federal Issues*

The existing unsatisfactory situation burdens the federal government. Federal law provides for the appointment of qualified counsel in habeas corpus proceedings challenging state capital convictions,[49] and, of course, one of the key duties of such counsel is to attempt to overcome any procedural blunders committed by state post-conviction attorneys—a duty whose competent discharge involves significant expense.[50] But if appointed federal habeas counsel fails to do this job effectively, a petitioner may be able to assert rights flowing from the federal statutory mandate for qualified counsel,[51] even though he could not predicate a habeas corpus claim directly on the ineffective assistance of state post-conviction counsel.[52]

Haley, 145 F. Supp. 2d 1280 (M.D. Ala. 2001) (staying execution two days before it was to occur for inmate who had been appointed counsel by court after filing of state post-conviction petition but whose counsel withdrew before dismissal of petition with result that no appeal from that dismissal was ever filed).

[46] *See* Johnson v. Mississippi, 486 U.S. 578, 585–86 (1988) (holding the state is not entitled to rely in capital sentencing on conviction that had been vacated for failure to provide defendant with counsel).

[47] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30 (1982).

[48] *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 495 (1980). The argument is made in greater detail in Freedman, Giarratano, *supra* note 1, Part IV.

[49] *See* 21 U.S.C. § 848(q)(4)(B) (2000); McFarland v. Scott, 512 U.S. 849, 859 (1994) (noting importance of this entitlement "in promoting fundamental fairness in the imposition of the death penalty").

[50] *See* Freedman, *The Revised ABA Guidelines*, *supra* note 1, at 342–43.

[51] *See* Cooey v. Bradshaw, 216 F.R.D. 408, 415–16 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under § 848), *motion to vacate stay denied,*

Thus, whether appointed federal habeas counsel performs well or badly in cleaning up the mess left behind by ineffective lawyers in state capital post-conviction proceedings, the federal government bears significant costs caused by the states' failure to provide competent counsel in the first place. Perhaps in recognition of these financial realities, if not of the demands of fundamental fairness, Congress has recently begun to provide funds to assist the states in their efforts.[53]

Looking ahead, even if Congress amends Chapter 154 by moving the decision as to whether the statutory criteria are met from the courts to the Attorney General of the United States,[54] the interests of the federal government would be best served by insisting that post-conviction capital attorneys provided by the states truly are capable ones.

V. PEERING OVER THE HORIZON

The prevailing interpretation of *Giarratano* as denying a right to counsel in post-conviction proceedings in capital cases will probably be overruled or at least significantly narrowed.[55] Moreover, "[e]ven if the federal constitutional proposition endures, its practical effect will predictably be undermined by a series of developments in state and federal law that render it irrelevant."[56]

At least three significant consequences follow.

First, because capital litigation is notoriously lengthy, states that do not provide competent post-conviction counsel today may find their convictions reversed on the basis of legal developments, whether constitutional or otherwise, that occur tomorrow. For example, the states are at continuing risk of challenges under Section 1983 to the validity of their overall systems for the provision of post-conviction capital counsel—challenges in which the courts will apply the law at the time of decision.[57] Indeed, at least one such action is already being actively litigated.[58]

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338 F.3d 615 (6th Cir. 2003), *motion to vacate stay denied*, 539 U.S. 974 (2003).

[52] *See* 28 U.S.C. § 2254(i) (2004) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

[53] *See* 42 U.S.C. § 14163 (2004); *see also* Lily Henning, *The White House's Capital Venture*, LEGAL TIMES, Mar. 21, 2005, at 1 (discussing President Bush's support for such funding in his State of the Union Address on Feb. 2, 2005).

[54] As indicated *supra* text accompanying note 26, various proposals to this effect are presently in circulation in Congress. On behalf of the ABA, I testified against one of these. *See* Rhonda McMillion, *Not So Fast: ABA Contends Proposed Habeas Legislation Would Sacrifice Principles for Speed*, 92 A.B.A. J. 65 (2006). The gist of the opposition was that if the Attorney General used the new authority inappropriately to certify state mechanisms that were not providing genuinely competent counsel, there would be system-wide negative effects.

[55] The argument in support of this assertion is set forth at length in Freedman, Giarratano, *supra* note 1.

[56] Freedman, *The Revised ABA Guidelines*, *supra* note 1, at 329.

[57] *Cf.* Nelson v. Campbell, 541 U.S. 637, 639–40 (2004) (challenge to state's lethal injection

Second, turning to the context of federal habeas corpus attacks on individual convictions, if *Giarratano* is overruled or re-written the resulting rule may, under *Teague v. Lane*,[59] be retroactively binding on the states. The Court could reach this conclusion by one of two straightforward paths.

The Court might, and indeed should, hold that in enforcing a duty to provide competent post-conviction counsel in capital cases it was not creating a new rule but merely applying an old one.[60] A decision that some particular state—Alabama, say—was acting unconstitutionally would be a ruling that it was violating an already-existing obligation[61]—one that the state was well aware of and chose to disregard at its own risk.[62] In that event *Teague* would not apply.[63]

Alternatively, even if a rule requiring the states to provide post-conviction counsel in capital cases were "new," so that *Teague* would apply, this particular new rule might easily be determined to be retroactive on the grounds that it fell within the *Teague* exception for new rules making a fundamental contribution to reliable decisionmaking.[64] As indicated in Part II, the realities are simple. Under AEDPA state post-conviction proceedings are likely to be the prisoner's last chance to find and assert claims of legal or factual error. Without the assistance of diligent counsel, that opportunity is drained of practical meaning[65]—with the result that judicial determinations must be made on the basis of trial records that, as several Justices have acknowledged, are systematically inadequate.[66]

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protocols properly brought under Section 1983; plaintiff entitled to a stay of execution *pendente lite*).

[58] *See* Barbour v. Haley, 410 F. Supp. 2d 1120 (M.D. Ala. 2006) (class action challenging Alabama system). On January 23, 2006, the District Court in a lengthy opinion dismissed the action on the merits. Plaintiffs have appealed to the Eleventh Circuit, where the case is pending as this is written.

[59] 489 U.S. 288 (1989).

[60] This argument, outlined *supra* text accompanying notes 13–15, is made at length in Freedman, Giarratano, *supra* note 1, Part III.

[61] *Cf.* Penry v. Lynaugh, 492 U.S. 302, 315 (1989) (rule mandating that Texas juries take mental retardation into account in imposing capital sentences was not imposing new obligation on the state, but simply requiring it "to fulfill the assurance upon which [Jurek v. Texas, 428 U.S. 262 (1976)] was based: namely that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence").

[62] *See, e.g.*, GUIDELINES, *supra*, note 1, at 1081 n.333 (Commentary to Guideline 10.15.1) (criticizing Alabama's performance and urging counsel to challenge it as a federal constitutional violation); Editorial, *supra* note 22; *Agency Claims*, *supra* note 22. Similarly, Georgia has been warned repeatedly that its system for the provision of capital post-conviction counsel is constitutionally inadequate, *see, e.g.*, American Bar Association, *supra* note 21, and thus will hardly be able to claim that it is being blind-sided when a court agrees.

[63] *See generally* HERTZ & LIEBMAN, *supra* note 43, at § 25.5 (demonstrating impossibility of predicting whether rule will be denominated "new").

[64] *See Teague*, 489 U.S. at 312–13 (describing exception); *see also* Freedman, Giarratano, *supra* note 1, Part V (showing importance of post-conviction counsel to achievement of accurate outcomes in capital cases).

[65] *See* GUIDELINES, *supra* note 1, at 932–35 (Commentary to Guideline 1.1).

[66] *See id.* at 928–29.

Third, as continuing factual and legal developments make the constitutional claim stronger, Congress would be increasingly justified both legally[67] and politically in shifting the costs of compliance entirely to the states by simply imposing an unfunded mandate in the exercise of its power under Section 5 of the Fourteenth Amendment.[68]

Together, these considerations mean that in failing to provide competent post-conviction in capital cases now, the states are running significant legal risks for the future that they should be eager to avoid as a matter of narrow self-interest.

VI. A LAST LOOK

It should be unnecessary to add that the ultimate concerns in this area are not limited to ones that are susceptible to narrow calculations of financial and litigation costs and benefits. Nor is this a question that pits the defense bar against prosecutors. The interest in insuring that the decision of the government to execute a person in the name of its citizens is based upon the most complete possible factual and legal picture belongs not just to each individual actor in the legal system—including judges and victims as well as defendants and prosecuting and defense attorneys—but to society as a whole.

The failure to provide competent counsel to capital prisoners in post-conviction proceedings imperils the achievement of the basic goal of a system of justice: justice.[69]

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[67] *See* Tennessee v. Lane, 541 U.S. 509, 530–34 (2004) (Congress acted within its Section 5 powers in requiring states to make judicial facilities accessible to the physically handicapped because the remedy was congruent and proportional to a documented need to enforce constitutional rights).

[68] *See* Geraldine Szott Moohr, Note, Murray v. Giarratano*: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 809 (1990) (making this proposal).

[69] *See* GUIDELINES, *supra* note 1, at 931 (Commentary to Guideline 1.1).