Essay

The Right to Counsel for Habeas Proceedings

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INTRODUCTION

Federal habeas is often the last avenue of relief for both federal and state prisoners. The Framers thought the right to the writ of habeas corpus was so established in law that its only reference in the Constitution is under what conditions the right may be suspended,[1] implying it is available unless extreme circumstances exist. Yet, most habeas petitioners are expected to prepare these complicated petitions on their own while incarcerated. And that assumes they have exhausted any available state appeals, met all procedural requirements, and are still within one year from the final judgment of their conviction.[2] With the near impossibility that a prisoner would be able to successfully file a subsequent habeas petition,[3] it is of utmost importance to make the first one count.

As the system exists today, there is no constitutional right to counsel for habeas proceedings.[4] But that does not mean that

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1. *See* U.S. CONST. art. I, § 9, cl. 2.

2. *See* 28 U.S.C. § 2244(d)(1); *id.* § 2254(c), (d); *id.* § 2255(e), (f).

3. *See* 28 U.S.C. § 2244(b) (limiting successive habeas petitions to specific issues not presented in the original application and filing only with approval from the federal court of appeals).

4. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases

one should not exist. This Essay argues that there should be a right to counsel for federal habeas petitions, which implicates a right to counsel for all forms of post-conviction relief. This Essay begins with an overview of the issue as habeas procedures currently stand and then argues that the right to counsel for habeas is both necessary for the protection of criminal defendants and supported by the Constitution.

I. REVIEW OF THE ISSUE

Post-conviction proceedings are enormously complicated. Defendants face obstacles in what arguments they can make and when they can make them, for the most part without an attorney. If a defendant makes a misstep along the way, the courts are unforgiving and will likely consider the issue waived.[5] The following Part discusses the barriers to filing a federal habeas petition and how defendants suffer as a result. Although this Part discusses federal procedures specifically, state post-conviction processes are similarly consequential and complicated.[6]

A. THE TROUBLING NATURE OF POST-CONVICTION PROCEEDINGS

The right to the writ of habeas corpus[7] has been whittled down over the years. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA") to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."[8] Evidently, one of the "other purposes" of AEDPA was to restrict access to federal habeas. Habeas

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establish that the right to appointed counsel extends to the first appeal of right, and no further." (citation omitted)).

5. *See, e.g.*, *infra* note 22.

6. For example, non-death penalty defendants in Illinois have six months to file for post-conviction relief from the date on which they filed for a writ of certiorari to the U.S. Supreme Court or three years from the date of conviction if they chose not to file a direct appeal. 725 ILL. COMP. STAT. 5/122-1(c). But if a defendant does not file a direct appeal and waits more than a year to file for state post-conviction relief, they would be ineligible to file a federal habeas petition should the state court deny their request for relief. *Id.*

7. Translated literally from Latin, habeas corpus means "show me the body." Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1750 (2009). It is the process by which a prisoner may challenge the legality of their detention. *Id.*

8. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996).

reform in AEDPA was the culmination of decades of legislative efforts to diminish access to habeas.[9] AEDPA restricted the availability of federal habeas relief for state prisoners to situations involving an "unreasonable application of clearly established federal law" or "unreasonable determination of the facts in light of the evidence."[10] It also required that state prisoners exhaust their claims in state court prior to filing for federal habeas,[11] meaning that prisoners must have (1) exhausted their direct appeal, (2) exhausted any available state post-conviction proceedings, and (3) already brought their federal claims before the state court.[12] Further, AEDPA severely limited the possibility of successive habeas petitions for federal and state prisoners and implemented a one-year limitation for filing.[13]

As Justice Souter once said, "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."[14] With momentum to act following the Oklahoma City bombing, Congress hastily drafted AEDPA and framed it as antiterrorist legislation, which made it nearly impossible for cautious politicians to oppose.[15] Habeas reform was an add-on to the bill, but is now known as the most consequential and controversial part of AEDPA.[16] *Terry Williams v. Taylor* declared that AEDPA's purpose is "to further the principles of comity, finality, and federalism," without explaining how it reached that conclusion.[17] The concepts of "comity, finality, and federalism" have

9. *See* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459–65 (2007).

10. 28 U.S.C. § 2254(d).

11. *Id.* § 2254(b)(1) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.").

12. *See* Bridget Kennedy, *Federal Habeas Corpus*, *in* A JAILHOUSE LAWYER'S MANUAL 262, 263 (12th ed. 2020) ("If you are incarcerated in state custody, you will need to 'exhaust' your state remedies before being able to file a federal habeas petition. This means that you can only file a federal habeas petition if you have already lost your state direct appeal and your state post-conviction proceedings. In your federal habeas petition, you can ask the federal court to review the claims that you brought in your direct appeal and your post-conviction proceedings in state court. However, in your federal habeas petition, you can only include claims that are based on federal law . . . .").

13. *See* Kovarsky, *supra* note 9, at 452–53.

14. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

15. *See* Kovarsky, *supra* note 9, at 447.

16. *See id.* at 447–48.

17. 529 U.S. 420, 436 (2000).

since become staples in Supreme Court decisions discussing AEDPA.[18] But with the habeas provisions being additions rather than the original focus of AEDPA, the principles of "comity, finality, and federalism" are less about congressional intent and more about judicial assumption.

AEDPA's one-year statute of limitations provision is particularly frustrating. For most prisoners, the first few months in custody are about getting acquainted with a new way of life. Prisoners arriving at a new facility will need to find their footing and figure out how to survive in a tumultuous environment.[19] There also may be certain procedures prisoners need to go through before they can settle into a facility. For example, male prisoners in Minnesota must be processed at the prison in St. Cloud for anywhere from a few days to a couple of weeks before they are transported to their destination facility.[20] All of these complications are coupled with high rates of existing mental health problems among prisoners and mental health problems that develop during incarceration.[21] While battling adjustment, relocation, and new or existing mental health issues, prisoners must contend with multiple deadlines involving complicated legal procedures for their direct appeal and any other available post-conviction relief, including the one-year deadline to file a federal habeas petition. Though the one-year deadline pauses upon filing for other post-conviction relief, a defendant who misses one deadline may have defaulted any available claims under state law and find themselves barred from filing for federal habeas later.[22] With the current system, a defendant must manage these deadlines on their own with everything else they face as a newly incarcerated person.

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18. *See* Kovarsky, *supra* note 9, at 444 n.5 (listing Supreme Court decisions invoking the principles of "comity, finality, and federalism").

19. *See, e.g.*, *id.*

20. *See Minnesota Correctional Facility – St. Cloud*, MINN. DEP'T OF CORR., https://mn.gov/doc/facilities/st-cloud [https://perma.cc/LA3D-TD8W].

21. *See, e.g.*, Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUST. (Dec. 14, 2016), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf [https://perma.cc/3BAX-3LYT] (discussing high rates of mental health problems among prison and jail populations).

22. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991) (finding that a defendant who filed a notice of appeal with the state court three days late was procedurally barred from filing for federal habeas).

B. THE IMPORTANCE OF HABEAS PROCEEDINGS

As the previous Section explained, federal habeas is often the final route through which prisoners are eligible to obtain relief from detention. The right to the writ of habeas corpus dates back centuries and persists to the modern day. This Section will lay out the origins of the Great Writ and how it remains vital for prisoners today.

1. The Habeas Corpus Act of 1679

The writ of habeas corpus is one of the most crucial rights arising from English common law.[23] By the seventeenth century, the writ was regularly used in court to combat frequent instances of imprisonment without due process.[24] The right to the writ was codified in the Habeas Corpus Act of 1679, providing certainty for criminal detainees that the right to contest their detention would be available to them.[25] The Act placed limits on how long an individual could be detained without indictment and promised discharge as a remedy for violation, even for the most serious crimes.[26] Because the writ was available to all prisoners, including those accused of treason, the idea that the writ could be suspended arose just ten years later as the result of war.[27] This suggests that the right to the writ was so powerful that even during wartime there had to be a lawful suspension of it to properly detain individuals outside the confounds of the criminal process.[28] Before the Act was passed into law, its operation at common law was unpredictable at best.[29] At that time, the English Parliament recognized the urgent need to protect the people from the corruption of those with power over the court system.

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23. *See Writ of Habeas Corpus*, LIBR. OF CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html#obj077 [https://perma.cc/5AGG-RKEH] (discussing the origins of habeas corpus).

24. *See* Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635, 641–42 (2015).

25. *Id.* at 643; *see also* Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 528 (1960) ("[T]he act of 1679 was necessary to make the writ truly effective.").

26. Tyler, *supra* note 24, at 643.

27. *Id.* at 644.

28. *Id.*

29. *See* Nutting, *supra* note 25, at 530 ("Before 1668 . . . delays and evasions almost negated the effect of the writ. . . . It is safe to say that the judges were not throwing their weight on the side of individual liberty.").

Having been long-established in English common law, the right to the writ carried over to the American tradition. Initially, British rule denied the protections of the Act to American colonists, which only contributed to their qualms with Great Britain.[30] Given this context of having been denied the rights of the Act, the Framers included the Suspension Clause in the U.S. Constitution, implying that all protections originally included in the Act persisted within the American legal framework as well as specifying under what conditions the writ could be suspended.[31]

2. *Gideon v. Wainwright*

Eventually, the right to the writ of habeas corpus was expanded by statute beyond its original meaning in the U.S. Constitution.[32] There are many examples of habeas corpus as a pivotal remedy for those in custody,[33] but none may be as important for the majority of prisoners as *Gideon v. Wainwright*. *Gideon*, which established the right to appointed assistance of counsel for state prisoners, originated from the denial of a state habeas petition.[34] The Florida Supreme Court previously denied Clarence Gideon all relief "without opinion,"[35] prompting Gideon to petition the U.S. Supreme Court for a writ of certiorari "to review the order and judgment of the court below denying the petitioner a writ of habeas corpus."[36] In his handwritten petition, Gideon claimed the trial court erred in "ignor[ing] [his] plea" for counsel and hence "deprived [him] due process of law."[37] The Court appointed Gideon counsel after granting certiorari.[38] If Gideon had been asked to proceed without counsel, it's unclear whether the same relief would have been granted and, consequently, how

30. *See* Tyler, *supra* note 24, at 647.

31. *See generally id.* at 696–98.

32. *See, e.g.*, 28 U.S.C. § 2254 (granting the right to the writ of habeas corpus to prisoners in state custody).

33. *See, e.g.*, United States v. Rodriguez, No. 2:04-CR-55 (D.N.D. Jan. 3, 2022) (vacating the death sentence of Alfonso Rodriguez and ordering a new sentencing hearing).

34. *See* Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

35. Gideon v. Cochran, 135 So. 2d 746 (Mem) (Fla. 1961).

36. Petition for Writ of Certiorari at 1, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

37. *Id.* at 3–4.

38. *Gideon*, 372 U.S. at 338.

much longer defendants in every state courtroom would have had to wait for the full vindication of their Sixth Amendment right to counsel. Similarly, *Johnson v. Zerbst*, which established the right to appointed counsel in federal court, came to the Court via a federal habeas petition.[39]

C. CONSEQUENCES OF NOT HAVING A RIGHT TO COUNSEL FOR HABEAS

Although there is no right to counsel for federal habeas proceedings, that does not necessarily mean that all indigent defendants will go unrepresented. The Criminal Justice Act provides that a federal judge or magistrate may appoint counsel for any "financially eligible person" if they determine that "*the interests of justice so require*."[40] However, neither the Act nor federal courts have clearly defined the "interests of justice" standard for everyday indigent defendants. Federal courts that have attempted to supply a definition have mostly found that appointment of counsel is squarely within the discretion of the district court[41] and decisions to appoint counsel are only reviewable for abuse of discretion.[42] Other courts have not articulated a standard at all.[43]

Courts that have tried to prescribe an "interests of justice" standard have generally construed the provision narrowly. The

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39. *See* 304 U.S. 458, 458–59 (1938).

40. 18 U.S.C. § 2006A(a)(2)(B) (emphasis added).

41. *See, e.g.*, Johnson v. Warren, 344 F. Supp. 2d 1081, 1088 (E.D. Mich. 2004) ("[T]he appointment of counsel [in habeas proceedings] is within the discretion of the [c]ourt and required only if, given the difficulty of the case and petitioner's ability, the petitioner could not obtain justice without an attorney, he could not obtain a lawyer on his own, and he would have a reasonable chance of winning with the assistance of counsel."); United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994) ("Whether to appoint counsel to represent a defendant in a § 2255 proceeding is committed to the sound discretion of the district court.").

42. *See, e.g.*, United States v. Scurry, 992 F.3d 1060, 1065 (D.C. Cir. 2021) ("Determinations regarding appointment of counsel in the interests of justice . . . are reviewed for an abuse of discretion."); Wiseman v. Wachendorf, 984 F.3d 649, 655 (8th Cir. 2021) ("We review the court's decision [under § 3006A(a)(2)(B)] for abuse of discretion.").

43. *See, e.g.*, Veiovis v. Goguen, No. 22-1216, 2023 WL2745155, at *1 (1st Cir. Mar. 6, 2023) (stating that the court was "not persuaded that 'the interests of justice' require appointment of counsel" without explaining why); Mobley v. Elzie, No. 98-7026, 1998 WL929778, at *1 (D.C. Cir. Dec. 30, 1998) (stating simply that appointment of counsel "would not be in the interests of justice" without explanation).

Ninth Circuit determined that representation is required when "the circumstances of the case indicate that appointed counsel is necessary to prevent due process violations."[44] In that case, the court found the petitioner met the burden for appointed counsel because he raised nonfrivolous claims and, due to his suspected schizophrenia, it would be nearly impossible for the court to accurately determine the merits of those claims without appointed counsel.[45] However, the Ninth Circuit standard has not been cited in any subsequent case. Similarly, the Seventh Circuit held that appointed counsel "rests in the sound discretion of district courts unless denial would result in fundamental fairness impinging on due process rights."[46] The court went on to say that decisions of the district court would only be overturned if the prisoner would not obtain justice without an attorney, could not obtain an attorney on their own, and would have a "reasonable chance of winning" with representation.[47] The Seventh Circuit standard implies that, when reviewing the decision of the district court, circuit court judges should make a preliminary assessment of the merits based on a prisoner's pro se petition to determine whether it was an abuse of the lower court's discretion to withhold appointed counsel. The Eleventh Circuit eluded that appointed counsel may be required "where the legal issues are unusually complex," without further elaboration.[48]

Ultimately, the vast majority of federal habeas petitioners go without representation.[49] In one study that reviewed nearly 2,000 habeas petitions filed in federal court by state prisoners, habeas courts appointed counsel in 4% of cases, with 93% of

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44. Stokes v. Roe, 18 F. App'x 478, 479 (9th Cir. 2001).

45. *Id.*

46. Winsett v. Washington, 130 F.3d 269, 281 (7th Cir. 1997).

47. *Id.*

48. *See* Soreide v. United States, No. 16-16002-FF, 2017 WL11622192, at *1 (11th Cir. Nov. 17, 2017).

49. *See* Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55, 88–89 (2014) ("[T]he reality is that federal habeas petitions are overwhelming filed pro se."). While most habeas petitioners are unrepresented, appointed counsel *is* required when an evidentiary hearing is warranted. R. GOVERNING SECTION 2254 AND SECTION 2255 PROC. 8(c); *see also* Rauter v. United States, 871 F.2d 693, 695 (7th Cir. 1989) ("The requirements of [rule 8(c)] are very clear. If an evidentiary hearing is held, the district court *must* appoint counsel for an indigent petitioner.").

petitioners having no representation.[50] This means that, like Clarence Gideon, most defendants are tasked with drafting their own petitions without the assistance of counsel and filing within constrained deadlines. District court decisions to appoint counsel, or in most cases not to appoint counsel, are very rarely reversed because of the wide latitude given to district courts in making those decisions and lack of guidance on how to make them. While the right to habeas and other post-conviction relief has been diminished by legislators and the courts, it remains a potentially imperative venue for prisoners to raise legitimate challenges to their detention, including the opportunity to raise federal rights violations in front of a federal court for the first time. Despite the importance of post-conviction relief, most prisoners are left to their own devices to navigate each step of the process.

II. ARGUMENT

Although indigent prisoners are expected to prepare what can be extraordinarily complicated legal petitions on their own, that shouldn't be the expectation. This Part argues that providing post-conviction counsel for all prisoners is not only necessary and possible, but also constitutionally supported.

A. WHY PRISONERS NEED POST-CONVICTION COUNSEL

According to one study conducted from 1973 to 1975 and then again from 1979 to 1981, "the single most important predictor of success in federal habeas corpus" for non-capital cases was whether the petitioner had representation.[51] Furthermore, this was prior to the passage of AEDPA in 1996, making it even more difficult for pro se habeas petitioners to succeed amid procedural barriers. This Section points out issues with the scheme for habeas petitioners, argues that providing counsel may ultimately benefit the criminal justice system, and addresses potential resistance to providing appointed post-conviction relief counsel.

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50. Roger A. Hanson & Henry W.K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions*, U.S. DEP'T OF JUST. 14 (Sept. 1995), https://static.prisonpolicy.org/scans/bjs/fhcrcscc.pdf [https://perma.cc/D4EE-TEUE].

51. Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 707 (1991).

1. Ability to Raise Certain Claims

The most common claim raised by habeas petitions is ineffective assistance of counsel ("IAC").[52] But how would a prisoner know their case suffered from ineffective assistance if they don't even know they can raise the claim? Generally, both state and federal defendants are discouraged from raising IAC claims on direct appeal,[53] or outright barred from doing so.[54] That means that, for the most part, indigent defendants must determine the effectiveness of their counsel on their own. Moreover, it is possible a defendant has only had one attorney representing them throughout the duration of their case, from trial through their direct appeal. This means that if this attorney failed somewhere along the way, whether it be neglecting to raise a particular defense or not investigating the case to the fullest extent, a defendant bears the burden of discovering their attorney's error. Providing post-conviction relief counsel would shift some of this burden from an incarcerated individual to someone with a legal education.[55]

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52. *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 433 (2011) (stating that IAC claims are the most common type of claim for habeas litigants and have been rising steadily over the last thirty years).

53. *See, e.g.*, People v. Woodruff, 421 P.3d 588, 620 (Cal. 2018) ("Rarely is ineffective assistance of counsel established on appeal since the record usually sheds no light on counsel's reasons for action or inaction."); United States v. Flores, 739 F.3d 337, 341 (7th Cir. 2014) ("[W]e have said many times that it is imprudent to present an ineffective-assistance argument on direct appeal."); *see also* Commonwealth v. Grant, 813 A.2d 726, 735 (Pa. 2002) ("[A]n overwhelming majority of states indicate a general reluctance to entertain ineffectiveness claims on direct appeal.").

54. *See, e.g.*, State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) ("Any [IAC] claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit.").

55. Even providing counsel just for the federal habeas petition would help alleviate this problem, as the failure to raise an IAC claim may establish "cause" for avoiding procedural default. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012) ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."), *abrogated by* Shinn v. Ramirez, 142 S. Ct. 1718, 1739 (2022) (holding that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond state-court record based on ineffective assistance of state post-conviction counsel).

Another significant barrier to petitioning for federal habeas relief is the limitation on issues that can be raised in federal collateral proceedings. For state court prisoners, a claim is only eligible for relief if there was (1) an unreasonable application of federal law or (2) an unreasonable determination of the facts in light of the evidence.[56] A federal court will only grant habeas relief for a trial error if the error "'had substantial and injurious effect or influence in determining the jury's verdict' or when a 'deliberate and especially egregious error' warrants habeas relief even without substantial influence on [the] jury's verdict."[57] IAC claims and *Brady* claims are subject to an even higher standard, requiring the prisoner to "show that but for the error, there is a reasonable probability that the result of the proceeding would have been different, such that confidence in the outcome is undermined."[58] In addition to the extraordinarily high bar to succeed on a federal habeas petition, those claims *must* have been raised previously in a state court proceeding.[59] Hence, if an indigent defendant fails to explicitly raise a federal constitutional claim in state court, that claim is considered defaulted for the federal habeas petition.[60] As the process currently exists, indigent prisoners are expected to raise these claims on their own, and lack of awareness will not serve as a basis to avoid default. Although state prisoners may be given some information on what they must do to file for federal habeas relief,[61] this still must be done within stringent timelines, by someone who may

56. 28 U.S.C. § 2254(d).

57. *Habeas Relief for State Prisoners*, 51 GEO. L.J. ANN. REV. CRIM. PROC. 1091, 1104 (2022). Review for harmless error is also known as the *Brecht* standard. *Id.*

58. *Id.* at 1105–06.

59. 28 U.S.C. § 2254(b)(2), (c).

60. *See* Picard v. Connor, 404 U.S. 270, 270 (1971) ("The substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts . . . ."); *see also* Baldwin v. Reese, 541 U.S. 27, 32 (2004) ("We consequently hold that ordinarily a state prisoner does not 'fairly present' a claim to a state court if the court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find such material, such as a lower court opinion in the case, that does so.").

61. *E.g.*, *Pro Se Guidebook for Petitions for Writs of Habeas Corpus Governed by 28 U.S.C. § 2254*, U.S. DIST. CT. DIST. OF MINN. (Oct. 2020), https://www.mnd.uscourts.gov/sites/mnd/files/2254-PrisonerGuidebook.pdf [https://perma.cc/S7X5-RTT4].

be suffering from mental health issues,[62] is without financial resources, and is incarcerated on top of all else.

2. Benefits to the Criminal Justice System

Providing counsel for federal habeas petitions and other versions of post-conviction relief has the potential to be a net good for the criminal justice system. Apart from the inherent inequity in current procedures, there are other reasons for providing counsel that may be more palatable for those less inclined to advocate for convicted criminals. The most prudent reason for providing appointed counsel is the likelihood that doing so would lead to less meritless habeas petitions. For the right to counsel on first appeal, the Supreme Court condones the filing of an *Anders* brief to withdraw from the case if appellate counsel "finds [the] case to be wholly frivolous, after a conscientious examination of it."[63] This standard could be extended to post-conviction relief counsel, meaning that counsel would be permitted to withdraw from a case should they find no "nonfrivolous" grounds for relief. Although this procedure allows defendants to proceed pro se,[64] it would provide the reviewing court with the attorney's assessment of anything that "might arguably support" the petition[65] so that the court could determine whether these points might have merit despite counsel's evaluation. Presently, one out of every fourteen civil cases filed in federal habeas courts is filed under § 2254,[66] which leads to federal judges spending hours reviewing habeas petitions only to dismiss the vast majority on procedural grounds.[67] Requiring appointed counsel for habeas petitioners would shift the burden from federal judges parsing through pro se petitions to experienced attorneys working with defendants to determine the merits of any potential claims.

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62. *See* James & Glaze, *supra* note 21 and accompanying text.

63. Anders v. California, 386 U.S. 738, 744 (1967).

64. *See id.* ("A copy of counsel's brief should be furnished [to] the indigent and time allow [for] him to raise any points he chooses . . . .").

65. *Id.*

66. Nancy J. King, Fred L. Cheesman & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts*, NAT'L INST. OF JUST. 9 (Feb. 2023), https://www.prisonlegalnews.org/media/publications/habeas_litigation_in_federal_courts_vanderbilt_study_2007.pdf [https://perma.cc/24M2-JPEP].

67. Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 887 (2012).

Implementing a right to counsel for habeas petitioners may also deter violations of federal rights. It is the duty of federal courts to determine rights under federal law.[68] With the current system, a state prisoner's claim of a federal rights violation might never make it before a federal court, regardless of the claim's merit. State prisoners only have the right to counsel on their direct appeal, which occurs in state court.[69] If there was a federal rights violation either missed by the appellate counsel or on the direct appeal itself, the indigent prisoner, proceeding without counsel, would likely not know how to successfully present their federal claim before a federal court. If all parties involved know that prisoners will have post-conviction relief counsel that will be more knowledgeable about raising federal claims, it could lead to more successful claims of federal rights violations and hence deter future violations.

3. Potential Pushback

The primary concern with providing a right to post-conviction relief counsel is almost certainly the associated cost. Public defender systems are already stretched thin with the funding available to them.[70] Adding post-conviction work to the public defender's docket would put substantially more weight on an already overburdened system. And thoroughly investigating a case after its official conclusion is no small task. However, it would shift the burden from courts to public defenders and substantially limit the number of frivolous claims, potentially cutting costs in at least one area of the criminal justice system.

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68. *Cf.* Murdock v. Memphis, 87 U.S. 590, 632 (1874) ("It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State courts were against him on that question. That rights of this character, guaranteed to him by the Constitution and laws of the Union, should not be left to the exclusive and final control of the State courts.").

69. *See supra* notes 11–12 and accompanying text.

70. *See Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, AM. BAR ASS'N 39 (Dec. 2004) ("The lack of funding [for indigent defense services] impacts on virtually every aspect of indigent defense systems[.]"); *see also* Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 243 (2015) ("One of the largest obstacles in providing proper public defense for indigent defendants is funding." (footnote omitted)).

Further, habeas petitions take a long time and, given current custody requirements,[71] only prisoners with the longest sentences would be eligible to file.[72] State prisoners, who constitute around 87% of the country's total prison population,[73] serve approximately 2.7 years from admission to their initial release.[74] By contrast, on average state prisoners file federal habeas petitions 6.3 years following initial judgment.[75] While timelines will vary from state to state, a random sample of cases found that state trial courts reviewing post-conviction relief petitions issued decisions anywhere from 3 to 4.5 years after conviction.[76] This means that, in general, many or even most prisoners will be released from custody before having the opportunity to obtain any form of post-conviction relief. In addition, most prisoners forego nearly all rights to appeal anyway by accepting plea deals.[77] Given lengthy timelines and pleas, the number of attorneys needed as post-conviction relief counsel is likely not as high as some might think but would still require additional funding.

Besides cost, it is also important to consider finality. The Supreme Court is particularly concerned with finality for criminal convictions.[78] Finality is not only seen as important for

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71. *See Habeas Relief for State Prisoners*, *supra* note 57, at 1092–93.

72. *Cf.* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 260 (1995) ("Only prisoners with relatively long sentences have time to complete the entire habeas process . . . .").

73. *See* E. Ann Carson, *Prisoners in 2021 – Statistical Tables*, U.S. DEP'T OF JUST. 6 (Dec. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/9KAJ-WRU8].

74. Danielle Kaeble, *Time Served in State Prison, 2018*, U.S. DEP'T OF JUST. 1 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf [https://perma.cc/3GZ5-NPJN]. While the average sentence for a state prisoner is 6.7 years, this number is likely skewed by extraordinarily high sentences for the most serious offenses. *See id.* at 4.

75. King et al., *supra* note 66, at 22.

76. *See* R. Davis, *How Long Does Post Conviction Relief Take?*, BARKAN RSCH. (July 29, 2021), https://barkanresearch.com/how-long-until-post-conviction-relief [https://perma.cc/Z9G7-9P69].

77. *See* Beth Schwartzapfel, Abbie VanSickle & Annaliese Griffin, *The Truth About Trials*, THE MARSHALL PROJECT (Nov. 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials [https://perma.cc/N225-QERD] (reporting that 94% of felony convictions in state court and 97% in federal court end in plea bargains).

78. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 748 (1991) (stating that the most significant "cost to finality in criminal litigation . . . [is] federal

judicial procedure, but also for victims who must cope with their perpetrators continually being brought before the court related to their case.[79] However, a right to appointed counsel for habeas and post-conviction relief petitioners does not necessarily undermine victims' rights any more than the current system, but rather gives petitioners equal footing should they choose to challenge their conviction. Further, providing representation may actually decrease meritless petitions and hence potentially conclude more cases before the filing stage, actually increasing the chances of finality. In the end, the right to freedom for an individual unconstitutionally detained outweighs the interests of the victim and the larger criminal justice system in finality.[80]

B. CONSTITUTIONAL SUPPORT FOR THE RIGHT TO POST-CONVICTION COUNSEL

Having established why there is a need for post-conviction counsel, the next question is how courts would find a legal foundation for the right to the Great Writ. This Section points to the Sixth Amendment, the due process clauses, and the Suspension Clause for constitutional support.

1. Sixth Amendment Right to Counsel

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence."[81] While the Supreme Court has generally interpreted the Sixth Amendment's substantive guarantee for the right to counsel as extending only to

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collateral review of state convictions"); Shinn v. Ramirez, 596 U.S. 366, 381 (2022) ("[The] principles of comity and finality . . . govern every federal habeas case.").

79. *Cf. Shinn*, 596 U.S. at 376 ("Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." (quoting Calderon v. Thompson, 523 U.S. 536, 556 (1998)). *See also* Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 398 (2007) (quoting a victim who stated "I want . . . finality, I'm tired of hearings and court proceedings").

80. *Cf.* George C. Thomas, Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 300 (2003) (acknowledging that due process rights must be measured against desire for finality while emphasizing that a core interest of due process is to protect against unjust confinement).

81. U.S. CONST. amend. VI.

the defendant's "defence" *at trial*,[82] the right temporally extends to "all *criminal prosecutions*."[83] Similar to the narrowing of what constitutes "defen[s]e," the members of the Court have previously analyzed the phrase "criminal prosecutions" by examining its historical meaning, which limits the right through imposition of sentence following trial.[84]

However, as our understanding of the right to counsel has evolved substantially over time,[85] it is similarly appropriate to consider what a "criminal prosecution" may consist of today. Post-conviction proceedings are in place to protect defendants from error inherent in the criminal justice system[86] and are critical forums for defendants to raise certain claims for the first time.[87] The Court has recognized that the "core purpose" of the Sixth Amendment right to counsel is to assure aid "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."[88] Although it has also emphasized this right is limited to trial, prisoners filing for post-conviction relief are still confronted with the "intricacies of the law and

82. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 216 (2008) (Alito, J., concurring) ("In interpreting this . . . phrase, we have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused.").

83. U.S. CONST. amend. VI.

84. *E.g.*, *Rothgery*, 554 U.S. 191 at 219 (Thomas, J., dissenting) ("I think it appropriate to examine what a "criminal prosecutio[n]" would have been understood to entail by those who adopted the Sixth Amendment."); United States v. Haymond, 139 S. Ct. 2369, 2379 (2019) ("[F]ounding-era prosecutions traditionally ended at final judgment. . . . [W]e recognized in *Apprendi* and *Alleyne* [that] a 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.").

85. At the time the Framers adopted the Sixth Amendment, it was understood as recognizing a right to retain counsel as choice, not an affirmative right to appointed counsel. YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR & EVE BRENSIKE PRIMUS, BASIC CRIMINAL PROCEDURE 65 (15th ed. 2019); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006) ("The right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee.").

86. *What is Post Conviction?*, NAT'L POST-CONVICTION PROJECT (2023), https://postconviction.org/what-is-post-conviction/#:~:text=The%20post%2Dconviction%20process%20is,in%20the%20criminal%20justice%20system [https://perma.cc/5JU2-VNFJ].

87. *See supra* Part II.A.0.

88. United States v. Gouveia, 467 U.S. 180, 188–89 (1984).

the advocacy of the public prosecutor."[89] Moreover, the same logic the Court used to extend the right to effective assistance of counsel on appeal applies to other forms of post-conviction relief in that the defendant "face[s] an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding."[90] The Court has also previously overturned Sixth Amendment precedent despite "strong . . . historical support" and "considerations of necessity and efficiency."[91] The complexity of post-conviction proceedings combined with their importance for criminal defendants leads to the conclusion that the Sixth Amendment right to counsel may extend to defendants filing for post-conviction relief.

While the Sixth Amendment argument is plausible, there are substantial obstacles in the way of its success. Not only would it require finding the Sixth Amendment extends well-beyond established bounds, but it also faces the challenge of the Sixth Amendment specifically guaranteeing rights to "the accused."[92] The stronger case for representation arises under the Due Process and Suspension Clauses.

2. Due Process and Suspension Clauses

Soon after handing down *Gideon*, the Supreme Court held that the right to counsel extends to the first direct appeal under the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment.[93] In its holding, the Court emphasized the inherent inequality in a system "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf" versus the indigent defendant who "is forced to shift for himself."[94] Are the same principles not applicable to other forms of post-conviction relief? The Court has been firm in its stance that the same principles are not applicable[95] while

89. *Id.* at 181.

90. Evitts v. Lucey, 469 U.S. 387, 396 (1985).

91. *See* Bloom v. Illinois, 391 U.S. 194, 198–99 (1968) (overturning the established rule that a jury trial is not required for cases of criminal contempt under the Sixth Amendment).

92. U.S. CONST. amend. VI.

93. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963).

94. *Id.* at 358.

95. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 610 (1974) ("We do not believe that the Due Process Clause require North Carolina to provide respondent with

continuing to recognize the inherent injustice that comes with defining access to counsel based on financial status,[96] emphasizing the presumption of guilt after conviction.[97] However, circumstances have changed since the Court issued those previous holdings.

Notably, there have been more studies done on habeas petitions, both before and after the passage of AEDPA, showing how critical representation is to the success of habeas petitions.[98] This reiterates the point that the difference between success and failure should not come down to an individual's finances. Additionally, some states have recognized this inherent unfairness and found a right to counsel for state post-conviction proceedings under state law.[99] Thus, there may be a stronger argument now that, given what we know about representation and post-

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counsel on his discretionary appeal to the State Supreme Court."); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus we have rejected suggestions that we establish a right to counsel on discretionary appeals.").

96. *See, e.g.*, *Ross*, 417 U.S. at 610 (quoting *Gideon*'s principle that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"); *Finley*, 481 U.S. at 554 (noting the holding of *Douglas* that "denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor").

97. *See, e.g.*, *Ross*, 417 U.S. at 610 ("[I]t is ordinarily the defendant . . . who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below."); *Finley*, 481 U.S. at 555 (quoting *Ross* for the notion that a determination of guilt is the fundamental difference between constitutional rights at trial and rights on appeal).

98. *See* Faust et al., *supra* note 51 and accompanying text; Flango & McKenna, *supra* note 72, at 261 ("[O]f the 103 petitions granted by state courts where representation was known, petitioners had counsel in sixty percent of them (sixty-two); of the 1,452 petitions dismissed or denied, twenty-two percent of the petitions had counsel."); King et al., *supra* note 66, at 23, 52 (reporting that of the 2,384 non-capital federal habeas petitions reviewed, of which 92.3% or 2,202 had no assistance from counsel, relief was granted in only seven cases with three petitioners having retained attorneys and not clarifying whether the other four petitioners had been appointed counsel by the court).

99. *See, e.g.*, Commonwealth v. McClinton, 413 A.2d 386, 387 (Pa. 1980) ("[I]n this jurisdiction a first post-conviction hearing petition should not be dismissed where the petitioner is indigent and has requested counsel, without affording him representation in that proceeding . . . ." (citations omitted) (quoting Commonwealth v. Fiero, 341 A.2d 448, 449–50 (Pa. 1975)); N.J. R. CT. 7:10-2(e) (guaranteeing post-conviction counsel upon a finding of indigency and that the "conviction involved a consequence of magnitude").

conviction relief, due process is violated when the procedure depends on the ability of a defendant to retain counsel.[100]

The Suspension Clause further strengthens the case for a Due Process right to counsel for federal habeas petitions. The Framers believed the right to habeas was so fundamental that it is only mentioned by reference to when it can be taken away.[101] The right is entrenched in common law and for centuries was supported by lawmakers[102] rather than diminished by statutes like AEDPA. Although the Court previously held AEDPA does not constitute "suspension" of the Great Writ,[103] it has not faced the question in the context of denial of the right to counsel as effectively amounting to suspension, given what we know about representation being the primary indicator for success. While the Suspension Clause argument is not likely to succeed on its own given that the Court has continually upheld AEDPA,[104] it adds to the premise that due process requires assistance of counsel for habeas, which is a right long valued by history and tradition.

CONCLUSION

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[105]

The right to counsel and the right to habeas are both critical for those facing federal or state detention. While courts have long recognized that a defendant's success in court should not depend on their financial status, that idea is lost once a defendant is found guilty. Granting counsel for post-conviction relief will assure that no person with a genuine claim against their detention

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100. *Cf.* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1396 (1999) ("There is an odd dissonance between the Court's apparent satisfaction with the accuracy and appropriateness of the result of a trial and the universal perception that we ought not imprison someone, much less execute him, unless an appellate court has examined alleged errors.").

101. *See* U.S. CONST. art. I, § 9, cl. 2.

102. *See supra* Part I.B.0.

103. Felker v. Turpin, 518 U.S. 651, 654 (1996).

104. *See generally* Shoop v. Twyford, 142 S. Ct. 2037 (2022); Shinn v. Ramirez, 596 U.S. 366 (2022).

105. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 152 (1970) (quoting Walter V. Schaefer, *Federalism and State Criminal Trials*, 70 HARV. L. REV. 1, 8 (1956)).

must single-handedly meet procedural deadlines and craft a legal argument to convince a court to agree with them. While appointing counsel for indigent post-conviction relief petitioners may not be popular, it is necessary to fully realize the constitutional guarantees of the right to counsel.