Are We Closer to Fulfilling *Gideon*'s Promise?: The Effects of the Supreme Court's "Right-to-Counsel Term"

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Are We Closer to Fulfilling *Gideon*'s Promise?: The Effects of the Supreme Court's "Right-to-Counsel Term"

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During the 2011-2012 Term, the United States Supreme Court handed down decisions in five cases that open the door to expanding and better protecting the availability of effective counsel in both the pre-trial and post-conviction stages of a criminal prosecution. These decisions recognized the realities of our 21st century criminal justice system and proved that the Court's last term deserved the sobriquet the "Right-to-Counsel Term."[1]

In the companion cases *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court recognized that the Sixth Amendment right to counsel extends to the entire plea bargaining process, which is relatively unregulated. In *Frye*, the Court held that to ensure effective assistance of counsel, defense counsel has a duty to convey plea offers to clients. A defense attorney who, without consulting with her client, rejects a plea offer or allows a plea offer to lapse may violate her client's Sixth Amendment right to counsel. In *Lafler*, the Court found a defense attorney failed to provide effective assistance because he offered unreasonable legal advice that caused his client to reject a favorable plea offer and proceed to trial, at which he was convicted and sentenced to a term three and half times longer than what he would have served if he had accepted the plea.

The other three cases involved post-conviction counsel issues. In *Maples v. Thomas*, the Court recognized that a *habeas* petitioner should not be barred from federal review because he was unaware of and missed the procedural deadline after he was abandoned by his attorneys. The holding may have largely been a result of the unique facts, but it nonetheless protects hapless prisoners from the consequences of counsel abandonment. Dealing with a similar issue of procedural default in *Martinez v. Ryan*, the Court held that a petitioner's procedural default may be excused because of ineffective assistance of counsel or a lack of counsel in a first state habeas petition if the defendant was prohibited from raising those claims during his direct appeal. In *Martel v. Clair*, the Court held that the federal statute entitling capital *habeas* petitioners to appointed counsel allows a court to substitute counsel when it is in the interest of justice, giving federal courts discretion in deciding when substitute counsel is appropriate.

This Issue Brief examines the five "Right-to-Counsel Term" decisions the Court handed down during the 2011-2012 Term and some of the subsequent lower court decisions applying those decisions. First, it provides an overview of the right to counsel during the plea bargaining stage and considers how the *Frye* and *Lafler decisions may have altered the landscape*. Next, it provides an overview of ineffective assistance of counsel and related claims in post-conviction proceedings and explores the implications of *Maples*, *Martinez*, and *Clair* in this context. The Issue Brief concludes by suggesting that the manner in which lower courts implement these decisions will reveal what the Right-to-Counsel Term's lasting impact will be.

I. Right to Counsel During Plea Bargaining

Prior to *Frye* and *Lafler*, it was well-grounded in Supreme Court precedent that an accused's Sixth Amendment right to effective assistance of counsel extended to all "critical

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[1] *See* Kent Scheidegger, *The Right-to-Counsel Term*, CRIME AND CONSEQUENCES (July 15, 2011, 1:44 PM), http://www.crimeandconsequences.com/crimblog/2011/07/the-right-to-counsel-term.html.

stages" of a prosecution.[2] The Court's rationale behind the critical stage doctrine was the recognition that stages of a prosecution beyond the actual trial may be just as crucial to ensuring that the accused receives an adequate defense. It is well established for example, that an accused's Sixth Amendment right to counsel is undermined if he does not have access to counsel during custodial interrogations or other law enforcement questioning that occurs after an arrest or indictment.[3] Similarly, plea bargaining has been considered a "critical stage" since at least 1985.[4] As a result, even before *Frye* and *Lafler*, courts were considering ineffective assistance of counsel claims in the plea bargaining stage.

The difficulty that prompted the Court to grant certiorari in *Frye* and *Lafler* was the manner in which courts applied the test for ineffective assistance of counsel in the plea bargaining phase.[5] Under the Supreme Court's ruling in *Strickland v. Washington*, to establish ineffective assistance of counsel, the defendant must show (1) his counsel's performance fell below an objective standard of reasonableness ("deficient performance"); and (2) there is a reasonable probability that if his counsel performed adequately, the result of the proceeding would have been different ("prejudice").[6] Under the test, a defense attorney's deficient performance is not an automatic violation of his client's Sixth Amendment right to counsel. The client must show that the deficiency affected the outcome of the proceedings. The standard is difficult to meet given the Court's instruction that lower courts should be "highly deferential" to defense counsel and indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance.[7]

In the Court's first consideration of effective assistance claims at the plea bargaining stage, *Hill v. Lockhart*, the Court held that the *Strickland* test applies to ineffective assistance of counsel claims in the plea bargaining context.[8] The defendant in *Hill* accepted a plea offer on his counsel's advice that he would be eligible for parole after serving one-third of his prison sentence, when in fact he would only be eligible for parole after serving one-half of his sentence. Applying *Strickland*, the Court held that in the plea bargain stage, as in the trial stage, the deficient performance prong requires an analysis of whether counsel's performance fell below an objective standard of reasonableness. The Court further held that under the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. The Court ultimately rejected the defendant's ineffective assistance of counsel claim in *Hill* because the defendant failed to plead that he would have proceeded to trial but for his attorney's inadequate advice.

In 2010, the Supreme Court focused on the substance of *Strickland*'s deficient performance prong in the plea bargaining stage. In *Padilla v. Kentucky*, the defendant pled guilty to an offense on the advice of his counsel that a conviction pursuant to the guilty plea would have no immigration consequences.[9] The counsel's advice was incorrect, and the government subsequently commenced deportation proceedings against the defendant. After reaffirming that plea bargaining was a critical stage for purposes of the Sixth Amendment right to counsel, the Court held that the right to effective assistance of counsel requires competent advice about the deportation consequences of a guilty plea.[10] Through its decision in *Padilla*, the

[2] Rothgery v. Gillespie County, 554 U.S. 191 (2008).
[3] *See* Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).
[4] Hill v. Lockhart, 474 U.S. 52 (1985).
[5] The Constitution Project's National Right to Counsel Committee has criticized this test because the burden it imposes on defendants is too difficult to meet.
[6] Strickland v. Washington, 466 U.S. 668 (1984).
[7] *Id.* at 689.
[8] 474 U.S. 52 (1985).
[9] 130 S. Ct. 1473 (2010).
[10] *Id.*

Court created an affirmative duty for defense counsel to inform their clients of the immigration consequences of a guilty plea.

Frye and *Lafler* may be viewed as a continuation of the Court's reasoning in *Hill* and *Padilla*. In *Frye*, the defendant never had the opportunity to accept the government's plea offer because his attorney failed to convey the offer to him before the offer lapsed. In *Lafler*, the defendant had the opportunity to accept a plea offer, but he chose to reject the offer based on his attorney's objectively unreasonable advice.

A. *Missouri v. Frye*[11]

In *Frye*, the State of Missouri charged Galin Frye with driving with a revoked license. Frye had been convicted of the same offense (a misdemeanor) three times before, so Missouri law allowed the prosecutor to charge him with a felony carrying a maximum sentence of four years in prison. The prosecutor communicated to Frye's counsel (but not to Frye) two plea offers: (1) plead guilty to the felony and the prosecutor would recommend a 10-day jail sentence along with probation; or (2) plead guilty to the misdemeanor and the prosecutor would recommend a 90-day jail sentence. Frye's counsel never conveyed these offers to Frye and they expired. After being arrested again for the same offense before trial, Frye pled guilty to the felony charge without a plea agreement and was sentenced to three years in prison. He then obtained appellate counsel and brought an ineffective assistance of counsel claim on the basis that his trial counsel's failure to convey the plea offers to him was a violation of his Sixth Amendment right to counsel.

The Court first considered "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[.]"[12] Distinguishing this case from *Hill* and *Padilla* was the fact that in *Frye* the defendant never accepted the plea because his attorney failed to convey the offer to him until after it had lapsed. The Court held that the right to effective assistance of counsel during plea negotiations extends to plea offers that lapse or are rejected. The Court reasoned that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[13] The Court underscored this by adding that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[14]

In analyzing *Strickland*'s deficient performance prong for lapsed plea offers, the Court held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[15] Beyond this rule, the Court did not offer an explanation of what other behavior would constitute deficient attorney performance during plea negotiations. Since Frye ended up pleading guilty to a more serious charge with a longer sentence than the uncommunicated plea offer, Frye succeeded in establishing that his attorney's performance was deficient.

The second issue the Court tackled was what a defendant must show in order to establish prejudice resulting from counsel's failure to communicate a plea offer. In analyzing *Strickland*'s prejudice prong, the Court held that defendants alleging ineffective assistance of counsel from a

[11] 132 S. Ct. 1399 (2012).
[12] *Id.* at 1404.
[13] *Id.* at 1407.
[14] *Id.* (emphasis in original).
[15] *Id.* at 1408.

lapsed or rejected plea offer must show (1) a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel; (2) a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it if they had the authority to exercise that discretion under state law; and (3) a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.[16] Frye was able to show that he would have accepted the earlier plea offer if his attorney had presented it to him and that the end result of the criminal process would have been more favorable because his prison time would have been less. However, the court remanded the case to determine whether Frye's arrest and charge for the same offense before trial would have likely caused the prosecution to withdraw its original plea offer.

B. *Lafler v. Cooper*[17]

In *Lafler*, defendant Anthony Cooper pointed a gun at a female victim's head and fired, but missed. He then chased her as she fled and shot her in the buttock, hip, and abdomen, but she survived. The State of Michigan charged Cooper with four offenses, including assault with intent to murder. The prosecution offered to dismiss two of the charges and recommend a sentence of 51 to 85 months in prison if Cooper plead guilty to two of the charged offenses. Cooper initially expressed to the trial court his willingness to take the plea offer, but he ultimately rejected the offer and proceeded to trial based on his attorney's advice to reject the offer because the prosecution would be unable to show his intent to murder. The legal basis for his counsel's advice was that all three of Cooper's shots hit the victim below the waist, so the prosecution could not show that Cooper intended to kill the victim. Needless to say, this was objectively unreasonable advice. At trial, Cooper was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months in prison. Cooper then brought an ineffective assistance of counsel claim arguing that his attorney's poor advice caused him to reject the plea bargain and proceed to trial.

All parties conceded that the performance of Cooper's counsel was deficient under *Strickland*. The primary issue for the Court was "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial."[18] The Court applied the same reasoning as in *Frye* to extend the right to effective counsel to advice concerning a rejected plea bargain. Rejecting the government's multifaceted argument that Cooper's fair trial remedied any errors during plea bargaining, the Court reiterated the facts that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Therefore, the court took the same reality-based approach as its companion case and found that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[19] Under the facts, the Court found that Cooper satisfied both parts of *Strickland*. All parties conceded Cooper's counsel's deficient performance; and Cooper demonstrated prejudice with his initial willingness to accept the plea offer before his counsel's unreasonable advice and the fact that under the plea offer he would have received a sentence at least three times shorter than the one he received at trial.

The Court then moved on to determining the appropriate remedy for when deficient attorney performance causes the defendant to reject the plea offer resulting in a trial and a more severe sentence. The Court offered two forms of remedy, both of which give the lower courts

[16] *Id.* at 1409-10.
[17] 132 S. Ct. 1376 (2012).
[18] *Id.* at 1384.
[19] *Id.* at 1388.

discretion to fashion an appropriate remedy. First, the court may simply conduct a resentencing hearing to give the defendant the sentence in the plea offer, the sentence imposed at trial, or something in between. Second, under certain circumstances, such as the defendant being convicted at trial of a charge carrying a mandatory minimum that would have been dropped as part of the plea agreement, the court may require the prosecution to reoffer the plea offer. "[T]he judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."[20]

C. The Effect of *Frye* and *Lafler*

In *Frye* and *Lafler*, the Supreme Court extended the right to effective assistance of counsel from the confines of *Hill* and *Padilla* to the entire plea bargaining process. Moreover, the Court correctly acknowledged that plea bargaining is now the defining feature of the criminal justice system and that criminal trials are becoming less often the avenues for obtaining convictions and achieving justice. Perhaps most notably, the Court explicitly rejected the argument that a fair trial cures earlier errors.

This rejection of the absolute curative properties of a criminal trial is critical in the face of a criminal justice system centered on a plea bargaining process that strongly favors the government. Very often, prosecutors have a multitude of statutes covering the same or substantially similar wrongful conduct. This allows prosecutors to charge individuals with multiple crimes, or multiple counts of the same crime, for the same conduct. This is known as "charge stacking." Charge stacking allows prosecutors to present defendants with a slew of charges that, taken together, carry overwhelming sentences with the goal of intimidating and frightening the defendant into accepting a plea bargain with a much shorter sentence, simply out of fear of a guilty verdict that could carry a substantially longer sentence. The idea that a defendant would waive his or her right to a jury trial simply out of fear of receiving a longer sentence is often referred to as the "trial penalty." The leverage that charge stacking and trial penalties provide a prosecutor requires a counterbalancing force, which ideally is what effective defense counsel provides.

Extending the right to effective assistance of counsel to the plea negotiation phase is equally important because of the national crisis in indigent defense. About 80% of criminal defendants are represented by either public defenders or appointed counsel.[21] It is well-documented that indigent defense providers across the nation are overworked and have too few resources to adequately perform their duties.[22] These realities create an atmosphere ripe for inadequate legal representation, despite the best efforts of many indigent defense providers. Before *Frye* and *Lafler*, a court-appointed attorney's deficient performance might go without remedy if the defendant rejected a favorable plea offer or received unreasonable advice during plea negotiations. Now, courts have discretion in implementing a remedy to offset the defense counsel's inadequate performance.

The United States Court of Appeals for the Ninth Circuit recently remanded a case relying on the holdings in *Frye* and *Lafler*.[23] In *Miles v. Martel*, the defendant, Tyrone Miles, had two prior serious felony convictions that qualified as "strikes" under the California Three

[20] *Id.* at 1389.
[21] Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, BUREAU OF JUSTICE STATISTICS 14 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474&download=yes.
[22] *See* THE CONSTITUTION PROJECT, REPORT OF THE NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.
[23] Miles v. Martel, No. 10-15633, 2012 U.S. App. LEXIS 20346 (9th Cir. Sept. 28, 2012).

Strikes Law[24] when he was arrested for cashing fictitious checks—a third strike. Miles alleged that the prosecutor offered him a plea agreement in which he would serve six years in prison. Miles further alleged that his court-appointed attorney failed to properly look into his background and was, therefore, unaware that he had two strikes. Consequently, his attorney advised him to reject the offer. Miles later entered an open plea and was sentenced under the three strikes law to 25 years to life in prison. The Ninth Circuit held that Miles was entitled to an evidentiary hearing to determine whether his attorney provided unreasonable legal advice that resulted in him being sentenced to at least 19 more years in prison than he would have under the original plea offer.[25] This case demonstrates that if states fail to provide adequate representation to defendants, then *Frye* and *Lafler* offer courts an avenue for addressing such failures, at least on a case-by-case basis.

Regardless of the expansion of the right to effective assistance of counsel, defendants must still overcome the onerous *Strickland* test in order to successfully prove a constitutional violation during plea negotiations. While cases certainly exist of extremely deficient attorney performance to which *Frye* and *Lafler* are applicable,[26] most cases that have attempted to use the decisions have been unsuccessful. Some have encountered a problem of "counsel-said, client-said."[27] The clients argue that their counsel failed to explain to them the effect of a plea offer, or the strength of the prosecution's case, or even the existence of a plea offer and the defense counsel offers contradictory testimony. A few courts have granted an evidentiary hearing when the defendant offers some additional evidence,[28] but most courts have rejected the claims for the defendants' failure to overcome the burden of proving both prongs of the *Strickland* test.[29] Moreover, courts have made clear that to invoke *Frye* and *Lafler*, there must first be a government plea offer on the table; a mere discussion of a plea offer is insufficient to base a *Frye*/*Lafler* ineffective assistance of counsel claim.[30]

Despite the mixed results defendants have achieved by invoking *Frye* and *Lafler* in lower courts, the decisions may have a significant practical impact on the way in which plea bargaining is conducted. Plea bargaining traditionally has been informal, with the prosecutor and defense counsel meeting or talking on the phone to discuss the case. As the Court indicated in *Frye* and *Lafler*, courts and prosecutors may create rules that make these negotiations much more formal. To ensure that defense counsel conveys a plea offer to his or her clients, courts or prosecutor offices may require that all plea offers be on the record or in writing, or that the defendant be present at the time the prosecutor makes the plea offer.

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[24] CAL. PENAL CODE §§ 667(b)-(i) and 1170.12 (West 2012). The California 'three strikes law' significantly increases the sentencing range for a defendant's third offense.

[25] *Miles*, 2012 U.S. App. LEXIS 20346.

[26] *See, e.g.*, United States v. Wolfe, 2012 U.S. Dist. LEXIS 75369 (E.D. Tenn. May 31, 2012); United States v. Love, 2012 U.S. Dist. LEXIS 99332 (N.D. Ill. July 17, 2012).

[27] *See, e.g.*, Strain v. Perez, 2012 U.S. Dist. LEXIS 72850 (N.D.N.Y. May 24, 2012); Bonsu v. United States, 2012 U.S. Dist. LEXIS 47661 (D. Md. Apr. 4, 2012).

[28] *See, e.g.*, United States v. Bishop, 2012 U.S. App. LEXIS 16386, at *3-4 (5th Cir. Tex. Aug. 7, 2012); Ortega v. United States, 2012 U.S. Dist. LEXIS 88727 (S.D.N.Y. June 27, 2012); Williams v. Schneiderman, 2012 U.S. Dist. LEXIS 88521 (E.D.N.Y. June 26, 2012); Smith v. United States, 2012 U.S. Dist. LEXIS 128438 (D. Del. Sept. 7, 2012); United States v. Zamora, 2012 U.S. Dist. LEXIS 119781 (W.D. La. Aug. 20, 2012).

[29] *See, e.g.*, United States v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012); Bowens v. United States, 2012 U.S. Dist. LEXIS 112487 (S.D.N.Y. Aug. 10, 2012); United States v. Marks, 2012 U.S. Dist. LEXIS 130825 (W.D.N.Y. Sept. 12, 2012); Mitchum v. United States, 2012 U.S. Dist. LEXIS 139792 (D.S.C. Sept. 28, 2012); Salas v. United States, 2012 U.S. Dist. LEXIS 130725, 23-25 (E.D. Tenn. Sept. 13, 2012).

[30] *See, e.g.*, Ramos v. United States, 2012 U.S. Dist. LEXIS 44611 (D. Mass. Mar. 30, 2012); Williams v. United States, 2012 U.S. Dist. LEXIS 47065 (E.D.N.Y. Mar. 30, 2012); United States v. Thornton, 2012 U.S. Dist. LEXIS 42532 (W.D. Pa. Mar. 28, 2012); United States v. Habeeb Malik, 2012 U.S. Dist. LEXIS 66507 (E.D. Pa. May 11, 2012); Gilchrist v. United States, 2012 U.S. Dist. LEXIS 140278 (D. Md. Sept. 27, 2012).

There is also concern that the decisions could create a disincentive for defense counsel to reject otherwise unfavorable plea offers. Some defense attorneys may become overly cautious and recommend that their clients take the prosecution's first plea offer out of concern that a client convicted at trial will argue that their counsel was deficient in failing to advise them to take a plea offer. A corollary concern is that the decisions will deter aggressive defense positions that reject initial plea offers in order to obtain more favorable offers. With the decisions less than a year old, these concerns have not played out in lower court decisions so far.[31] In addressing these concerns, the Court was probably correct when it noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance."[32]

Like previous questions of deficient performance under the *Strickland* test, courts applying *Frye* and *Lafler* have given strong deference to the reasonableness of counsel's conduct, even if their conduct turns out to be incorrect in hindsight. While *Frye* and *Lafler* are important decisions, the limitations of *Strickland* will prevent courts from remedying all but the most egregious failures of counsel.

II. Ineffective Assistance of Counsel & Related Claims in Post-Conviction Proceedings

The three cases related to effective assistance of counsel in the post-conviction stage, *Maples*, *Martinez*, and *Clair*, asked the Court to consider whether the right to effective assistance of counsel ever extends to collateral proceedings. The Court has previously ruled that there is no constitutional right to counsel in post-conviction review, as the Supreme Court established in *Pennsylvania v. Finley*.[33] Consequently, there is no right to *effective* assistance of counsel at this stage.[34] Thus, a petitioner may not raise claims for ineffective assistance of counsel that occurred during the post-conviction stage as part of a post-conviction or *habeas* petition, regardless of whether counsel is retained by the petitioner or provided by a state or the federal government.

Though there is no constitutional right to post-conviction counsel, there are state and federal laws that provide for appointment of counsel in certain circumstances. States vary greatly in this regard. Most states provide counsel, at least nominally, for indigent capital defendants in post-conviction proceedings.[35] Under federal law, courts are given discretion to appoint counsel for indigent non-capital defendants when the interests of justice so require.[36] In 1988, Congress enacted a law that gives capital federal defendants and capital *habeas* petitioners counsel as a matter of right.[37] In addition, a provision of this law enables capital defendants to move to substitute counsel, which forms the central issue in *Clair*.

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[31] *See, e.g.*, Colotti v. United States, 2012 U.S. Dist. LEXIS 48084, 40-42 (S.D.N.Y. Apr. 4, 2012) (noting that defense counsel giving advice on whether sentencing exposure is greater under plea offer or trial is an "extremely challenging task" and should be given deference by judge); Mitchum v. United States, 2012 U.S. Dist. LEXIS 139792 (D.S.C. Sept. 28, 2012) (rejecting argument that defendant received IAC because attorney advised him to go to trial rather than negotiate plea agreement); Toto-Ngosso v. United States, 2012 U.S. Dist. LEXIS 109040 (D. Md. 2012) (finding no deficient performance for failing to dissuade the defendant of his belief that he could convince a jury that he was innocent and accordingly rejecting a plea offer).

[32] Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012).

[33] Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); *see also* Murray v. Giaratano, 492 U.S. 1, 3-4 (1989).

[34] *Compare* Evitts v. Lucey, 469 U.S. 387, 395-96 (1985) (right to counsel includes right to effective assistance of counsel), *with* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (no right to counsel means no right to effective assistance of counsel).

[35] One notable exception is Alabama, which is pointed out in *Maples*.

[36] 18 U.S.C. § 3006A.

[37] 18 U.S.C. § 3599.

In order to meaningfully explain the Court's decisions, a brief overview of post-conviction proceedings is necessary. A defendant convicted of a state crime generally has three possible opportunities to have his conviction reviewed: a direct appeal in state court from the trial court to the state court of appeals, a post-conviction (or collateral) review in state court with the original trial court, and a petition for federal *habeas corpus*.[38] Every state provides for at least one statutory direct appeal as of right. After a defendant has exhausted his direct appeals, he may seek state post-conviction review. States typically impose procedural barriers before any claims may be considered on collateral review.[39] A claim of ineffective assistance of counsel is most often raised during post-conviction review because, assuming the same counsel is representing the defendant at trial and through direct appeal, the defendant's attorney is unlikely to argue that he was ineffective in representing his client. In fact, some states only allow defendants to raise claims of ineffective assistance of trial counsel in state collateral proceedings.

If a defendant has made all possible direct appeals and collateral attacks in state court with no success,[40] he may still petition for federal review of his conviction by means of a writ of *habeas corpus*. In a petition for *habeas corpus*, the petitioner is limited to raising claims that federal law or his federal constitutional rights were violated. Under the current federal habeas regime, petitioners generally must (1) be in custody at the time the petition is filed, (2) timely file the petition, (3) have exhausted state remedies, and (4) not have their claim precluded by procedural default. Two of these requirements are relevant in *Maples* and *Martinez*: procedural default and the timely filing of the petition.

Procedural default occurs when the petitioner fails to follow state procedural rules for her claim. A federal court may not entertain a prisoner's *habeas* claims when (1) a state court has declined to address those claims because the prisoner failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds.[41] However, due to the rigidity of this requirement, the Supreme Court adopted a "cause and prejudice" standard in *Wainwright v. Sykes* to determine whether there is cause to excuse state procedural default.[42] The grounds for proper cause are in the Supreme Court's discretion, but the Court has generally remarked that the cause must be something external to the petitioner or something that cannot fairly be attributed to her that impeded her efforts to comply with the state procedural rule.[43] Further elaborating on the cause and prejudice test, the Supreme Court stated in *Coleman v. Thompson* that an attorney's errors or negligence ordinarily will not provide cause for procedural default because agency principles impute the attorney's negligence to the client.

The other relevant requirement for federal *habeas* review is the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year time limit for filing the petition.[44] Although there are various markers that begin the one-year deadline and several ways to extend the deadline, in the recent case of *Holland v. Florida*, the Court held that the one-year deadline for filing a federal *habeas* petition can be tolled for equitable reasons.[45] The Court had previously

[38] The structure of the review process for federal offenses differs, but none of the cases were federal convictions.

[39] For example, in most states, the claim raised on collateral review must be new, must have been filed within a specified time period, and must have not been adjudicated in direct appeal.

[40] Some states provide a state writ of *habeas* corpus as well.

[41] Walker v. Martin, 131 S.Ct. 1120 (2011).

[42] Wainwright v. Sykes, 433 U.S. 72 (1977). Under the cause and prejudice standard, the petitioner must show that there was a cause for her failure to follow state procedural rules and that procedural default has prejudiced her case. The standard for prejudice is similar to the standard in the *Strickland* test for IAC, discussed *supra*. There must be a reasonable probability that the outcome would have been different.

[43] Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

[44] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d).

[45] 130 S. Ct. 2549 (2010).

held that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[46] Testing *Holland*, the Court found that, while mere garden variety claims of attorney negligence do not constitute an extraordinary circumstance, attorney misconduct that rises to the level of effective abandonment may be an extraordinary circumstance sufficient to justify equitable tolling.[47]

A. *Maples v. Thomas*[48]

After having his state capital conviction affirmed on direct appeal, Cory Maples sought state post-conviction review with the help of two attorneys at the New York office of Sullivan & Cromwell who served as his pro bono counsel.[49] Both attorneys were admitted *pro hac vice* to practice in Alabama courts under the engagement of a local Alabama attorney. With his new counsels' aid, Maples pursued a collateral attack on his conviction in state court, arguing that his underpaid and inexperienced trial counsel failed to afford him effective assistance of counsel. While his petition was pending, the two attorneys from Sullivan & Cromwell left the firm. They failed to inform Maples or the court of their inability to continue representing Maples. Subsequently, the court denied Maples' petition, which triggered procedural time limits for an appeal. The court's attempt to notify Maples' through his counsel failed, with the mailroom clerk at Sullivan &Cromwell returning the notification to the Alabama court. The court clerk took no further action to inform Maples, and the deadline for Maples to file an appeal of the court's order lapsed. Consequently, when Maples petitioned for federal *habeas* review, the federal court denied his petition on the grounds that he procedurally defaulted on his ineffective assistance of counsel claim.

The issue before the Supreme Court was whether Maples could show cause under the *Sykes* 'cause and prejudice' standard to excuse the state procedural default in his *habeas* petition. The Court first distinguished what happened to Maples from its holding in *Coleman*.[50] The reason for Maples missing the state procedural deadline was not simply his attorney's negligence. His attorneys abandoned him, severing the agency relationship that would cause the court to hold Maples responsible for the mistakes of his attorney-agents. Once an attorney abandons his client, the attorney's errors, including errors that result in the procedural default, are no longer attributable to the client and may represent cause under the *Sykes* test. The Court pointed out that it made a similar distinction in *Holland*. In *Holland*, the Court distinguished between garden variety negligence claims and unprofessional conduct that amounts to an attorney essentially abandoning his client. The Court in *Maples* made the same distinction but applied it in the context of the cause and prejudice standard rather than equitable tolling.

The Court reasoned that Maples should not be procedurally barred from raising his claim because his attorneys abandoned him without any notice. It was their abandonment that prevented Maples, despite his best efforts, from complying with the state procedural rules. Neither the fact that other lawyers from Sullivan & Cromwell later represented Maples nor the fact that Maples had local counsel in Alabama dissuaded the court from finding that Maples' attorneys abandoned him and that abandonment caused him to miss the state deadline.

[46] *Id.* at 2562 (citation omitted).
[47] *See id.* (citing a case where an attorney's effective abandonment was grounds for tolling). On remand, the lower court found that the petitioner's attorney effectively abandoned him, which amounted to an extraordinary circumstance distinguishable from the situation of attorney negligence mentioned in *Coleman*. Holland v. Florida, 2010 U.S. Dist. LEXIS 144790 (S.D. Fla. Nov. 22, 2010).
[48] 132 S. Ct. 912 (2012).
[49] Alabama does not provide counsel in state post-conviction proceedings for indigent capital defendants. It relies entirely on pro bono assistance like that provided by the attorneys from Sullivan & Cromwell.
[50] Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

Therefore, Maples had excuse for procedural default. The Court remanded for the lower court's determination of prejudice under the *Sykes* test.

B. *Martinez v. Ryan*[51]

Luis Martinez was convicted of two counts of sexual misconduct with a minor. Despite the victim recanting her accusation and numerous other problems with the state's case against Martinez, his trial counsel failed to address or explain these problems to the jury. Such failures gave rise to a colorable ineffective assistance of counsel claim. Arizona requires claims of ineffective assistance of counsel at trial to be reserved for state collateral proceedings. After the court appointed Martinez new counsel for his direct appeals, his counsel alleged numerous grounds for his direct appeals. His counsel also filed a notice of post-conviction relief—the first and only time Martinez could raise an ineffective assistance of counsel claim—but she failed to raise any claims, including an ineffective counsel claim. Instead, she noted that she could find no colorable claims for post-conviction relief. The court gave Martinez an opportunity to raise claims for post-conviction relief *pro se*, but Martinez did not understand the opportunity, and the court eventually dismissed the petition for post-conviction relief. About a year and a half later, Martinez obtained new counsel and sought to file a second notice of post-conviction relief, alleging that his trial counsel was ineffective. However, the state court dismissed his petition for failing to raise the ineffective assistance of counsel claim in the previous state collateral proceeding, which constituted procedural default under Arizona law. Consequently, when Martinez sought federal *habeas* review alleging his ineffective assistance of counsel claim,[52] the court found that there was an adequate and independent state procedural ground to bar federal review and Martinez failed to show cause to excuse the procedural default. In particular, based on the reasoning of *Coleman*, the federal court found Martinez could show no cause because he was responsible under agency law for his attorney's actions, even if erroneous.

There were two questions presented to the Supreme Court in *Martinez*: (1) whether a prisoner has a right to effective counsel in collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial ("initial-review collateral proceedings") and (2) whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for excusing procedural default in a federal *habeas* proceeding.

The Court held that when state law prohibits a defendant from raising an ineffective assistance of trial counsel claim until the initial-review collateral proceeding, the defendant's lack of counsel or ineffective assistance of counsel in regard to that proceeding may give cause to excuse a procedural default. The Court intentionally sidestepped the underlying constitutional issue of a right to counsel post-conviction.[53] The holding would appear to be at odds with *Coleman*, but the Court explained that it was merely creating an "exception" or "qualification" to

[51] 132 S. Ct. 1309 (2012).

[52] Martinez's claim was essentially that his post-conviction counsel was ineffective in failing to allege that his trial counsel was ineffective at trial and that his post-conviction counsel's error was what caused him to procedurally default.

[53] As discussed *supra*, under *Coleman*, an attorney's errors may only constitute cause under the *Sykes* test when those errors amount to ineffective assistance of counsel. If Martinez had no constitutional right to counsel at his initial-review collateral proceedings, then he had no right to effective assistance of counsel at that stage of the proceedings and hence his attorneys' performance could not give rise to an ineffective assistance of counsel claim. Under this line of reasoning, Martinez's counsel's alleged error in failing to raise the claim would not constitute ineffective assistance. However, if Arizona allowed ineffective assistance of counsel claims on direct appeal as of right, Martinez's counsel's performance could have constituted ineffective assistance. This contrast leaves open the question whether a prisoner has a right to effective counsel in initial-review collateral proceedings, but the Court declined to answer this question.

the rule in *Coleman*.[54] The Court stated that the initial-review collateral proceeding for Martinez's ineffective assistance of counsel claim was the equivalent of an appeal on direct review. Since the Court already recognized in *Coleman* that an attorney's errors that amount to ineffective assistance may provide cause to excuse default, the same should be true for an initial-review collateral proceeding. This is despite the fact that the defendant is not constitutionally entitled to counsel at that proceeding. After noting the importance of the right to counsel, the Court stated that its exception to *Coleman* "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim."[55]

In laying out what is required under the Court's departure from *Coleman*, the Court stated that petitioners must show that: (1) the state court did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial or that appointed counsel in the initial-review collateral proceeding was ineffective under *Strickland*; and (2) the "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."[56]

The Court found that Martinez's attorney in effect conceded that Martinez lacked any meritorious claims by filing a notice of post-conviction relief but failing to ever pursue any post-conviction claims, including his claim of ineffective assistance at trial. The Court remanded the case for the lower court to determine whether Martinez's counsel was ineffective and whether his claim of ineffective assistance of trial counsel is substantial.

C. *Martel v. Clair*[57]

Nearly two decades after his conviction for capital murder in California, and a decade after commencing federal *habeas* proceedings, Kenneth Clair moved to substitute his counsel who worked for the Federal Public Defender (FPD).[58] Clair claimed that his counsel was seeking only to overturn his death sentence, not to prove his innocence. After his motion, Clair relayed through his counsel that he changed his mind and the court took no action on his motion. Six weeks later, Clair filed another motion to substitute counsel, adding a claim to his earlier motion that his attorneys refused to test physical evidence from the crime scene that had never been fully tested. The court denied the motion without further inquiry and also denied Clair's *habeas* petition. With the FPD's agreement, Clair was appointed new counsel to appeal the denials of his *habeas* petition and motion for substitute counsel. After the district court rejected his request to vacate the denials, the Ninth Circuit vacated the district court's decision, holding that it was in the "interest of justice" that Clair be allowed to substitute counsel.

In granting Clair's motion, the Ninth Circuit noted that 18 U.S.C. § 3599 allows a defendant in a capital case to request new counsel, but fails to provide a standard for courts to apply in reviewing such a request.[59] In formulating a standard, the Ninth Circuit looked to 18 U.S.C. § 3006A, which entitled non-capital defendants to new counsel in federal post-conviction proceedings when "the interests of justice required that the request be granted."[60] The Supreme Court held that the "interests of justice" standard should apply to motions by capital *habeas* petitioners to substitute counsel. The Court explained that utilizing the interests of justice

[54] The rule from *Coleman*, discussed *supra*, is that an attorney's error in a post-conviction proceeding will not qualify as cause to excuse a procedural default.
[55] *Martinez*, 132 S. Ct. at 1318.
[56] *Id.*
[57] 132 S. Ct. 1276 (2012).
[58] Under 18 U.S.C. § 3599(e), appointed counsel may be replaced upon motion of the defendant.
[59] Clair v. Ayers, 403 F. App'x 276, 278 (9th Cir. 2010).
[60] *Id.*

standard "comports with the myriad ways that §3599 seeks to promote effective representation for persons threatened with capital punishment."[61]

Although the Supreme Court agreed with the Ninth Circuit's use of the "interest of justice" standard, it reversed the Ninth Circuit's finding that the lower court abused its discretion when it denied Clair's second motion for substitute counsel without inquiring into Clair's claims. The Supreme Court reversed the Ninth Circuit, finding that the lower court did not abuse its discretion. The Court noted that Clair filed his second motion for substitute counsel right before the lower court was about to decide his 10-year-old *habeas* petition. In addition, the court had inquired into Clair's first motion for substitute counsel, but Clair later changed his mind about whether he wanted new counsel. Under these facts, the Court found that the lower court did not abuse its discretion in denying Clair's motion.

D. The Effects of *Maples*, *Martinez*, and *Clair*

Though the Supreme Court refused to extend a constitutional right to effective assistance of counsel to the post-conviction stage, *Maples*, *Martinez*, *and Clair* each represent an incremental step towards establishing some protections in critical post-conviction proceedings. The Court's even limited recognition of the need for some accountability for counsel in a post-conviction setting is critical given both the crisis in indigent defense services across the nation and the near impossibility of navigating the complex, high stakes state post-conviction proceedings. The impact of errors in such proceedings on the ability to obtain federal *habeas corpus* review can be devastating.

In all three cases, counsel at trial was provided by the state, as is the case in an estimated 80% of criminal prosecutions. Despite this reliance on public defenders and appointed counsel, indigent defense services throughout the nation have always faced chronic underfunding. The economic and budget crises facing states over the past four years has only exacerbated this underfunding. In April, the chief public defender in one Pennsylvania county was forced to sue the county because deep budget cuts and hiring freezes were creating overwhelming caseloads for public defenders that were resulting in systemic constitutionally inadequate representation.[62] Earlier this year, in New Orleans, the chief public defender was forced to lay off a third of that office's staff and institute a two day per month furlough to address budget shortfalls.[63] In Washington, that state's supreme court felt compelled to adopt caseload limits in response to some public defenders handling over a thousand, and in some instances, over 2,100 cases annually.[64] The court felt the case limits were necessary to ensure defendants receive constitutionally adequate representation, even though cities are unsure how they will pay for these additional attorneys.[65] These are just a few of the examples of strain that indigent defense systems are feeling throughout the country.

When indigent defense providers do not have the time and resources to properly defend an indigent defendant, ineffective assistance of counsel claims in the post-conviction phase should serve as the bulwark against right to counsel violations. As a result, holding post-conviction counsel to a meaningful minimum standard of representation is only just. The

[61] *Clair*, 132 S. Ct. at 1285.

[62] Press Release, ACLU-PA, ACLU-PA Sues Luzerne County Alleging Gross Underfunding of Public Defender Deprives Defendants of Constitutional Rights (Apr. 10, 2012), *available at* http://www.aclupa.org/pressroom/aclupasuesluzernecountyall.htm.

[63] John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES-PICAYUNE, Feb. 2, 2012, http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html.

[64] Gene Johnson, *Wash. Cities Grapple with New Public Defense Rules*, ASSOCIATED PRESS, June 25, 2012, http://seattletimes.com/html/localnews/2018528020_apwapublicdefense.html.

[65] *Id.*

lingering question after *Maples* will be where to draw the line between negligent representation and effective abandonment. It is clear that courts will continue to impute typical counsel errors and negligence to the prisoner under agency principles. The Court gave a thorough analysis of why Maples' attorneys' actions constituted effective abandonment, severing the agency relationship, and the importance of Maples' unawareness that the agency relationship had been severed. Prior precedent made clear that the egregiousness of the attorney's conduct should not affect the agency relationship.[66] The majority's analysis of effective abandonment in *Maples*, coupled with the Justice Alito's concurrence in *Holland*, which the majority cited in *Maples*, will likely serve as the blueprint on how to distinguish attorney negligence from effective abandonment going forward.[67] Thus, to successfully argue that a procedural default attributable to counsel should be excused on equitable grounds, a petitioner will need to demonstrate that his counsel "is not operating as his agent in any meaningful sense of that word."[68]

In *Hinkley v. Lehigh*, a case decided shortly after *Maples*, a federal district court found that the petitioner established abandonment by his attorney after his attorney failed to file an appellate brief in his state post-conviction proceeding. The court also noted, however, that the abandonment did not result in the dismissal of the petitioner's appeal, and that the petitioner, in fact, pursued the appeal *pro se* before withdrawing it.[69] The court concluded that, "In these circumstances, counsel's abandonment… cannot be regarded as having occasioned the default and is therefore insufficient to establish cause for the default."[70] The fact that, unlike Maples, the petitioner in this case was well aware of his counsel's abandonment and attempted, at least first, to proceed with his appeal *pro se*, prevented the court from excusing the procedural bar.

Similarly, in *Ford v. Warren*, a federal district court found that counsel's failure to file a state post-conviction review petition, and his affirmative misrepresentation to petitioner that he had filed the petition, constituted abandonment under *Maples*.[71] Though the counsel still held himself out as representing the petitioner, his conduct was so egregious as to constitute abandonment. The court, unfortunately, still determined that the petitioner's *habeas claim* was procedurally barred. The court reasoned that the petitioner was entitled to equitable tolling during the period he was unaware of his counsel's misrepresentation.[72] Once he became aware that his counsel had failed to file his petition for post-conviction review, the equitable tolling ceased and the petitioner had one year to file his petition, the court reasoned.[73] The court determined that the petition was filed three months beyond this constructive deadline, reflecting a lack of "diligence in pursuing his rights" and, therefore, denied relief.[74]

In *Martinez*, the Court declined to answer the constitutional issue left open in *Coleman*: whether a prisoner has a constitutional right to effective counsel in initial-review collateral proceedings. Martinez simply put an asterisk on the *Coleman* rule – it excluded initial-review collateral proceedings from the term 'post-conviction proceedings' in the *Coleman* rule that an attorney's negligence in post-conviction proceedings may not establish cause. The Court predicted that its decision should not put a significant strain on resources because it was not creating a constitutional right to counsel in initial-review collateral proceedings. States are free

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[66] *See* Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor.")
[67] *See, e.g.*, Moormann v. Schriro, 2012 U.S. Dist. LEXIS 24426, 10-11 (D. Ariz. Feb. 27, 2012) (distinguishing between attorney negligence and effective abandonment).
[68] Holland v. Florida, 130 S. Ct. 2549, 2568 (2010).
[69] Hinkley v. Lehigh, 2012 U.S. Dist. LEXIS 148299, at *24 (E.D. Pa., Oct. 15, 2012).
[70] *Id.*
[71] Ford v. Warren, 2012 U.S. Dist. Lexis 140295, at *22-23 (D.N.J., Sept. 25, 2012).
[72] *Id.* at *23.
[73] *Id.*
[74] *Id.* at *24.

to choose whether to appoint counsel in these proceedings. However, if states do not appoint counsel or if counsel is ineffective under *Strickland*, then federal courts may review the case. As a consequence, affected states may either repeal their laws similar to the one in Arizona or else appoint counsel to all defendants in initial-review collateral proceedings for ineffective assistance of counsel claims.

The Court recently agreed to hear a Texas death penalty case that raises the issues of whether the *Martinez* decisions extends to other state post-conviction regimes beyond Arizona.[75] Carlos Trevino asserts that his state post-conviction counsel's failure to raise a claim of ineffective assistance of counsel during sentencing should not bar him from raising the claim in his federal habeas petition. The Fifth Circuit dismissed this claim without considering the impact of the *Martinez* decision.[76] The Court's decision in this case may determine whether *Martinez* has any effect beyond the specific regime in Arizona.

The *Martinez* opinion also emphasized that it does not "concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."[77] Justice Scalia disagreed in his dissent, stating that the majority's reasoning will likely extend to claims other than ineffective assistance of counsel that states require defendants initially raise in collateral proceedings.[78] The majority appears to be correct so far in that circuit courts have limited *Martinez* to the narrow exception when states have a rule against raising ineffective assistance of counsel claims on direct appeal.[79]

One criticism of the *Martinez* decision is that it is unclear what constitutes a substantial claim under the Court's decision. Besides showing that the prisoner received no counsel or ineffective counsel at the initial-review collateral proceeding, the Court stated that the prisoner must show that the underlying ineffective assistance of counsel claim is substantial. The *Strickland* test is difficult enough to overcome, so it is unclear what effect courts will give the Supreme Court's instruction that the ineffective assistance of counsel claim must be substantial. Adding another rigorous burden to the *Strickland* test would diminish the chances of defendants successfully obtaining federal habeas review under the *Martinez* holding.

The Court's decision in *Clair* adopted the "interests of justice" standard for courts to use in determining whether a capital *habeas* petitioner is entitled to substitute counsel. Since the same standard was already in place for courts to use in determining whether to appoint counsel for non-capital *habeas* petitioners, courts should be fully capable of applying this existing standard to capital cases. Perhaps the more significant aspect of the decision was the Court's rejection of the more stringent standard that the state proposed. Courts liberally apply the interests of justice standard to appoint counsel in federal cases and *habeas* proceedings. By applying the same standard to motions to substitute counsel in capital cases, courts will better ensure that the representation is effective. For example, in situations where counsel refuses to pursue a certain claim or investigate aspects of the petitioners' cases, courts may substitute counsel to ensure that petitioners put forward all colorable claims.

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[75] Trevino v. Thaler, 2012 U.S. LEXIS 8391 (U.S. S. Ct. 2012).
[76] Trevino v. Thaler, 2011 U.S. App. LEXIS 22873, at *36-37 (5th Cir. 2011).
[77] Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).
[78] *Id.* at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases.").
[79] *See, e.g.*, Ibarra v. Thaler, 687 F.3d 222 (5th Cir. 2012) (rejecting arguments to expand *Martinez*); Dansby v. Norris, 682 F.3d 711, 729 (8th Cir. 2012) ("*Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal.").

Although the Court in *Clair* adopted a desirable standard for motions to substitute counsel, the appellate standard of review (abuse of discretion) for the application of the standard leaves lower courts with relatively unfettered discretion in deciding what is in the interests of justice. In *Clair*, the Supreme Court considered if the lower court abused its discretion in its application of the interests of justice test. The Supreme Court found no abuse of discretion despite the fact that the lower court rejected Clair's motion for substitute counsel without even reading Clair's letter. Although Clair's case had a 10-year history of *habeas* litigation and an extensive record, Clair still presented colorable claims in his motion for substitute counsel that the Court did not even consider. It is difficult to reconcile the lower court's complete lack of an inquiry into Clair's claims with an application of the interests of justice test. Therefore, the Court's decision reflects the reality that lower courts will have great discretion in deciding whether to substitute counsel.

III. Conclusion

The Supreme Court's decisions in the Right to Counsel Term cases acknowledge the extent to which our criminal justice system now operates well beyond the trial setting. To varying extents, the Court's decisions sought to adjust the parameters of the right to counsel in pre- and post-trial settings. In *Frye* and *Lafler*, the Court sent a strong message that the accused are entitled to objectively reasonable counsel during the plea negotiation process. In *Maples*, the Court held that a *habeas* petitioner will not be prevented from raising a colorable ineffective assistance of counsel claim for missing a filing deadline due to his counsel abandoning him without notice. In *Martinez*, the Court stopped short of extending a constitutional right to counsel for indigent defendants in initial-review collateral proceedings for ineffective assistance of counsel claims, but it provided protection against errors during those proceedings due to no counsel or ineffective counsel. Finally, in *Clair*, the Court adopted a standard that will allow federal courts to substitute counsel for a capital *habeas* petitioner as long as it is in the interests of justice. The extent to which lower courts aggressively apply these decisions, and the extent to which the Court supports these aggressive applications, will determine the true consequences of the Right to Counsel Term.