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REGULATING THROUGH HABEAS: A BAD INCENTIVE FOR BAD LAWYERS?

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The most important—and most heavily criticized—provisions of the Antiterrorism and Effective Death Penalty Act restricted federal courts' ability to hear habeas petitions and grant relief to prisoners. But the 1996 law also included another procedural reform, now tucked away in a less-traveled corner of the federal habeas statute. It enables a state to receive fast-track review of its death row prisoners' federal habeas petitions if the U.S. Attorney General certifies that the state provides capital prisoners with competent counsel in state postconviction proceedings.[1]

Presumably, the rationale underlying this fast-track provision is that states and the judicial system have an interest in expeditiously resolving claims, executing lawful sentences, and achieving finality for victims' families and other interested parties. Claims raised in federal habeas petitions must usually first be raised in state postconviction proceedings, and the federal court hearing the petition may not grant relief unless the prior state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."[2] In theory, if prisoners lose in state postconviction proceedings despite the benefit of competent representation, their federal habeas petitions are unlikely to contain meritorious claims that overcome the high bar to relief. Requiring that such petitions be developed, filed, and moved through the courts more quickly makes some sense.

As of 2005, no state had yet received the benefit—if hastier review of death row habeas petitions can really be called that—of the fast-track provision.[3] Now, a pending Department of Justice (DOJ) rule sets forth extensive

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1. *See* 28 U.S.C. §§ 2261-66 (2006). Among other provisions, the fast-track scheme reduces the period of limitation to file a federal habeas petition from one year, *id*. § 2255(f), to 180 days, *id.* § 2263(a).

2. *Id.* § 2254(d)(1).

3. *See* Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 93 n.21 (2012); Jennifer Ponder, Comment, *The Attorney General's Power of Certification Regarding State Mechanisms to Opt-In to Streamlined Habeas*

criteria for states' certification for fast-track review.[4] Piggybacking on a federal statute that does the same, the proposed DOJ rule encourages states to adopt a seemingly commonsense measure to weed out bad lawyers: if an attorney has been found legally ineffective, remove him or her from the list of qualified counsel eligible for appointment.

Unfortunately, such removal provisions may do more harm than good by jeopardizing the interests of ineffective lawyers' former clients. This Note explains why removal provisions can be counterproductive, argues that rewarding the implementation of these provisions with fast-track habeas review is especially unwise, and offers a few recommendations.

The pending DOJ rule would replace a rule issued in the final months of the George W. Bush Administration and later rescinded by the Obama Administration. The Bush-era rule required states seeking fast-track certification to adopt "competency standards" for capital postconviction counsel in state proceedings, but it never specified what those standards should be.[5] The Obama Administration apparently saw an opportunity to nudge state capital postconviction systems into shape by giving the previously unspecified competency standards some teeth.[6]

Under the proposed rule,[7] one way for states to provide "competent" postconviction counsel is to comply with the standards set forth in the federal Innocence Protection Act of 2004 (IPA), which provides grants to states if they impose certain standards for the qualification of counsel in capital cases.[8] Among the IPA standards is a requirement that states "remove from the roster" of law-

Corpus Procedure, CRIM. L. BRIEF, Spring 2011, at 38, 41. The federal courts were originally responsible for the certification of the state's provision of competent postconviction counsel, but members of Congress grew upset that the courts never granted it, *see id.*, and transferred certification authority to the Attorney General when Congress reauthorized the USA PATRIOT Act in 2006, *see* USA PATRIOT Improvement and Reauthorization Act of 2005, § 507, Pub. L. No. 109-177, 120 Stat. 192, 250-51 (2006) (codified at 28 U.S.C. §§ 2251, 2261, 2265 (2006)).

4. *See* Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (proposed Feb. 13, 2012) (to be codified at 28 C.F.R. pt. 26). As of this writing, the final rule has not been published.

5. *See* 28 C.F.R. §§ 26.20-.23 (2009), *removed by* Certification Process for State Capital Counsel Systems; Removal of Final Rule, 75 Fed. Reg. 71,353 (Nov. 23, 2010).

6. The Obama Administration made an initial proposal in March 2011, *see* Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11,705 (proposed Mar. 3, 2011) (to be codified at 28 C.F.R. pt. 26), that it revised in response to comments in February 2012, *see* Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (proposed Feb. 13, 2012) (to be codified at 28 C.F.R. pt. 26).

7. *See* Certification Process for State Capital Counsel Systems, 77 Fed. Reg. at 7560 (revised proposal); Certification Process for State Capital Counsel Systems, 76 Fed. Reg. at 11,708 (initial proposal).

8. *See* 42 U.S.C. § 14163 (2006).

yers eligible for appointment "attorneys who . . . fail to deliver effective representation."[9]

The IPA was focused on trial rather than collateral review, and only some states chose to implement the standards it set forth. Texas, for instance, implemented a removal provision for trial-level capital defense lawyers in 2005,[10] but other highly active death-penalty states do not have removal provisions.[11] Thus, the proposed DOJ rule reaffirms the IPA's policy that ineffective attorneys be purged from lists of qualified counsel eligible for appointment, and it encourages states to extend that logic to state postconviction proceedings.

Preventing a previously ineffective lawyer from again representing a capital defendant or death row prisoner might seem like an uncontroversially good idea. After all, given the notoriously low bar by which *Strickland v. Washington* and its progeny measure "effectiveness," it takes a serious blunder—and a close enough case that the error can be deemed prejudicial—to be found ineffective. In a vacuum, disqualifying the worst performers makes perfect sense.

The problem is that removal provisions encourage prior counsel to fight against, rather than cooperate with, subsequent claims of ineffectiveness. Where removal provisions are in effect, lawyers suddenly have a very direct stake in the outcome of later habeas proceedings that are supposed to be about their former clients' rights, not their own pecuniary interests. Appointed capital

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9. *Id.* § 14163(e)(2)(E)(ii) (2006). This IPA requirement was omitted from the initial proposed rule, but, in response to comments, the DOJ put it back into the revised version of the rule. *See* 77 Fed. Reg. at 7560 (explaining that the revised rule includes the IPA removal provision and describing that provision as an "integral element[] of the IPA's comprehensive approach to counsel qualifications").

10. *See* Act of June 18, 2005, §§ 5, 7, 2005 Tex. Gen. Laws 3239, 3240-41 (codified as amended at TEX. CODE CRIM. PROC. ANN. arts. 11.071, 26.052(d) (West 2011)) (requiring that "a trial attorney appointed as lead counsel to a capital case . . . have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case"), *repealed in part by* Act of June 19, 2009, § 11, 2009 Tex. Gen. Laws 1972, 1976. The Texas State Senate—not known for its favorable disposition toward capital defendants—passed the Act unanimously. *See* 2005 Tex. Gen. Laws at 3242. It may not be a coincidence that Texas did so the year after the Innocence Protection Act made grants available.

11. My review of relevant statutory provisions in Alabama, for instance, identified no such policy. *See* ALA. CODE § 13A-5-54 (2012) (requiring appointment of experienced counsel in capital cases); *id.* §§ 15-12-1 to -6, -20 to -29, -40 to -46 (governing appointment of counsel for indigent defendants). Similarly, the Virginia statute setting forth standards for appointed capital defense counsel includes no removal provision. *See* VA. CODE ANN. § 19.2-163.8 (West 2012); *see also Statutory Qualifications for Court Appointment*, VA. INDIGENT DEF. COMMISSION, http://www.indigentdefense.virginia.gov/serving.htm (last visited July 7, 2012) (collecting relevant statutory authority). If an attorney violates the Commission's standards of practice—which are not the measure of effectiveness under *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984), though they may be relevant to a *Strickland* analysis—then he may be subject to sanctions, including removal from the list. *See* VA. INDIGENT DEF. COMM'N, STANDARDS OF PRACTICE COMPLAINT PROCEDURE PAMPHLET, *available at* http://www.indigentdefense.virginia.gov/PDF%20documents/SOP%20Brochure.pdf (last visited July 7, 2012).

defense lawyers and state habeas lawyers are often solo practitioners who depend on the modest but steady income from handling a string of cases. Removal from the list of qualified counsel could well threaten their livelihoods. While federal habeas lawyers make ineffectiveness claims as a matter of course, sometimes decades after the events in question, those claims could become personal, high-stakes affairs if the attorneys accused of ineffectiveness could lose their jobs. Without a removal provision, of course, some lawyers are still loath to be found ineffective for reasons of pride, principle, or reputation. But *with* a removal provision, the ordinary appointed lawyer has a much stronger reason to vigorously defend her past performance instead of assisting her former client.[12]

This perverse incentive might seem to be a much bigger issue for trial counsel than for postconviction counsel. After all, ineffective assistance by trial counsel violates a defendant's constitutional rights and constitutes a ground for habeas relief, whereas ineffective assistance of state habeas counsel does neither.[13] It stands to reason that capital postconviction lawyers would face few, if any, ineffectiveness claims compared to their trial-level colleagues. After the Supreme Court's March 2012 decision in *Martinez v. Ryan*, however, ineffective assistance of postconviction counsel may allow defendants to raise ineffectiveness-of-trial-counsel claims that would otherwise be procedurally barred from federal habeas review.[14] In many cases, federal habeas lawyers now have as good a reason to levy claims of ineffectiveness against state habeas counsel as they do against trial counsel. Indeed, the former claims will often be essential to the latter.

The consequences are not trivial. Prior counsel's cooperativeness, or lack thereof, can significantly affect the success of an ineffectiveness claim in a federal habeas petition. At a basic level, prior counsel's file is the backbone of any ineffectiveness claim. This is especially true in the context of capital sentencing, where insufficient review of a client's personal history may constitute ineffectiveness.[15] Only by painstakingly reviewing all of prior counsel's records can federal habeas counsel identify what her predecessor failed to investigate. Getting prior counsel to promptly turn over a complete and orderly file—

12. In my own conversations with Texas capital habeas attorneys, they have suggested that trial lawyers have become more hesitant to cooperate with them since Texas implemented its removal provision.

13. There is no constitutional right to counsel in discretionary postconviction proceedings. *See* Murray v. Giarratano, 492 U.S. 1, 9-10 (1989); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam); Ross v. Moffitt, 417 U.S. 600, 610 (1974).

14. *See* Martinez v. Ryan, No. 10-1001, slip op. at 15 (U.S. Mar. 20, 2012), *available at* http://www.supremecourt.gov/opinions/11pdf/10-1001.pdf ("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, . . . counsel in that proceeding was ineffective.").

15. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374 (2005).

even when his career is not on the line—can be more difficult than one might expect.

More dramatically, prior counsel can undermine an ineffectiveness claim by testifying in an affidavit or at an evidentiary hearing that his apparent deficiencies were actually deliberate strategic choices, which warrant deference under *Strickland* if they were grounded in professional judgment.[16] Indeed, habeas lawyers often find themselves competing with the state attorney general's office, which works to defend the judgment by opposing habeas relief, to quickly secure trial counsel's cooperation and her commitment to submit a favorable affidavit.[17] After *Martinez*, both sides now have a similar incentive to secure the cooperation of state habeas counsel. If prior counsel is out of a job if the federal habeas petition is granted, who's more likely to win that competition?

It is one thing, then, for the federal government simply to offer money to states that adopt removal provisions, as it did in the Innocence Protection Act. But there's a special irony and a special problem with encouraging states to adopt removal provisions *in exchange for fast-track review of their capital prisoners' federal habeas claims*. It is precisely such federal habeas claims—the last step in the chain of collateral review—that may suffer when prior counsel is incentivized not to cooperate. If anything, removal provisions should probably give rise to more deliberate and searching collateral review.

So, what to do? The DOJ rule, and removal provisions more generally, aim not only to police bad lawyers, but to encourage lawyers to do a good job in the first place. To strike a more appropriate balance of incentives, one partial fix might be to make removal provisions prospective. That is, boot an attorney from the list only if he renders ineffective assistance after the removal provision takes effect.[18] Prospective rules would give lawyers the same incentive as retrospective ones to improve their performance in the future. They would also eliminate the incentive to fight tooth and nail against claims of ineffectiveness based on events that took place years or decades ago. Yet they would still have the drawback of encouraging counsel to obstruct those claims when based upon future conduct.

The lesson, at a minimum, is that policymakers should be wary of one-off regulatory interventions into indigent defense, considering the hydraulic pressure that a new requirement might exert elsewhere in the system. Leaders within the public defense bar might also wish to think carefully about their expres-

16. *See Strickland*, 466 U.S. at 681.

17. For an explanation of that process from a habeas lawyer's perspective, see *If Ineffective Assistance of Counsel Rears Its Ugly Head, Here's How to Approach It*, GA. ASS'N OF CRIM. DEF. LAWYERS, http://www.gacdl.org/zoomdocs/articles/article-ineffective%20assistance%20of%20counsel.htm (last visited July 7, 2012).

18. Whether the IPA standard applies retrospectively is unclear: it simply states that attorneys should be removed from the roster if they "fail to deliver effective representation." 42 U.S.C. § 14163(e)(2)(E)(ii)(I) (2006).

sions of support for ineffective-attorney-removal provisions.[19] And, while some scholars have considered the ethical obligations of predecessor counsel when faced with an ineffectiveness claim,[20] rigorous empirical study of lawyers' actual responses to allegations of ineffectiveness may be needed to develop sound policy. Do most attorneys actually understand themselves to owe continuing duties to former clients, or do most do what they can to protect their professional reputations against charges of deficient performance? (And are those with the latter attitude more likely to be ineffective in the first place?) The practical effect of regulatory interventions, including removal provisions, turns on the answer to these questions.

None of this is to suggest that it's in any way acceptable for an ineffective lawyer, let alone an incorrigibly awful one, to represent a capital—or non-capital—defendant or prisoner. The point is the opposite. Even a well-intentioned patchwork of regulation through habeas is no substitute for an adequately funded system that trains, compensates, and screens counsel appropriately. If kicking ineffective lawyers off the list may do more harm than good, the goal should be keep them off the list to begin with.

19. *Cf.* Comments by Federal Public Defenders and Community Defenders at 4, Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559, (proposed Feb. 13, 2012) (to be codified at 28 C.F.R. pt. 26), *available at* http://www.regulations.gov/#!documentDetail;D=DOJ-OAG-2012-0002-0020 (describing "removal of inadequately performing attorneys" as an "important element[] of any federal minimum standard to ensure counsel competency").

20. *See, e.g.*, Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181 (2003); Jenna C. Newmark, Note, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699 (2010); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf (discussing trial counsel's disclosure obligations to successor habeas counsel).