***NOT-READY-FOR-POWERPOINT PRODUCTIONS PRESENTS*:**

RECENT DEVELOPMENTS IN FEDERAL HABEAS PRACTICE

The October 2010 Supreme Court Term and Selected Ninth Circuit Highlights

AEDPA standard of review!

Federal review after Cal. summary habeas denials!

Procedural default!

AEDPA statute of limitations and "gap tolling"!

And much more!

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SUPREME COURT Oct. 2010 Term
AEDPA Reversals of Decisions Granting Habeas Relief (with one exception)

Reversals on Merits After Full Briefing and Argument

Case	Cir.	Claim
Harrington v. Richter, 131 S.Ct. 770 (2011)	9th	IAC, trial – failure to investigate & present forensic evidence
Premo v. Moore, 131 S.Ct. 733 (2011)	9th	IAC, plea – advising acceptance of early plea offer, rather than moving to suppress confession as involuntary
Cullen v. Pinholster, 131 S.Ct. 1388 (2011)	9th	IAC, penalty phase – failure to investigate & present additional mitigation evidence (incl. family background; medical & mental health history, etc.)

Summary Reversals on Merits

Wilson v. Corcoran, 131 S.Ct. 13 (2010)	7th	Death penalty; court's alleged reliance on non-statutory aggravating factor in violation of state law
Swarthout v. Cooke, 131 S.Ct. 859 (2011)	9th	Parole denial, not supported by "some evidence" of current dangerousness, as required by California law
Felkner v. Jackson, 131 S.Ct. 1305 (2011)	9th	*Batson* violation (including juror comparisons indicating disparate treatment)

Reversal on procedural issue

Walker v. Martin, 131 S.Ct. 1120 (2011)	9th	Procedural default; California's timeliness standard "regularly followed" and "adequate" procedural bar

AEDPA Statute of Limitations (One Defense Habeas Victory!)

Wall v. Kholi, 131 S.Ct. 1278 (2011)	1st	Post-judgment motion for discretionary reconsideration of sentence qualified as motion for collateral relief, which tolled AEDPA statute of limitations

FEDERAL HABEAS REVIEW OF CALIFORNIA STATE HABEAS DENIALS

Those pesky California "silent denials" not stating reasons

Federal treatment depends on substantive or procedural doctrine at issue:

Issue	Treatment	Authority
AEDPA deference, under § 2254(d), if state court decision was adjudicated on merits	**Denial not stating reasons deemed on merits**, triggering AEDPA deference (even though some other denials on same day had explicitly stated on "merits").	*Harrington v. Richter*, 131 S.Ct. 770 (2011)
Procedural default	**Also deemed on merits**, unless state court explicitly cited procedural bar.	Reiterated in *Walker v. Martin*, 131 S.Ct. 1120 (2011)
AEDPA statute of limitations – tolling during pendency of properly filed petition for collateral relief, § 2244(d)(2).	**Not necessarily deemed properly filed,** even where no citation of timeliness or other procedural bar. Federal court must still assess whether "gap "between lower court habeas denial and habeas filing was reasonable. Any gap longer than 30-60 days (appeal period in most states) runs risk of being deemed unreasonable.	*Evans v. Chavis*, 546 U.S. 189 (2006), & subsequent 9th Cir. cases, e.g., *Valasquez v. Kirkland*, 639 F.3d 964 (9th Cir. 2011)

AEDPA STANDARD & CALIFORNIA HABEAS DENIALS

AEDPA standard & silent denials. ***Harrington v. Richter*, 131 S.Ct. 770 (2011).**

- Summary denials. A California summary denial of a habeas petition, with no reasons stated or citations, is presumed to be on the merits, even though (in contrast to some other denials on same date) the California Supreme Court's denial didn't include an explicit "on the merits" notation. Because the claims were deemed adjudicated on the merits in state court, federal court was required to accord full deference to the state decision under the AEDPA standard. "§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"

- Rephrasing of the AEDPA standard: "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 131 S.Ct. at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

- Evolution of the "fairminded jurists" standard from *Williams* to *Richter.*
  - ***Williams:* It's not the standard**. *Williams v. Taylor*, 529 U.S. 362, 409-410 (2000). Majority explicitly rejects Fourth Circuit standard allowing habeas relief only where state court applied law "'in a manner that reasonable jurists would all agree is unreasonable.'" Per the Justice O'Connor's opinion for the Court: "The 'all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than an objective one."
  - ***Yarborough*: It's not the standard, but they mention it anyway.** *Yarborough v.*541 U.S. at 664: "**Ignoring the deferential standard of** § **2254(d)(1) for the moment,** it can be said that fairminded jurists could disagree ..." (emphasis added).
  - ***Richter:* It is the standard.** Whether "fairminded jurists could disagree" repeated multiple times in *Richter* and also in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).
  - All "fairminded jurists" even more "subjective" than "reasonable jurists."

- Putting the AEDPA and summary denial holdings together: Where state court didn't state its reasons for denial, "a [federal] habeas court must determine what arguments or theories supported or, as here, *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 131 S.Ct. at 786.

AEDPA standard & evidentiary hearings. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).

- Relationship between § 2254(d)(1) standard and federal evidentiary hearings. *Pinholster* addressed the relationship between the § 2254(d)(1) standard ("unreasonable application" of clearly established law, etc.) and evidence presented in a federal evidentiary hearing.

- § 2254(e)(2) bars a federal evidentiary hearing unless the petitioner satisfies difficult criteria concerning both his diligence in attempting to develop the record in state court and the materiality of the facts underlying the claim. However, under *Pinholster*, even if a petitioner satisfies the § 2254(e)(2) criteria and obtains an evidentiary hearing, **the federal court cannot grant habeas relief unless the state court's habeas denial was unreasonable under § 2254(d)(1) on the record before the state court** (assuming that the state court adjudicated the claim on the merits). In other words, the federal court must apply the "unreasonable application" test solely based on the record before the state court and may not consider the additional record developed through the federal evidentiary hearing:

- "[T]he record under review is limited to the record in existence at that same time [of state court decision], i.e., the record before the state court." *Pinholster*, 131 S.Ct. at 1398.

- "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court. [Fn.]" *Id.* at 1400.

- The opinion also contains several pointed comments on the "intended" effect of AEDPA on the availability of evidentiary hearings. "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Id.* at 1401.

AEDPA REVIEW & SUBSTANTIVE ISSUES

IAC Nuggets – *Richter*, *Pinholster* & *Moore*

- AEPDA Deference & *Strickland* Deference:
  - Continued emphasis on "doubly deferential" character of AEDPA review of an IAC claim. "We take a 'highly deferential' look at counsel's performance [citing *Strickland*], through the 'deferential lens of § 2254(d) [citation]." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011).

  - "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011); *Premo v. Moore*, 131 S.Ct. 733, 741 (2011).

- Standard of performance and "prevailing professional" norms.
  - "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter* at 788; *Moore* a740.

  - Time and place? The *Pinholster* opinion notes that there was "no evidence" that counsel's strategy of limiting penalty phase to a "family-sympathy mitigation defense" (not including any psychiatric testimony) "would have been inconsistent with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984 [time of trial]." *Pinholster* at 1407.

- IAC claims & pleas.
  - In rejecting IAC claim based on failure to move for suppression of involuntary confession, Court applies particular deference to plea bargains struck at early stage of case, even before full development of facts, in light of uncertainties and risk that defense's prospects may deteriorate as case progresses: "In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take." *Moore* at 742. "Moore's counsel could reasonably believe that a swift plea bargain would allow Moore to take advantage of the State's aversion to these hazards." *Ibid*.

- Prejudice
  - Although "reasonable probability" "does not require a showing that counsel's actions 'more likely than not altered the outcome,' ... the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight

and matters 'only in the rarest case.' [Citing *Strickland*.]" *Richter* at 792.

- Where state court reached prejudice prong, federal court must apply § 2254(d)(1) deference to state court's finding of no prejudice, rather than just assess *Strickland* prejudice independently. *Pinholster* at 1410-1411.
  - In contrast, outside the IAC context, federal habeas court ordinarily is not required to assess reasonableness of state court's application of prejudice test. Rather than apply AEDPA review to state court's application of *Chapman* prejudice standard, federal court can proceed immediately to its independent application of *Brecht*'s "substantial and injurious effect or influence" test. Because "AEDPA/*Chapman*" is "more liberal" test than *Brecht*, "the latter obviously subsumes the former." *Fry v. Pliler*, 551 U.S. 112, 120 (2007).

State-Created Liberty Interests after *Swarthout v. Cooke*

- ***Swarthout v. Cooke*, 131 S.Ct. 859 (2011)**. Summary reversal of Ninth Circuit decision, which had overturned California parole denial on ground that denial wasn't supported by "some evidence" of current dangerousness, as required by state law.
  - Supreme Court describes Ninth Circuit's holding that "California law creates a liberty interest in parole" as "a reasonable application of our cases."
  - But due process requires only "fair procedures for ... vindication" of liberty interest. "[I]n the context of parole, we have held that the procedures required are minimal" – an "opportunity to be heard" and "a statement of the reasons" for denial. *Id*. at 861.
  - Court rejects notion that California's "some evidence" standard is "a component" of the federally-protected liberty interest.
    - "Such reasoning would subject to federal-court merits review the application of all state-prescribed procedures in cases involving liberty or property interests, including (of course) those in criminal prosecutions." *Id*. at 863.
    - "[I]t is no federal concern here whether California's 'some evidence' rule of judicial review ... was correctly applied." *Id*. at 863.
- See also ***Wilson v. Corcoran*, 131 S.Ct. 13 (2010)**. Summary reversal of Seventh Circuit's grant of habeas relief in capital case. Indiana Supreme Court had accepted sentencing court's statement that it had not relied on non-statutory aggravating factors in selecting death penalty. But Seventh Circuit had rejected that holding as "unreasonable determination of facts." As in *Swarthout*, Supreme Court condemns federal intrusion upon a state court's application of state law. "[N]or does [the Seventh Circuit's opinion] even articulate what federal right was allegedly infringed"

by asserted violation of Indiana restrictions on aggravating factors. *Id*. at 17.

- **Implications of *Cooke* for "state-created liberty interests" under *Hicks v. Oklahoma*, 447 U.S. 343 (1980).**
  - Why *Cooke* does **not** overrule *Hicks*.
    - *Cooke* opinion doesn't even mention *Hicks*, nor did the cert. petition or cert. opposition. On the contrary, *Cooke* refers to the due process principle of state-created liberty interests with apparent approval.
    - Even if some aspects of *Cooke* could be viewed as inconsistent with the spirit of *Hicks*, such as its refusal to treat California's well-established "some evidence" standard as a "component" of the liberty interest created by its parole laws, *Hicks* itself remains binding precedent unless and until it's explicitly overruled:
      - "[I]f the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' [Citation.]" *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005).
    - *Cooke* is a per curiam summary reversal, decided without full briefing and argument. Ordinarily, Court views its summary reversal opinions as straightforward applications of existing law and doesn't use such opinions to announce changes in the law.
    - *Cooke* involved a state executive branch decision denying parole, rather than state judicial proceedings resulting in conviction and sentence. In contrast to the extensive body of rights associated with trials, "the procedures required" in the parole context "are minimal." *Cooke*, 131 at 862.
    - *Cooke* arose on federal habeas, subject to 28 U.S.C. § 2254(d), and may be viewed simply as a holding that "clearly established" Supreme Court precedents did not mandate the Ninth Circuit's treatment of California "some evidence"standard as a federally-enforceable right. Cf. *Cooke* at 862 ("No opinion of ours supports converting California's 'some evidence' rule into a substantive federal requirement.").
  - **Cautionary notes for some applications of *Hicks*.**
    - Both *Swarthout v. Cooke* and *Wilson v. Corcoran* admonish against federalizing claims based on a state court's asserted misapplication of state law.
    - *Hicks* itself involved a complete (and conceded) deprivation of a state-established right to jury discretion in non-capital recidivist sentencing.

- In contrast, the state court in *Cooke* had purported to apply the "some evidence" standard. Consequently, (in Supreme Court's view) the "liberty interest" claim amounted to an assertion that the state court had misapplied that state-law standard.
- Other *Hicks*-type claims are likely to encounter similar obstacles if they appear to call upon a federal court to second-guess a state court's application of a state law standard (including in non-parole trial and sentencing contexts).

HABEAS PROCEDURE – Procedural Default

Adequacy of California's timeliness standard for habeas petitions

- *Walker v. Martin*, 131 S.Ct. 1120 (2011). Supreme Court unanimously finds that California's "reasonableness" standard for filing a state habeas petition (*Clark*, *Robbins*, etc.) represents an "adequate" procedural bar for "procedural default" purposes.
  - Although California employs "a general 'reasonableness' standard," rather than a "fixed statutory deadline, "[i]ndeterminate language is typical of discretionary rules" and does not preclude their adequacy as state procedural bars. The Court finds the "requisite clarity" in California's application of its standard and rejects claim that "California's rule is too vague to be regarded as 'firmly established." *Id*. at 1128.

  - "Nor is California's rule vulnerable on the ground that it is not regularly followed." *Id.* at 1129.
    - Supreme Court rebuffs attempts to show inconsistent application through evidence that California Supreme Court often summarily denies long-delayed petitions, apparently on the merits, in silent orders *not* citing procedural bars.
    - "We see no reason to reject California's time bar simply because a court may opt to bypass the *Clark/Robbins* assessment and summarily dismiss a petition on the merits, if that is the easier path." *Id*. at 1129.

- Scope of *Martin*'s endorsement of Cal. timeliness rules? Two potentially-distinguishing aspects of *Martin* are noteworthy.
  - *Martin* involved a *non-capital* petition. (In contrast, the California Supreme Court has promulgated much more specific benchmarks for capital petitions.)
  - *Martin* involved an extraordinarily lengthy delay – *5 years* – for which the petitioner offered no explanation.

HABEAS PROCEDURE – AEDPA Statute of Limitations

Statutory Tolling – "Gap Tolling" Gets Worse and Worse in Ninth Circuit

Refresher on statute-of-limitations treatment of Cal. habeas filings

- AEDPA statute of limitations is tolled during pendency of a "properly filed" state petition for post-conviction relief (such as a Cal. habeas petition). § 2244(d)(2).
- California's unusual system for seeking review of a lower court habeas denial by filing new "original" petition in higher court is equivalent to an appeal process. Consequently, tolling continues during the "gap" between the lower court denial and the filing in the higher court, provided that the latter petition is filed within a "reasonable" time under California's timeliness standard. *Carey v. Saffold*, 536 U.S. 214 (2001).

- State reviewing court's failure to cite procedural grounds in denial order ("silent"denial) is not dispositive of whether petition was "properly filed." Federal court must independently assess reasonableness of the "gap" between lower court denial and higher court filing. In most jurisdictions, time for filing a conventional appeal is 30-60 days (suggesting a gap of that length is reasonable). Any unexplained gap of 6 months or more is presumptively unreasonable. *Evans v. Chavis*, 546 U.S. 189 (2006).

Recent Ninth Circuit cases finding gap intervals unreasonable & denying gap tolling

- *Banio v. Ayers*, 614 F.3d 964 (9th Cir. 2010): No tolling for 146-day gap (approx. 5 months) between superior court's denial of first petition and pro se petitioner's filing of second petition in same court, including additional evidence in support of claims. (Development of the new evidence didn't justify the delay because that "evidence could have been discovered earlier in the exercise of due diligence.")

- *Chaffer v. Prospero*, 592 F.3d 1046 (9th Cir. 2010). No tolling for unexplained gaps of 115 days (between superior court denial & appellate petition) and 101 days (between appellate court denial & Cal. Supreme Court filing) on pro se petitions.
  - "Chaffer's filing delays were substantially longer than the "30 to 60 days" that "most States" allow for filing petitions, and Chaffer's petitions offered no justification for the delays...."
  - Circuit also rejects equitable tolling based on pro se status and absence of "a handful of reporter volumes" from prison library. "[T]hese circumstances are hardly extraordinary given the vicissitudes of prison life, and there is no

indication ... that they made it 'impossible' for him to file on time."

- *Valasquez v. Kirkland*, 639 F.3d 964 (9th Cir. 2011): No tolling for gaps of 91 days (between superior court denial & appellate petition) and 81 days (between appellate court denial & Cal. Supreme Court filing) on petitions filed by counsel.
  - Much as in *Chaffer*, *Valesquez* opinion emphasizes that "each of the gaps ... is far longer than the [U.S.] Supreme Court's thirty-to-sixty benchmark for California's 'reasonable time' requirement."
  - Each petition "is essentially identical to the petition that came before it," and counsel shouldn't have required "excess time essentially to re-file an already written brief."
  - Opinion also rejects equitable tolling claim based on state of pre-*Chavis* Ninth Circuit case law.

Exception: allowing tolling for appellate petition after extensive evidentiary hearing

- *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010). 14-month gap between superior court habeas denial and reviewing court habeas petition deemed reasonable, where petitioner's counsel presented "compelling justification." Superior court had conducted evidentiary hearing which "spanned two years" and included testimony from more than 30 witnesses and admission of over 50 exhibits. "[T]he evidentiary hearing in this case was astoundingly long, the record complex and voluminous, and Maxwell's claims were substantially affected by [additional evidence on a jailhouse informant] that was discovered during the course of the hearing." *Id*. at 496-497.

Implications of recent "gap tolling" cases.

- The Ninth Circuit is clearly moving toward branding any gap longer than the 30-to-60 day "benchmark" as presumptively unreasonable, unless there's showing of extraordinary circumstances. Although *Kirkland* involved an 81-day gap on a counseled petition, the Circuit appears to be just a small step away from applying its reasoning to pro se petitions as well and to any gap longer than 60 days.
  - The irony is that these federal cases are purporting to apply California's "reasonableness" requirement. Yet, no published California case has applied a timeliness bar to an appellate petition filed after a gap as short as this, and a few cases have explicitly tolerated much longer gaps. Cf. *In re Crockett*, 159 Cal.App.4th 751, 757-758 (2008) (5-month gap on counseled petition); *In re Burdan*, 169 Cal.App.4th 18, 30-31 (2008) (10-month gap on pro se petition).

- Very few cases will present a "compelling justification" comparable to the extensive

evidentiary hearing in *Maxwell*, especially where lower court denied relief summarily. Petitioners shouldn't count on pro se status or other obstacles inherent to inmate petitions as grounds for delay beyond 60 days.

- Although no California case states such a rule, **both attorneys and pro se petitioners should treat 60 days as a firm deadline for a reviewing court habeas filing, following a lower court denial.** Otherwise, even if California appellate court denied the petition without citing timeliness bar, federal court may consider the state petition untimely and will not toll the AEDPA limitations statute during that period.

- Also, **ideally a habeas petitioner should not count on "statutory tolling" at all and should make every effort to get his federal petition on file one-year after the case became "final" on direct appeal** (usually, upon expiration of the 90-day cert. filing period after the California Supreme Court's denial of review).

ON THE HORIZON – Noteworthy Cert. Grants

Timing of the "clearly established" inquiry.

- ***Greene v. Fisher*, No. 10-637, cert. gr., Apr. 4, 2011**. Question Presented: "For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as 'clearly established Federal law' under 28 U.S.C. § 2254(d)...."

- The problem: In the Court's seminal AEDPA case, *Williams v. Taylor*, 529 U.S. 362, (2000), Justices Stevens' and O'Connor's respective majority opinions employed seemingly inconsistent formulations of the time for measurement of "clearly established" federal law under § 2254(d)(1). (Because there were differently-constituted majorities for distinct issues, the decision of the Court in *Williams* consists of portions of both Justice Stevens' and Justice O'Connor's opinions.)
  - Whether the petitioner "seeks to apply a rule of law that was clearly established *at the time his state-court conviction became final*." *Williams* at 390 (Stevens, J.; emphasis added).
  - Compare: "That statutory phrase ['clearly established, etc."' refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." *Id.* at 412 (O'Connor, J.; emphasis added). (The Court has also passingly repeated the "relevant state-court decision" phrase in some intervening opinions.)

- Consistency of AEDPA standard with *Teague*? Under *Teague v. Lane*, 489 U.S. 286, 310 (1989), the date on which a state court conviction became "final" on direct review (usually, either the denial of cert. or expiration of the 90-day period for filing a cert. petition) determines the retroactive applicability of a precedent on federal habeas review. Under *Teague*, a federal habeas petitioner is (or, at any rate, was) entitled to the benefit of any Supreme Court decision rendered prior to the date his case became "final," even if the Supreme Court decision announced a "new rule."
  - Justice Stevens' formulation in *Williams* indicates that "clearly established" federal law for purposes of the AEDPA standard, § 2254(d)(1), is also to be measured as of the *Teague* date-of-finality. Consequently, "clearly established" law consists of U.S. Supreme Court precedents decided up to that date, including any opinions issued during the "cert. window," after the state appellate decision itself but before its "finality."
  - However, the Third Circuit in *Greene* read Justice O'Connor's "relevant state-court decision" formulation as requiring assessment of the reasonableness of the state court decision as of its filing date and barring consideration of any

post-decision, pre-finality precedents.

- Note that there was no such issue in *Williams* itself, because the "clearly established" Supreme Court precedent was *Strickland*, decided long before Williams' case.

- One troubling note: *Pinholster* (which was decided on the same date as the grant of cert. in *Greene*) doesn't bode well for *Greene*. In excluding evidence developed in federal court from AEDPA review of the reasonableness of the state court decision, *Pinholster* construed the "backward looking language" of § 2254(d)(1) as "requir[ing] an examination of the state-court decision *at the time it was made*." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011) (emphasis added).

- Playing it safe in the meantime: If a favorable Supreme Court opinion is rendered during the post-decision, pre-finality window, **counsel should file a cert. petition and request a "GVR" (grant, vacate & remand) order directing the state appellate court to reconsider the matter in light of the new precedent.**
  - Counsel should also be aware of any cert.-granted, but not yet decided cases, which could assist a defendant's claims if properly decided. In that situation too, counsel should consider filing a cert. petition seeking a GVR (just as many California practitioners did during the pendency of *Cunningham v. California*).

Effective assistance of post-conviction counsel.

- ***Martinez v. Ryan*, No. 10-1001, cert. gr., June 6, 2011.** Question Presented: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-of-assistance-of-trial-counsel-claim."

- The problem: Scope of the constitutional right to effective assistance of counsel.
  - The Supreme Court has recognized constitutional rights to effective assistance of trial counsel and to effective assistance of appellate counsel, at least as to a "first appeal" or a first tier of direct appellate review – i.e., as to a direct appeal as of right (*Evitts v. Lucey*, 469 U.S. 387 (1985)), but not as to discretionary review by a state supreme court (*Ross v. Moffitt*, 417 U.S. 600 (1974)).
  - To date, the Court has not recognized any "right to counsel in state collateral proceedings." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). However, the Court has left open the possibility that there *may* be "an exception ... in

those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."

- In *Coleman*, the Court did not resolve the question of the constitutional status of representation on a first level of post-conviction review. The alleged ineffective assistance there concerned *appellate review of the denial of the initial post-conviction petition*, not representation within the initial post-conviction proceeding. *Coleman* found no "right to counsel on appeal from *that* determination," but left open the possible constitutional import of counsel's representation on the first level of post-conviction review.

- In *Martinez* (as in *Coleman*), the issue of post-conviction counsel arises in a procedural default context. But, unlike *Coleman*, it concerns alleged ineffective assistance during a "first tier" of post-conviction review. And, as stated in the "Question Presented," Martinez's underlying claim is one which, under state law, can only be raised through a post-conviction proceeding, not on direct appeal.
  - Martinez seeks federal habeas review of a claim of ineffective assistance of trial counsel. But, to do so, he must overcome a procedural default, brought on by his Arizona appointed counsel's failure to raise that claim in a first post-conviction petition.
  - Counsel initiated a post-conviction proceeding, but filed the equivalent of a *Wende* brief, stating he found no issues. And counsel allegedly failed to inform the client of the proceeding and of his option to file a pro se petition within a specified period . Martinez, through new counsel, later sought to raise trial IAC claims, but the Arizona courts deemed the claims barred, because they weren't raised in the prior post-conviction proceeding.
  - In order to overcome the state procedural default and obtain federal habeas review, Martinez must establish "cause" excusing the default. But, as stated in *Coleman*, "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Coleman*, 501 U.S. at 755.
  - In order to obtain federal review of a conventional trial IAC claim, Martinez must establish that his post-conviction attorney's alleged ineffective assistance also represented a constitutional violation. The grant of certiorari consequently poses the broad question of **whether there is any constitutional right to effective assistance of counsel on a "first-tier" post-conviction petition , where that is the only available means to raise certain claims**.

- Possible implications of *Martinez*.
  - Because the Supreme Court has never previously recognized any constitutional right to post-conviction or "collateral" counsel, a favorable disposition in *Martinez* could potentially have broad ramifications for appellate and post-

conviction representation. At this point, it's difficult to assess how *Martinez* may affect appellate practice in California and, in particular, the constitutional status of state habeas representation.

- *Martinez* is not a capital case, so the claim is not driven by death-is-different considerations. Presumably, the ultimate decision will address the status of representation by counsel on any first state post-conviction proceeding.
- Note that, in *Martinez*, state appointed counsel *did* initiate a state post-conviction proceeding and allegedly rendered ineffective assistance by not raising any issues and not notifying the client of his option to file a pro se petition.
  - Consequently, the issue in *Martinez* does not appear to be whether a state must provide post-conviction counsel in the first place.
  - Instead, *if the state provides post-conviction counsel and that attorney files a first post-conviction proceeding*, does ineffective assistance in that first proceeding represent a constitutional violation in its own right, such that it will provide "cause" to remove the procedural bar which would otherwise block habeas federal review of the defendant's underlying claims of trial IAC?

- Fun fact. There's nothing new about grants of certiorari on Ninth Circuit habeas cases. But *Martinez v. Ryan* is a rare grant of a *defendant's petition* seeking review of a Ninth Circuit decision denying habeas relief. The Ninth Circuit panel found no constitutional right to effective assistance of post-conviction counsel, even on a first such petition, and enforced the procedural bar, blocking review of Martinez's underlying claims of trial IAC. See *Martinez v. Schiro*, 623 F.3d 731 (9th Cir. 2010).

RECENT GLIMMERS OF HOPE ON VARIOUS FRONTS (all decided after *Richter*)

Confessions

- *Doody v. Ryan*, __ F.3d __, 2011 WL 1663551 (9th Cir. May 4, 2011) (en banc). On remand from Supreme Court for reconsideration in light of *Florida v. Powell*, 130 S.Ct. 1195 (2011).
  - En banc panel sticks to conclusion that "nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary."
  - Majority also finds *Miranda* warnings inadequate where officers significantly "deviated from the printed form with inaccurate and garbled explanations" which "downplay[ed] ... the significance of the warnings" (including that

warnings were for mutual benefit of police and teenager and assurances that police didn't consider him a suspect).

***Apprendi* – determination of additional facts necessary to prove "strike"**

- *Wilson v. Knowles*, 638 F.3d 1213 (9th Cir. 2011). Denial of jury trial on additional facts necessary to prove prior qualified as "strike" violated "clearly established" *Apprendi* rule. Because prior offense (drunk driving with bodily injury) didn't require personal infliction of GBI, those additional facts did not come within the "prior conviction" exception to *Apprendi*. "It would be unreasonable to read *Apprendi* as allowing a sentencing judge to find the kind of disputed facts at issue here – such as the extent of the victim's injuries and how the accident occurred."
  - This decision places Ninth Circuit in direct conflict with California Supreme Court. See *People v. McGee* (2006) 38 Cal.4th 682.

No AEDPA deference where state court didn't address federal claim; Sixth Amendment violation in removal of holdout juror.

- *Williams v. Cavazos*, __ F.3d __, 2011 WL 1945744 (9th Cir. May 23, 2011).
  - California appellate opinion had rejected claim that removal of holdout juror was abuse of discretion under state law (Pen. Code § 1089), but hadn't addressed "obliquely or otherwise" separate argument that the removal also violated Sixth Amendment. In view of extensive discussion of the state law claim and complete lack of reference to the federal one, Ninth Circuit panel concludes that state appellate court "simply neglected the issue and failed to adjudicate the [federal] claim." Panel distinguishes *Harrington v. Richter* (which presumed summary habeas denial adjudicated all claims).
    - **Because there was no state court adjudication of the merits, deferential AEDPA standard (28 U.S.C. § 2254(d)) doesn't apply**, and Circuit reviews constitutional claim independently.

  - On independent review, panel finds that the trial court's removal of the holdout juror, following complaints from the other jurors, violated Sixth Amendment for two reasons: "(1) there was a reasonable possibility that the request for the juror's discharge stemmed from his views of the merits of the case, and (2) the grounds on which the court relied did not amount to 'good cause to remove a known holdout juror." (Because the AEDPA standard limiting review to "clearly established" *Supreme Court* precedents didn't apply, Ninth Circuit relies heavily on its own precedents.)