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COOPERATIVE FEDERALISM: NEVADA’S INDIGENT DEFENSE CRISIS AND THE ROLE OF FEDERAL COURTS IN PROTECTING THE RIGHT TO COUNSEL IN NON-CAPITAL CASES

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In *Martinez v. Ryan*, the United States Supreme Court held the ineffective assistance of post-conviction counsel, or the lack of representation in a state post-conviction proceeding, provides cause to allow a federal habeas petitioner to overcome a procedural default on an ineffective assistance of trial counsel claim.¹ This represented a radical shift in the criminal justice system. Prior to *Martinez*, state post-conviction proceedings—the typical mechanism for a criminal defendant to challenge the performance of his trial attorney—were not heavily scrutinized. It was understood and accepted that defendants did not have the right to counsel in these post-conviction proceedings. Whether a defendant represented himself in the state post-conviction proceedings or had counsel to assist him, federal review was strictly limited to those claims raised in that proceeding, regardless of how well they were investigated or presented.

However, *Martinez* has now altered that calculus and, in doing so, shined a bright spotlight on whether these state post-convictions proceedings adequately protect a defendant’s right to the effective assistance of counsel. The Supreme Court explained why this is so important: “[T]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system Indeed, the right to counsel is the foundation for our adversary system.”² In light of *Martinez*, a criminal defendant now has a broader mechanism for protecting this fundamental constitutional right. A defendant can raise new challenges to

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¹ *Martinez v. Ryan*, 566 U.S. 1 (2012).

² *Id.* at 12.

his attorney's performance in a federal habeas proceeding and argue that what occurred in the state post-conviction proceedings was inadequate.

Martinez's impact in non-capital cases in Nevada could be quite significant. The need for vigorous post-conviction review in Nevada is hard to deny. There have been systematic problems in the indigent defense system that continue to this day. Despite these nearly intractable issues, the Nevada Supreme Court refused to extend *Martinez* to its own state post-conviction process.³ Rather, the court chose to elevate the concept of finality of the conviction over rigorous protection of this invaluable constitutional right. It is this cramped vision of post-conviction review that *Martinez* was clearly meant to address.

I. SYSTEMATIC ISSUES IN NEVADA'S INDIGENT DEFENSE SYSTEM

Nevada boasts a strong yet complicated history with indigent defense. As early as 1875, Nevada became the first state in the country to authorize the appointment of counsel to indigent defendants in all criminal cases.⁴ It was not until 1971, however, that the Nevada State Legislature created the State Public Defender.⁵

Today, Nevada's statutes require that counties create their own public defender office if the county's population exceeds "100,000 or more."⁶ Clark and Washoe counties are the only counties that fall under this requirement. In the remaining Nevada counties, the counties themselves have discretion to determine the nature of their indigent defense services. They may choose, for example, to contract with the Nevada State Public Defender. They may decide to create their own county public defender office, as Elko has. Or they may—as the majority of the rural counties have opted to do—have private attorneys contract with the county to provide all indigent defense services.⁷ Under any of these scenarios, however, Nevada's counties are responsible for paying for nearly all of the indigent defense service costs with the state contributing very little.⁸

Although Nevada has demonstrated a long history of commitment to indigent defense, the state's indigent defense system continues to face significant challenges. In 2007, the Nevada Supreme Court created the Indigent Defense Commission, following several damning reports on the quality of indigent defense services in Nevada.⁹ The court created the commission "in response to [its] concerns about the current processes for providing indigent defendants . . .

³ *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014).

⁴ Karin L. Kreizenbeck, *The Sixth Amendment in Nevada*, NEV. LAW. 46 (Oct. 2015).

⁵ NEV. REV. STAT. § 180.010 (1971).

⁶ NEV. REV. STAT. § 260.010 (2016).

⁷ See generally NEV. REV. STAT. § 260.

⁸ *Nevada*, GIDEONAT50, gideonat50.org/in-your-state/nevada [https://perma.cc/2PNJ-HPQK] (last visited Apr. 13, 2017).

⁹ Order Establishing Study Committee on Representation of Indigent Defendants, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. Apr. 26, 2007).

with counsel and whether the attorneys appointed are providing quality and effective representation.”¹⁰ Several incidents demonstrate the need for the commission’s work.

First, in 1997 the Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System (“Task Force”) issued its final report.¹¹ The report concluded the failure to adequately fund and staff the public defender and court interpreter systems resulted in unequal representation.¹² In particular, the Task Force noted the high caseloads maintained by public defenders, a lack of investigators to prepare a case for trial, that defendants were only able to spend two to three hours total with their public defenders over the course of the case, a lack of training, and a pressure to plea bargain preempted the ability to effectively represent indigent defendants.¹³ The Task Force recommended guaranteeing the right to effective assistance of counsel at all stages of the proceedings, including post-conviction.¹⁴

Second, in 2000, the Spangenberg Group completed its review of indigent defense services in several of Nevada counties.¹⁵ The Group’s report noted a stark lack of data reporting throughout counties in the state.¹⁶ Further complicating the provision of effective indigent defense services are Nevada’s distinct demographics: the report observed that Nevada has a small population (although centered around urban cores in Clark and Washoe counties), and a large geographic size. “Thus, the indigent defense systems in the state have characteristics that can be compared to both small, densely-populated Eastern states and large, more sparsely populated, rural mid-Western and Western states.”¹⁷

The report concluded the Nevada “State Public Defender System is in Crisis.”¹⁸ In so finding, the report observed a lack of independence in the defense function throughout Nevada, a lack of accountability and oversight of the quality of indigent defense, unmanageable workloads of public defenders, a lack of “comprehensive, reliable indigent defense data,” and anecdotal evidence that “racial bias exists in the criminal justice system.”¹⁹ The report urged Nevada to assume its fair share of the burden to provide for quality indigent defense services, to establish an Indigent Defense Commission, to create an intermediate

¹⁰ *Id.* at 1.

¹¹ Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System: Findings and Recommendations, *In re* Establishment of the Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT No. 160 (Nev. June 18, 1997) [hereinafter Final Report: Findings and Recommendations].

¹² *Id.* at 64.

¹³ *Id.* at 65–67.

¹⁴ *Id.* at 67.

¹⁵ SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS & RECOMMENDATIONS 2–3 (2000), http://www.nlada.net/sites/default/files/nv_tsgindigentdefensereport_dec2000.pdf [<https://perma.cc/QJX5-9MK6>].

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 71.

¹⁹ *Id.* at 71–78.

appellate court, to create a plan to evaluate indigent defense providers on a regular basis.²⁰

Finally, in 2003, the Ninth Circuit Court of Appeals issued its decision in *Miranda v. Clark County*.²¹ Before the appeal, Roberto Miranda's capital murder conviction was overturned on grounds of ineffective assistance of counsel. Miranda then filed a § 1983 action²² in which he complained of two particular policies at the Clark County Public Defender's Office.²³ First was a policy of administering lie detector tests to all defendants, including non-capital cases. If the defendant failed the polygraph, he was presumed guilty and minimal resources were expended on the case, including investigation.²⁴ Second was a policy to assign brand-new lawyers to capital cases without providing training or experience beforehand.²⁵ The Ninth Circuit concluded both policies created "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt."²⁶

Since its creation in 2007, the Indigent Defense Commission has taken great strides to improve the quality of indigent defense services in Nevada. In 2008, the Nevada Indigent Defense Standards of Performance were implemented.²⁷ Other recommendations have been adopted, such as altering the payment methods for contract attorneys and supporting legislation to shift some of the cost from the counties to the state.²⁸ There have also been some moderate improvements in institutional public defender systems, such as decreased case-loads and relatively higher resources.

Despite these improvements, "[s]erious problems exist today in rural Nevada" with the quality of indigent defense representation.²⁹ The Sixth Amendment Center noted these problems include a woeful lack of financial resources, "a lack of attorneys to do the work, the geographic expanse of most rural counties, and limited infrastructure to train and evaluate attorneys."³⁰ As a result of its review of the current state of Nevada's indigent defense systems, the Sixth Amendment Center recommended that the state establish a permanent "state-funded public defender commission."³¹

Yet, while there is hope for future improvements, these reports and commissions cannot undo the deleterious impact the systemic problems in Nevada

²⁰ *Id.* at 78–84.

²¹ *Miranda v. Clark County*, 19 F.3d 465 (9th Cir. 2003).

²² 42 U.S.C. § 1983 (2012) (civil action for deprivation of rights).

²³ *Miranda*, 19 F.3d at 465.

²⁴ *Id.* at 467, 469–70.

²⁵ *Id.* at 471.

²⁶ *Id.* at 470–71.

²⁷ Order, *In re* Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. July 23, 2015).

²⁸ *Id.* at 1–2.

²⁹ SIXTH AMEND. CTR., RECLAIMING JUSTICE iii (2013), http://sixthamendment.org/6ac/nvreport_reclaimingjustice_032013.pdf [<https://perma.cc/TH6E-SZAR>].

³⁰ *Id.*

³¹ *Id.* at 35.

have had on the quality of representation going on many years now. Unfortunately, Nevada's available mechanism for vindicating this right—the post-conviction process—is woefully inadequate.

II. NEVADA'S POST-CONVICTION PROCESS IN NON-CAPITAL CASES

Nevada's post-conviction process for non-capital cases is set forth in Chapter 34 of the Nevada Revised Statutes. This set of statutes imposes strict limitations on a defendant's ability to pursue a post-conviction habeas petition in state court. For example, a habeas petition must be dismissed if it is not filed within one year after the Nevada Supreme Court issues its remittitur on a timely filed direct appeal.³² Further, every claim has to be brought in a single petition. Claims brought in a second or successive petition have to be dismissed, whether they were raised before or not.³³ These procedural bars are mandatory.³⁴ A petitioner can only overcome these procedural bars through a showing of "good cause" and prejudice or that he is actually innocent.³⁵

These rules are tough and unforgiving. And that was the legislature's goal—to provide only one time through the post-conviction system. The Nevada Supreme Court has stated the process was "designed to streamline the post-conviction review process and ensure the finality of judgments of convictions" while leaving open only "a safety valve" for review in extremely limited circumstances.³⁶

With these strict rules in place, the question becomes whether these procedures are adequate to protect a defendant's right to counsel in non-capital cases. Nevada, like most states, requires a defendant to raise ineffective assistance of counsel claims in a post-conviction petition. These claims typically require fact-development and inquiries into strategy that are outside the record on direct appeal.³⁷ But as the High Court recognized in *Martinez*, *pro se* incarcerated defendants are generally not in a position to conduct the necessary investigation and do not have the legal experience or wisdom to adequately present these claims.³⁸

Despite calls for effective representation of litigants in post-conviction proceedings,³⁹ the appointment of counsel to assist defendants with ineffective assistance of counsel claims in non-capital cases remains discretionary.⁴⁰ As a

³² NEV. REV. STAT. § 34.726(1) (2016). If no timely appeal was filed, then a petitioner only has one year from the entry of the judgment of conviction to file his post-conviction petition. *Id.*

³³ NEV. REV. STAT. § 34.810.

³⁴ *Pellegrini v. State*, 34 P.3d 519, 536 (Nev. 2001).

³⁵ *Id.* at 537.

³⁶ *Brown v. McDaniel*, 331 P.3d 867, 874 (Nev. 2014).

³⁷ *Martinez v. Ryan*, 566 U.S. 1, 11 (2012).

³⁸ *Id.* at 11–12.

³⁹ Final Report: Findings and Recommendations, *supra* note 11, at 67.

⁴⁰ NEV. REV. STAT. § 34.750 (2016). In contrast, appointment of counsel is required for a capital petitioner's first petition. NEV. REV. STAT. § 34.820(1)(a). Because it is a statutory

result, many petitioners are left on their own to raise ineffectiveness claims without the real ability to properly plead them.

But even in the situations where counsel is appointed, there is no guarantee the attorney will do a sufficient job on the post-conviction petition to adequately protect the petitioner's rights. Because counsel in these proceedings is neither a constitutional nor statutory right, a petitioner has no right to the *effective* assistance of counsel.⁴¹ Although no comprehensive review of attorney performance has been done in these proceedings, recent decisions from the Ninth Circuit indicate that some post-conviction counsel in Nevada do not perform at a reasonably competent level.⁴²

That is the goal of *Martinez*—to remedy this black hole in the process. But the underlying policy rationales of *Martinez* could easily extend to the state court's own processes. In other words, should the state courts extend the holding of *Martinez* to allow a non-capital petitioner to assert ineffective assistance of post-conviction counsel as a ground for cause in a second or successive post-conviction petition?

In *Brown v. McDaniel*,⁴³ the Nevada Supreme Court answered with a resounding “No.” They acknowledged what was at stake with their negative response: a non-capital petitioner would be given an opportunity to obtain federal merits review of a procedurally defaulted ineffective assistance of trial counsel claim.⁴⁴ The court stated it was willing to accept that risk. And the court put it in blunt terms. The main goal of its post-conviction proceedings was not to ensure the state courts were provided an opportunity to resolve all constitutional claims.⁴⁵ Rather, the true function of its system was to provide a streamlined process for post-conviction review in order to ensure the State's “interest in finality that animates the statutory habeas remedy and its procedural bars.”⁴⁶

The upshot of *Brown* is the post-conviction proceedings in non-capital cases remain an inadequate remedy for vindicating the right to counsel. Many peti-

right, the Nevada Supreme Court has held that a capital petitioner is entitled to the effective assistance of post-conviction counsel on the first petition. *Crump v. Warden*, 934 P.2d 247, 253 (Nev. 1997).

⁴¹ See *Brown*, 331 P.3d at 870.

⁴² For example, in *Gibbs v. Legrand*, post-conviction counsel erroneously told the petitioner that his time for filing for post-conviction relief had not started. *Gibbs v. Legrand*, 767 F.3d 879, 882 (9th Cir. 2014). Counsel failed to provide the petitioner any notice that the Nevada Supreme Court had denied Gibbs's appeal, which caused the petitioner to miss his federal habeas filing deadline. *Id.* In *Rudin v. Myles*, post-conviction counsel, the same one at issue in *Gibbs*, did nothing but appear at status checks. *Rudin v. Myles*, 781 F.3d 1043, 1051 (9th Cir. 2014). He did not even file a petition for post-conviction relief, causing his client to miss both her state and federal statute of limitations. *Id.* To note, the Ninth Circuit went out of its way to demonstrate that the underlying trial ineffectiveness claims were substantial. *Id.* at 1047. Without a federal forum, the petitioner in *Rudin* would never have the opportunity to litigate these substantial claims.

⁴³ *Brown*, 331 P.3d at 867.

⁴⁴ *Id.* at 871.

⁴⁵ *Id.* at 874 n.9.

⁴⁶ *Id.*

tioners will be left on their own to raise ineffectiveness claims for which they are unqualified and ill-prepared to raise. And the performance of post-conviction counsel remains standardless.

III. WHY MARTINEZ MATTERS IN NON-CAPITAL CASES IN NEVADA

The right to the effective assistance of counsel cannot be overstated.⁴⁷ But like any other constitutional right, this right means nothing without an effective mechanism to vindicate that right. The situation before *Martinez*, while recognizing the right to effective counsel, effectively prevented non-capital defendants from asserting that right. States could follow a simple formula to prevent federal review of the effectiveness of defense counsel: assign an attorney for the trial and direct appeal, and then either refuse to assign an attorney during post-conviction proceedings or assign an attorney who has no obligation to meet a certain level of competence. These post-conviction petitions—raising only weak claims of ineffective assistance, or no claims at all—would, of course, be denied by the state courts. When the defendant finds himself in federal court, he would find he could not raise his meritorious claims of ineffective assistance because these claims would be barred by the procedural default doctrine.⁴⁸

Martinez repudiated this.⁴⁹ Without effective post-conviction counsel, “the initial-review collateral proceeding . . . may not [be] sufficient to ensure that proper consideration was given to a substantial claim.”⁵⁰ In this regard, *Martinez* is less a case about the importance of initial post-conviction counsel than it is a recognition that criminal defendants must have a forum to assert their right to effective counsel. Initial post-conviction counsel is merely a means to that end: if states are not going to provide an adequate forum to litigate the effectiveness of counsel, then the federal courts will.

This concern is not merely academic. In at least three Nevada non-capital cases, review of ineffective assistance of counsel claims was only possible because federal courts, applying *Martinez*, allowed the claims to move forward.⁵¹ Without the benefit of a federal forum, these claims would not ever have been considered. Or consider the recent Supreme Court case of *Buck v. Davis*.⁵² There, during a capital sentencing trial, *defense* counsel presented evidence that

⁴⁷ See *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

⁴⁸ *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991); see also *Martinez*, 566 U.S. at 10–11 (“And if counsel’s errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner’s claims.”).

⁴⁹ *Martinez*, 566 U.S. at 10–11.

⁵⁰ *Id.* at 14.

⁵¹ See *McLaughlin v. Laxalt*, No. 15-15847, 2016 WL 6561500, at *1 (9th Cir. Nov. 4, 2016); *Jones v. Palmer*, No. 3:11-cv-00467-MMD-WGC, 2015 WL 10014935, at *2 n.2 (D. Nev. Feb. 4, 2015); *Benson v. Budge*, No. 3:05-cv-0464-PMP-VPC, 2013 WL 499033, at *5 (D. Nev. Feb. 7, 2013).

⁵² *Buck v. Davis*, 137 S. Ct. 759 (2017).

the defendant was more violence prone because he was black.⁵³ Chief Justice Roberts, writing for a six-justice majority, had little difficulty in concluding this was ineffective assistance of counsel.⁵⁴ However, Buck's claim would have been barred before *Martinez*: he had not raised the claim in state court until it was prohibited by state rules.⁵⁵ So, in *Buck* too, but for the availability of a federal forum, Buck's meritorious ineffective assistance claim would never have been heard.⁵⁶

Nevada is undergoing an indigent defense crisis. This problem is exacerbated by the state's inattention to post-conviction proceedings in non-capital cases, and the need for effective post-conviction attorneys. Without a proper state mechanism for non-capital defendants to litigate the effectiveness of their counsel, the role of federal courts—and federal habeas—takes on special importance. For, so long as non-capital defendants cannot meaningfully assert their right to effective assistance of counsel in state court, the federal courts will be the only available forum. And if the right to effective assistance of counsel is to mean anything, it must mean that the federal courts will enforce the right, especially when the state courts will not.

⁵³ *Id.* at 768–69.

⁵⁴ *Id.* at 767–69.

⁵⁵ *Id.* at 770.

⁵⁶ Like the petitioner in *Buck*, Nevada's capital petitioners also benefit from the protections afforded by *Martinez* in second or successive habeas proceedings. Although Nevada's capital petitioners are entitled to the effective assistance of post-conviction counsel in the initial post-conviction proceedings, they too have experienced many of the systemic problems with Nevada's indigent defense system. See Final Report: Findings and Recommendations, *supra* note 11. *Martinez* is a powerful tool to protect their constitutional rights as well.