CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS

2014–2015 SUPPLEMENT

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Chapter 5 – Constitutional Limitations on Death Eligibility

Page 302. Add before Note on Incompetence: Rickey Ray Rector:

Note on Ryan v. Gonzalez, 133 S.Ct. 696 (2013)

In *Ryan v. Gonzalez*, 133 S.Ct. 696 (2013), the Supreme Court decided two cases in which federal circuit courts had held that death row inmates were entitled to indefinite stays of execution for as long as they inmates were incompetent during federal habeas corpus proceedings. In Valencia Gonzales' case, there had been no determination that there would be any issues decided on the basis of anything outside of the existing record. In Sean Carter's case, the federal district court had determined that Carter's counsel needed Carter's help in developing four claims.

The Court first ruled that it could find no statutory basis for staying federal habeas proceedings due to a petitioner's incompetence. The federal statute which guarantees federal habeas petitioners on death row the right to counsel did not provide petitioners a right to competence during federal habeas proceedings. In deciding both cases, the Court refrained from considering "the outer limits" of a federal district court's discretionary power to issue stays. The Court said that if it were to turn out that one of Carter's claims were unexhausted and not barred by procedural default, "an indefinite stay would be inappropriate," because that would allow Carter to undermine the AEDPA's goal of promoting finality.

The Court said that where there is a competency-based stay based on a type of incompetence other than incompetence to be executed, "at some point, the State must be allowed to defend its judgment of conviction. The Court concluded by saying:

> If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment.

133 S.Ct. at 708-09.

Page 321. Insert before E. Age of the Offender:

HALL v. FLORIDA
___ S.Ct. ___ (May 27, 2014)
Docket No. 12-10882

JUSTICE KENNEDY delivered the opinion of the Court.

This Court has held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U. S. 304, 321 (2002). Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

I

On February 21, 1978, Freddie Lee Hall, petitioner here, and his accomplice, Mark Ruffin, kidnaped, beat, raped, and murdered Karol Hurst, a pregnant, 21-year-old newlywed. Afterward, Hall and Ruffin drove to a convenience store they planned to rob. In the parking lot of the store, they killed Lonnie Coburn, a sheriff's deputy who attempted to apprehend them. Hall received the death penalty for both murders, although his sentence for the Coburn murder was later reduced on account of insufficient evidence of premeditation.

Hall argues that he cannot be executed because of his intellectual disability. Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon.

When Hall was first sentenced, this Court had not yet ruled that the Eighth Amendment prohibits States from imposing the death penalty on persons with intellectual disability. And at the time, Florida law did not consider intellectual disability as a statutory mitigating factor.

After this Court held that capital defendants must be permitted to present nonstatutory mitigating evidence in death penalty proceedings, *Hitchcock v. Dugger*, 481 U. S. 393, 398–399 (1987), Hall was resentenced. Hall then presented substantial and unchallenged evidence of intellectual disability. School records indicated that his teachers identified him on numerous occasions as "[m]entally retarded." Hall had been prosecuted for a different, earlier crime. His lawyer in that matter later testified that the lawyer "[c]ouldn't really understand anything [Hall] said." And, with respect to the murder trial given him in this case, Hall's counsel recalled that Hall could not assist in his own defense because he had "'a mental . . . level much lower than his age,'" at best comparable to the lawyer's 4-year-old daughter. A number of medical clinicians testified that, in their professional opinion, Hall was "significantly retarded," was "mentally retarded," and had levels of understanding "typically [seen] with toddlers."

As explained below in more detail, an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual

disability. Hall's siblings testified that there was something "very wrong" with him as a child. Hall was "slow with speech and . . . slow to learn." He "walked and talked long after his other brothers and sisters," and had "great difficulty forming his words

Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe. Hall was raised—in the words of the sentencing judge—"under the most horrible family circumstances imaginable." Although "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded . . . [t]his retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him." Hall was "[c]onstantly beaten because he was 'slow' or because he made simple mistakes." His mother "would strap [Hall] to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." Hall was beaten "ten or fifteen times a week sometimes." His mother tied him "in a 'croaker' sack, swung it over a fire, and beat him," "buried him in the sand up to his neck to 'strengthen his legs,'" and "held a gun on Hall . . . while she poked [him] with sticks."

The jury, notwithstanding this testimony, voted to sentence Hall to death, and the sentencing court adopted the jury's recommendation. The court found that there was "substantial evidence in the record" to support the finding that "Freddie Lee Hall has been mentally retarded his entire life." Yet the court also "suspect[ed] that the defense experts [were] guilty of some professional overkill," because "[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, braindamaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed." The sentencing court went on to state that, even assuming the expert testimony to be accurate, "the learning disabilities, mental retardation, and other mental difficulties . . . cannot be used to justify, excuse or extenuate the moral culpability of the defendant in this cause." Hall was again sentenced to death. The Florida Supreme Court affirmed, concluding that "Hall's argument that his mental retardation provided a pretense of moral or legal justification" had "no merit." Chief Justice Barkett dissented, arguing that executing a person with intellectual disability violated the State Constitution's prohibition on cruel and unusual punishment.

In 2002, this Court ruled that the Eighth Amendment prohibited the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U. S., at 321. On November 30, 2004, Hall filed a motion claiming that he had intellectual disability and could not be executed. More than five years later, Florida held a hearing to consider Hall's motion. Hall again presented evidence of intellectual disability, including an IQ test score of 71. (Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80, but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80.) In response, Florida argued that Hall could not be found intellectually disabled because Florida law requires that, as a threshold matter, Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability. The Florida Supreme Court rejected Hall's appeal and held that Florida's 70-point threshold was constitutional.

II

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth

Amendment applies those restrictions to the States. *Roper v. Simmons*, 543 U. S. 551, 560 (2005); *Furman v. Georgia*, 408 U. S. 238, 239–240 (1972) (per curiam). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."

The Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U. S. 349, 378 (1910). To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society." The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force. The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. No person may be sentenced to death for a crime committed as a juvenile. And, as relevant for this case, persons with intellectual disability may not be executed.

No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." Rehabilitation, it is evident, is not an applicable rationale for the death penalty. As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.

A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. This is not to say that under current law persons with intellectual disability who "meet the law's requirements for criminal responsibility" may not be tried and punished. Id., at 306. They may not, however, receive the law's most severe sentence.

The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*. To determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*. . . .

III

A

. . . As the Court noted in *Atkins*, the medical community defines intellectual disability

according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period. This last factor, referred to as "age of onset," is not at issue.

The first and second criteria—deficits in intellectual functioning and deficits in adaptive functioning—are central here. In the context of a formal assessment, "[t]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability."

On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*. Florida's statute defines intellectual disability for purposes of an *Atkins* proceeding as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."

. . . On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. That strict IQ test score cutoff of 70 is the issue in this case.

Pursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.

Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise. The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. Each IQ test has a "standard error of measurement," often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.

The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. . . . A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. . . . Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Despite these professional explanations, Florida law used the test score as a fixed number, thus barring further consideration of other evidence bearing on the question of intellectual disability. For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing.

B

A significant majority of States implement the protections of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustment. This calculation provides "objective indicia of society's standards" in the context of the Eighth Amendment. Only the Kentucky and Virginia Legislatures have adopted a fixed score cutoff identical to Florida's. Alabama also may use a strict IQ score cutoff at 70, although not as a result of legislative action. Petitioner does not question the rule in States which use a bright-line cutoff at 75 or greater, and so they are not included alongside Florida in this analysis. In addition to these States, Arizona, Delaware, Kansas, North Carolina, and Washington have statutes which could be interpreted to provide a bright-line cutoff leading to the same result that Florida mandates in its cases. That these state laws might be interpreted to require a bright-line cutoff does not mean that they will be so interpreted, however. . . .

[A]t most nine States mandate a strict IQ score cutoff at 70. Of these, four States (Delaware, Kansas, North Carolina, and Washington) appear not to have considered the issue in their courts. On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years. In those States, of course, a person in Hall's position could not be executed even without a finding of intellectual disability. Thus in 41 States an individual in Hall's position—an individual with an IQ score of 71—would not be deemed automatically eligible for the death penalty. These aggregate numbers are not the only considerations bearing on a determination of consensus. Consistency of the direction of change is also relevant. Since *Atkins*, many States have passed legislation to comply with the constitutional requirement that persons with intellectual disability not be executed. Two of these States, Virginia and Delaware, appear to set a strict cutoff at 70, although as discussed, Delaware's courts have yet to interpret the law. In contrast, at least 11 States have either abolished the death penalty or passed legislation allowing defendants to present additional evidence of intellectual disability when their IQ test score is above 70.

Since *Atkins*, five States have abolished the death penalty through legislation. [Connecticut, Illinois, Maryland, New Jersey and New Mexico.] In addition, the New York Court of Appeals invalidated New York's death penalty under the State Constitution in 2004, and legislation has not been passed to reinstate it. And when it did impose the death penalty, New York did not employ an IQ cutoff in determining intellectual disability.

In addition to these States, at least five others have passed legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70. The U.S. Code likewise does not set a strict IQ cutoff. And no State that previously allowed defendants with an IQ score over 70 to present additional evidence of intellectual disability has modified its law to create a strict cutoff at 70.

In summary, every state legislature to have considered the issue after *Atkins*—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida. . . . The rejection of the strict 70 cutoff in the vast majority of States and the "consistency in the trend" toward recognizing the SEM provide strong evidence of consensus that our society does not regard this strict cutoff as proper or humane.

Atkins itself acknowledges the inherent error in IQ testing. It is true that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation" falls within the protection of the Eighth Amendment. *Bobby v. Bies*, 556 U. S. 825, 831 (2009). In *Atkins*, the Court stated:

> "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in Ford v. Wainwright with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"

As discussed above, the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.

The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70. . . .

Thus *Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. In the words of *Atkins*, those persons who meet the "clinical definitions" of intellectual disability "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Thus, they bear "diminish[ed] . . . personal culpability." The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM.

Respondent argues that the current Florida law was favorably cited by the *Atkins* Court. While *Atkins* did refer to Florida's law in a citation listing States which had outlawed the execution of the intellectually disabled, 536 U. S., at 315, that fleeting mention did not signal the Court's approval of Florida's current understanding of the law. As discussed above, when *Atkins* was decided the Florida Supreme Court had not yet interpreted the law to require a strict IQ cutoff at 70. That new interpretation runs counter to the clinical definition cited throughout *Atkins* and to Florida's own legislative report indicating this kind of cutoff need not be used.

Respondent's argument also conflicts with the logic of *Atkins* and the Eighth Amendment. If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability.

D

The actions of the States and the precedents of this Court "give us essential instruction," but the inquiry must go further. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." That exercise of independent judgment is the Court's judicial duty.

In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional. In addition to the views of the States and the Court's precedent, this determination is informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments. It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.

By failing to take into account the SEM and setting a strict cutoff at 70, Florida "goes against the unanimous professional consensus." Neither Florida nor its amici point to a single medical professional who supports this cutoff. The DSM–5 repudiates it: "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." This statement well captures the Court's independent assessment that an individual with an IQ test score "between 70 and 75 or lower" may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning. The flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning.

Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand

that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.

This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. . . . The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

E

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

In *Atkins v. Virginia*, 536 U. S. 304 (2002), the Court held that the Eighth Amendment prohibits a death sentence for defendants who are intellectually disabled but does not mandate the use of a single method for identifying such defendants. Today, the Court overrules the latter holding based largely on the positions adopted by private professional associations. In taking this step, the Court sharply departs from the framework prescribed in prior Eighth Amendment cases and adopts a uniform national rule that is both conceptually unsound and likely to result in confusion. I therefore respectfully dissent.

I

The Court's approach in this case marks a new and most unwise turn in our Eighth Amendment case law. In *Atkins* and other cases, the Court held that the prohibition of cruel and

unusual punishment embodies the "evolving standards of decency that mark the progress of a maturing society," and the Court explained that "those evolving standards should be informed by objective factors to the maximum possible extent." In addition, the Court "pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."

In these prior cases, when the Court referred to the evolving standards of a maturing "society," the Court meant the standards of American society as a whole. Now, however, the Court strikes down a state law based on the evolving standards of professional societies, most notably the American Psychiatric Association (APA). The Court begins its analysis with the views of those associations, and then, after briefly discussing the enactments of state legislatures, returns to the associations' views in interpreting *Atkins* and in exercising the Court's "independent judgment" on the constitutionality of Florida's law. This approach cannot be reconciled with the framework prescribed by our Eighth Amendment cases.

A

Under this Court's modern Eighth Amendment precedents, whether a punishment is "cruel and unusual" depends on currently prevailing societal norms, and the Court has long held that laws enacted by state legislatures provide the "clearest and most reliable objective evidence of contemporary values." This is so because "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Under this approach, as originally conceived, the Court first asked whether a challenged practice contravened a clear national consensus evidenced by state legislation, and only if such a consensus was found would the Court go on and ask "whether there is reason to disagree with [the States'] judgment."

Invoking this two-step procedure, *Atkins* held that the Eighth Amendment forbids the execution of defendants who are intellectually disabled. Critical to the Court's analysis was the conclusion that "today our society views mentally retarded offenders as categorically less culpable than the average criminal." "This consensus," the Court continued, "unquestionably reflects widespread judgment about . . . the relationship between mental retardation and the penological purposes served by the death penalty."

While *Atkins* identified a consensus against the execution of the intellectually disabled, the Court observed that there was "serious disagreement" among the States with respect to the best method for "determining which offenders are in fact retarded." The Court therefore "le[ft] to the States the task of developing appropriate ways" to identify these defendants. As we noted just five years ago, *Atkins* "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled. *Bobby v. Bies*, 556 U. S. 825, 831 (2009).

B

Consistent with the role that *Atkins* left for the States, Florida follows the procedure now at issue. As we explained in *Atkins*, in order for a defendant to qualify as intellectually disabled, three separate requirements must be met: It must be shown that a defendant has both (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior, and that (3) the onset of both factors occurred before the age of 18. In implementing this framework,

Florida has determined that the first requirement cannot be satisfied if the defendant scores higher than 70 on IQ tests, the long-accepted method of measuring intellectual functioning. The Court today holds that this scheme offends the Eighth Amendment. The Court objects that Florida's approach treats IQ test scores as conclusive and ignores the fact that an IQ score might not reflect "true" IQ because of errors in measurement. The Court then concludes that a State must view a defendant's IQ as a range of potential scores calculated using a statistical concept known as the "standard error of measurement" or SEM. The Court holds that if this range includes an IQ of 70 or below (the accepted level for intellectual disability), the defendant must be permitted to produce other evidence of intellectual disability in addition to IQ scores.

I see no support for this holding in our traditional approach for identifying our society's evolving standards of decency. Under any fair analysis of current state laws, the same absence of a consensus that this Court found in *Atkins* persists today. It is telling that Hall himself does not rely on a consensus among States. He candidly argues instead that "the precise number of States that share Florida's approach is immaterial."

The Court's analysis is more aggressive. According to the Court, a "significant majority of States" reject Florida's "strict 70 cutoff" and instead take "the SEM into account" when deciding whether a defendant meets the first requirement of the intellectual-disability test. On the Court's count, "at most nine States mandate a strict IQ score cutoff at 70"; 22 States allow defendants to present "additional evidence" when an individual's test score is between 70 and 75; and 19 States have abolished the death penalty or have long suspended its operation. From these numbers, the Court concludes that "in 41 States" a defendant "with an IQ score of 71" would "not be deemed automatically eligible for the death penalty." This analysis is deeply flawed.

To begin, in addition to the 8 other States that the Court recognizes as having rules similar to Florida's, 1 more, Idaho, does not appear to require courts to take the SEM into account in rejecting a claim of intellectual disability. And of the remaining 21 States with the death penalty, 9 have either said nothing about the SEM or have not clarified whether they require its use. Accordingly, of the death-penalty states, 10 (including Florida) do not require that the SEM be taken into account, 12 consider the SEM, and 9 have not taken a definitive position on this question. These statistics cannot be regarded as establishing a national consensus against Florida's approach.

Attempting to circumvent these statistics, the Court includes in its count the 19 States that never impose the death penalty, but this maneuver cannot be justified. It is true that the Court has counted non-death-penalty States in some prior Eighth Amendment cases, but those cases concerned the substantive question whether a class of individuals should be categorically ineligible for the death penalty. In *Roper v. Simmons*, 543 U. S. 551 (2005), for example, the Court counted non-death-penalty States as part of the consensus against the imposition of a capital sentence for a crime committed by a minor. The Court reasoned that a State's decision to abolish the death penalty necessarily "demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."

No similar reasoning is possible here. The fact that a State has abolished the death

penalty says nothing about how that State would resolve the evidentiary problem of identifying defendants who are intellectually disabled. As I explain below, a State may reasonably conclude that Florida's approach is fairer than and just as accurate as the approach that the Court now requires, and therefore it cannot be inferred that a non-death-penalty State, if forced to choose between the two approaches, would necessarily select the Court's. For all these reasons, it is quite wrong for the Court to proclaim that "the vast majority of States" have rejected Florida's approach. Not only are the States divided on the question whether the SEM should play a role in determining whether a capital defendant is intellectually disabled, but the States that require consideration of the SEM do not agree on the role that the SEM should play. Those States differ, for example, on the sort of evidence that can be introduced when IQ testing reveals an IQ over 70. Some require further evidence of intellectual deficits, while others permit the defendant to move on to the second prong of the test and submit evidence of deficits in adaptive behavior. The fairest assessment of the current situation is that the States have adopted a multitude of approaches to a very difficult question.

In light of all this, the resolution of this case should be straightforward: Just as there was no methodological consensus among the States at the time of *Atkins*, there is no such consensus today. And in the absence of such a consensus, we have no basis for holding that Florida's method contravenes our society's standards of decency. . . .

Chapter 9 – The Sentencing Phase of Capital Cases

Page 597. Insert after Note 3:

Note on Woodward v. Alabama, 134 S.Ct. 405 (2013)

Justice Sotomayor dissented from the Court's denial of certiorari. The case involved Alabama's capital sentencing scheme which permitted the trial judge to sentence the defendant to death, even though the jury had voted 8-4 to recommend a sentence of life without parole. The judge imposed death "after hearing new evidence [which the prosecution presented regarding the mitigation evidence which had been presented to the jury] and finding, contrary to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances." Justice Sotomayor observed that over the last decade, "Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts. Since Alabama adopted its current statute, its judges have imposed death sentences on 95 defendants contrary to a jury's verdict," of whom 48 remained on Alabama's death row.

Joined by Justice Breyer, Justice Sotomayor acknowledged that "in *Harris v. Alabama*, 513 U.S. 504 (1995), we upheld Alabama's . . . statute," but added that 18 years thereafter, "the time has come for us to reconsider that decision." She cited data showing that in the intervening time, "judicial overrides" had "become increasingly rare" elsewhere, and that "Alabama has become a real outlier." Of the states that permitted judicial overrides when *Harris* was decided, only in Alabama did judges still actually override jury votes against imposing the death penalty. In what Justice Sotomayor described as "a dramatic shift" in the last decade, whereas during the 1980s and 1990s three states overrode an average of 10 jury recommendations of life each year, "[j]udges now override jury verdicts of life in just a single State, and they do so roughly twice a

year." According to Sotomayor, the apparent reason for this unique practice by Alabama judges is that they "appear to have succumbed to electoral pressures" – with some judges even boasting about their overrides during re-election campaigns.

Justice Sotomayor pointed out that in many override cases, the jury's recommendation had been unanimous. She added that Alabama judges often gave no "meaningful explanation" for their overrides, while on other occasions, they gave reasons which seemed inconsistent with the Court's Eighth Amendment jurisprudence.

Chapter 11 – Assistance of Counsel

Page 713. Insert before G. Fatal Consequences of Attorney Error:

Note on Martel v. Clair, 132 S.Ct. 1276 (2012)

A capital prisoner sought to substitute his counsel representing him in the federal habeas review of his conviction and death sentence. In *Martel v. Clair*, 132 S.Ct. 1276 (2012), the Court, in an opinion authored by Justice Kagan, had this to say:

> We first consider the standard that district courts should use to adjudicate federal habeas petitioners' motions to substitute counsel in capital cases. The question arises because the relevant statute, 18 U.S.C. § 3599, contains a notable gap. Section 3599 first guarantees that indigent defendants in federal capital cases will receive the assistance of counsel, from pretrial proceedings through stay applications. See §§ 3599(a)(1), (a)(2), (e). It next grants a corresponding right to people like Clair who seek federal habeas relief from a state death sentence, for all post-conviction proceedings and related activities. And the statute contemplates that both sets of litigants may sometimes substitute counsel; it notes that an attorney appointed under the section may be "replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant." § 3599(e). But here lies the rub: The statute fails to specify how a court should decide such a motion. Section 3599 says not a word about the standard a court should apply when addressing a request for a new lawyer.
>
> The parties offer us two alternative ways to fill this statutory hole. Clair argues, and the Ninth Circuit agreed, that district courts should decide substitution motions brought under § 3599 "in the interests of justice." That standard derives from 18 U.S.C. § 3006A, which governs the appointment and substitution of counsel in federal *non*-capital litigation. By contrast, the State contends that district courts may replace an appointed lawyer under § 3599 only when the defendant has suffered an "actual or constructive denial" of counsel. Brief for Petitioner 33. That denial occurs, the State asserts, in just three situations: when the lawyer lacks the qualifications necessary for appointment under the statute; when he has a "disabling conflict of interest"; or when he has "completely abandoned" the client. *Id.,* at 34. On this matter, we think Clair, not the State, gets it right. . . .
>
> . . . . As its name betrays, the "interests of justice" standard contemplates a peculiarly context-specific inquiry. So we doubt that any attempt to provide a general definition of

the standard would prove helpful. In reviewing substitution motions, the courts of appeals have pointed to several relevant considerations. Those factors may vary a bit from circuit to circuit, but generally include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict). Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion.

Page 645. Insert before Note and Questions on the Right to Effective Assistance of Counsel

Note on Hinton v. Alabama, 134 S.Ct. 1081 (2014) (per curiam)

Without hearing oral argument, and based solely on the certiorari papers, the Supreme Court issued a unanimous per curiam opinion holding that Anthony Ray Hinton's trial counsel rendered ineffective assistance of counsel. The case's central issue was the validity of the prosecution experts' testimony that six bullets from three crime scenes had been fired from Hinton's pistol. Trial counsel hired someone whom he realized "was not a good expert" on this critical issue.

Trial counsel hired this expert because of his erroneous belief – shared by the trial judge – that available funding for experts was capped at $1000. In fact, the statute which provided for reimbursement for expert fees had been amended more than a year before Hinton's arrest. Under the revised statute, counsel could be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." Because trial counsel failed to research the issue, he also failed to correct "the trial judge's mistaken belief that a $1,000 limit applied" and therefore did not follow up on the trial judge's "invitation to file a motion for additional funds."

Instead, the trial attorney used an expert, Andrew Payne, whom "the prosecutor badly discredited" on cross-examination and closing argument – due to his paucity of experience as an expert on this subject, his difficulty in using the state forensic lab's microscope, his having only one eye, and his not having expertise in firearms and toolmark identification – all of which compared negatively to the training and experience of the state's experts.

Thereafter, new counsel representing Hinton in state post-conviction presented "three new experts on toolmark evidence," one of whom had worked in this field for the FBI – and for six years had been "chief of the firearms and toolmark unit at the FBI's headquarters." The other two experts were veteran "firearms and toolmark examiners at the Dallas County Crime Laboratory." All three "testified that they could not conclude that any of the six bullets had been fired from Hinton's gun.

The Court's holding was limited: "It was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000." Putting it another way, the Court added, "The trial attorney's failure to request additional funding because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance."

Although the lawyer realized he required more funding to put on a viable defense, "he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for 'any expenses reasonably incurred.'"

The Court took great pains to emphasize that it was *not* holding that anything unconstitutional would have occurred if all the facts of the case were the same but the law had been different – that is, if Alabama still had the $1,000 cap on expert expenses. The Court said, "We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, although qualified, was not qualified enough." Instead, "[t]he only inadequate assistance of counsel here was the inexcusable mistake of law – the unreasonable failure to understand the resources that the state law made available to him – that cause counsel to employ an expert that *he himself* deemed inadequate."

The Court remanded the case, for a determination of whether Hinton (having met the deficient performance prong of *Strickland*) could also meet the prejudice prong. Noting that the Alabama Court of Appeals and the prosecution had asserted that there was insufficient prejudice because Mr. Payne had "said all that Hinton could have hoped for from a toolmark expert, the Court said:

> It is true that Payne's testimony would have done Hinton a lot of good *if the jury had believed it*. But the jury did not believe Payne. And if there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial.

The Court also noted, as relevant to the determination of prejudice on remand, that experts presented by prosecutors "can sometimes make mistakes" and that "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."

Chapter 13 – Introduction to Federal Habeas Corpus Review

Page 775. Insert at the end of Note 5:

The statute of limitations provision in AEDPA continues to be an area of on-going litigation and tension. See *Wood v. Milyard*, 132 S.Ct. 1826 (2012); *Gonzalez v. Thaler*, 132 S.Ct. 641 (2012). Consider the following opinion in *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013).

McQUIGGIN v. PERKINS
___ U.S. ___, 133 S.Ct. 1924 (2013)

Justice GINSBURG delivered the opinion of the Court.

This case concerns the "actual innocence" gateway to federal habeas review applied in *Schlup v. Delo*, 513 U.S. 298 (1995), and further explained in *House v. Bell*, 547 U.S. 518 (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to

overcome a procedural bar to consideration of the merits of their constitutional claims. Here, the question arises in the context of 28 U.S.C. § 2244(d)(1), the statute of limitations on federal habeas petitions prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the petitioner does not file her federal habeas petition, at the latest, within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime?

We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*; see *House* (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence.

In the instant case, the Sixth Circuit acknowledged that habeas petitioner Perkins (respondent here) had filed his petition after the statute of limitations ran out, and had "failed to diligently pursue his rights." Nevertheless, the Court of Appeals reversed the decision of the District Court denying Perkins' petition, and held that Perkins' actual-innocence claim allowed him to pursue his habeas petition as if it had been filed on time. The appeals court apparently considered a petitioner's delay irrelevant to appraisal of an actual-innocence claim.

We vacate the Court of Appeals' judgment and remand the case. Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

I

[On March 4, 1993, Rodney Henderson was stabbed to death after leaving a party in the company of Floyd Perkins and Damarr Jones. Six months later, Perkins was tried and convicted of the first degree murder of Henderson and was sentenced to life without parole. Evidence against Perkins included Jones' testimony that he witnessed Perkins commit the murder, the testimony of a friend of both Perkins and Henderson that Perkins had said he would kill Henderson and had later admitted committing the murder, and the testimony of another friend of both that Perkins had admitted the murder to him. Perkins testified that although he was not present when Henderson was killed he saw Jones later that evening with blood on his pants, shoes, and plaid coat. Perkins' conviction was affirmed on appeal in 1997.]

B

Perkins filed his federal habeas corpus petition on June 13, 2008, more than 11 years after his conviction became final. He alleged, inter alia, ineffective assistance on the part of his trial attorney, depriving him of his Sixth Amendment right to competent counsel. To overcome

AEDPA's time limitations, Perkins asserted newly discovered evidence of actual innocence. He relied on three affidavits, each pointing to Jones, not Perkins, as Henderson's murderer.

The first affidavit, dated January 30, 1997, was submitted by Perkins' sister, Ronda Hudson. Hudson stated that she had heard from a third party, Louis Ford, that Jones bragged about stabbing Henderson and had taken his clothes to the cleaners after the murder. The second affidavit, dated March 16, 1999, was subscribed to by Demond Louis. . . . Louis stated that, on the night of the murder, Jones confessed to him that he had just killed Henderson. Louis also described the clothes Jones wore that night, bloodstained orange shoes and orange pants, and a colorful shirt. The next day, Louis added, he accompanied Jones, first to a dumpster where Jones disposed of the bloodstained shoes, and then to the cleaners. Finally, Perkins presented the July 16, 2002 affidavit of Linda Fleming, an employee at Pro-Clean Cleaners in 1993. She stated that, on or about March 4, 1993, a man matching Jones's description entered the shop and asked her whether bloodstains could be removed from the pants and a shirt he brought in. The pants were orange, she recalled, and heavily stained with blood, as was the multicolored shirt left for cleaning along with the pants.

[The District Court found the affidavits insufficient to warrant relief denied the petition as untimely. "Equitable tolling" did not apply because the affidavits did not meet the strict standard required to establish "actual innocence" and, alternatively, because Perkins had not shown diligence in discovering and presenting his new evidence. The Sixth Circuit reversed. The Supreme Court granted certiorari "to resolve a Circuit conflict on whether AEDPA's statute of limitations can be overcome by a showing of actual innocence."]

II

A

In *Holland v. Florida*, 560 U.S. 631 (2010), this Court addressed the circumstances in hich a federal habeas petitioner could invoke the doctrine of "equitable tolling." Holland held that "a [habeas] 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." As the courts below comprehended, Perkins does not qualify for equitable tolling. In possession of all three affidavits by July 2002, he waited nearly six years to seek federal postconviction relief. "Such a delay falls far short of demonstrating the . . . diligence" required to entitle a petitioner to equitable tolling. Perkins, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable exception to § 2244(d)(1), not an extension of the time statutorily prescribed.

Decisions of this Court support Perkins' view of the significance of a convincing actual-innocence claim. We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993). We have recognized, however, that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief.

"This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."

We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, see *McCleskey v. Zant*, 499 U.S. 467 (1991), failure to develop facts in state court, see *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and failure to observe state procedural rules, including filing deadlines, see *Coleman v. Thompson*, 501 U.S. 722 (1991).

The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In *Calderon v. Thompson*, 523 U.S. 538 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. In *Bousley v. United States*, 523 U.S. 614 (1998), we held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in *House v. Bell*, 547 U.S. 518 (2006), we reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error.

These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup* at 324. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.

As just noted, we have held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines. *Coleman* at 750. A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under state timeliness rules. The State's reading of AEDPA's time prescription would thus accord greater force to a federal deadline than to a similarly designed state deadline. It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States.

B

The State ties to § 2244(d)'s text its insistence that AEDPA's statute of limitations precludes courts from considering late-filed actual-innocence gateway claims. "Section 2244(d)(1)(D)," the State contends, "forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim." That is so, the State maintains, because AEDPA prescribes a comprehensive system for determining when its one-year limitations period begins to run. "Included within that system," the State observes, "is a specific trigger for the precise circumstance presented here: a constitutional claim based on new evidence." Section 2244(d)(1)(D) runs the clock from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." In light of that provision, the State urges, "there is no need for the courts to act in equity to provide additional time for persons who allege actual innocence as a gateway to their claims of constitutional

error." Perkins' request for an equitable exception to the statute of limitations, the State charges, would "rende[r] superfluous this carefully scripted scheme." The State's argument in this regard bears blinders. AEDPA's time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Schlup* at 329. Section 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by § 2244(d)(1)(D)'s triggering provision. That provision, in short, will hardly be rendered superfluous by recognition of the miscarriage of justice exception.

The State further relies on provisions of AEDPA other than § 2244(d)(1)(D), namely, §§ 2244(b)(2)(B) and 2254(e)(2), to urge that Congress knew how to incorporate the miscarriage of justice exception when it was so minded. Section 2244(b)(2)(B), the State observes, provides that a petitioner whose first federal habeas petition has already been adjudicated when new evidence comes to light may file a second-or-successive petition when, and only when, the facts underlying the new claim would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). And § 2254(e)(2), which generally bars evidentiary hearings in federal habeas proceedings initiated by state prisoners, includes an exception for prisoners who present new evidence of their innocence. See §§ 2254(e)(2)(A)(ii), (B) (permitting evidentiary hearings in federal court if "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

But Congress did not simply incorporate the miscarriage of justice exception into §§ 2244(b)(2)(B) and 2254(e)(2). Rather, Congress constrained the application of the exception. Prior to AEDPA's enactment, a court could grant relief on a second-or-successive petition, then known as an "abusive" petition, if the petitioner could show that "a fundamental miscarriage of justice would result from a failure to entertain the claim." Section 2244(b)(2)(B) limits the exception to cases in which "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the petitioner can establish that no reasonable factfinder "would have found [her] guilty of the underlying offense" by "clear and convincing evidence." Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ("clear and convincing evidence") and to satisfy a diligence requirement that did not exist prior to AEDPA's passage.

Likewise, petitioners asserting actual innocence pre-AEDPA could obtain evidentiary earings in federal court even if they failed to develop facts in state court. Under AEDPA, a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence. §§ 2254(e)(2)(A)(ii), (B).

Sections 2244(b)(2)(B) and 2254(e)(2) thus reflect Congress' will to modify the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court. These provisions do not demonstrate Congress' intent to preclude courts from applying the exception, unmodified, to "the type of petition at issue here"—

an untimely first federal habeas petition alleging a gateway actual-innocence claim. The more rational inference to draw from Congress' incorporation of a modified version of the miscarriage of justice exception in §§ 2244(b)(2)(B) and 2254(e)(2) is simply this: In a case not governed by those provisions, i.e., a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.

Our reading of the statute is supported by the Court's opinion in *Holland*. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," Holland reminded, and affirmed that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." (internal quotation marks omitted). The text of § 2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition. As we observed in *Holland*,

> "AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law. . . . When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights."

III

Having rejected the State's argument that § 2244(d)(1)(D) precludes a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence, we turn to the State's further objection to the Sixth Circuit's opinion. Even if a habeas petitioner asserting a credible claim of actual innocence may overcome AEDPA's statute of limitations, the State argues, the Court of Appeals erred in finding that no threshold diligence requirement at all applies to Perkins' petition.

While formally distinct from its argument that § 2244(d)(1)(D)'s text forecloses a late-filed claim alleging actual innocence, the State's contention makes scant sense. Section 2244(d)(1)(D) requires a habeas petitioner to file a claim within one year of the time in which new evidence "could have been discovered through the exercise of due diligence." It would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar § 2244(d)(1)(D) erects, yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition.

While we reject the State's argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold, we hold that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner's proof of innocence. To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup.* Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Perkins so acknowledges. As we stated in *Schlup*, "[a] court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . evidence [of actual innocence]."

Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence. The State fears that a prisoner might "lie in wait and use stale evidence to collaterally attack his conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence." The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim. Moreover, the deceased witness' prior testimony, which would have been subject to cross-examination, could be introduced in the event of a new trial. Focusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception-i.e., ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*.

[The Court remanded the case to the Sixth Circuit to review the District Court's holding that Perkins had made an insufficient showing to meet the *Schlup* standard, at the same time observing that it saw no reason to overturn the District Court's decision.]

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, and with whom Justice ALITO joins as to Parts I, II, and III, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a "1-year period of limitation shall apply" to a state prisoner's application for a writ of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1). The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what it concedes is an "exception" to this clear statutory command?

That question is unanswered because there is no answer. This Court has no such power, and not one of the cases cited by the opinion says otherwise. The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case.

I

A

"Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a procedural bar. Never before have we applied the exception to circumvent a categorical statutory bar to relief. We have not done so because we have no power to do so. Where Congress has erected a constitutionally valid barrier to habeas relief, a court cannot decline to give it effect.

Before AEDPA, the Supreme Court had developed an array of doctrines, see, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (procedural default); *McCleskey v. Zant*, 499 U.S. 467 (1991) (abuse of the writ), to limit the habeas practice that it had radically expanded in the early or mid-20th century to include review of the merits of conviction and not merely jurisdiction of the convicting court, see *Stone v. Powell*, 428 U.S. 465 (1976); *Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., concurring in result). For example, the doctrine of procedural default holds that a state prisoner's default of his federal claims "in state court pursuant to an independent and

adequate state procedural rule" bars federal habeas review of those claims. *Coleman v. Thompson*, 501 U.S. 722 (1991). That doctrine is not a statutory or jurisdictional command; rather, it is a "prudential" rule "grounded in considerations of comity and concerns for the orderly administration of criminal justice." *Dretke v. Haley*, 541 U.S. 386 (2004).

And what courts have created, courts can modify. One judge-made exception to procedural default allows a petitioner to proceed where he can demonstrate "cause" for the default and "prejudice." As relevant here, we have also expressed a willingness to excuse a petitioner's default, even absent a showing of cause, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Ca*rrier, 477 U.S. 478 (1986); see *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006).

There is nothing inherently inappropriate (as opposed to merely unwise) about judge-created exceptions to judge-made barriers to relief. Procedural default, for example, raises "no question of a federal district court's power to entertain an application for a writ of habeas corpus." Where a petitioner would, but for a judge-made doctrine like procedural default, have a good habeas claim, it offends no command of Congress for a federal court to consider the petition. But that free-and-easy approach has no place where a statutory bar to habeas relief is at issue. "[T]he power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75 (1807) (Marshall, C.J.), and "judgments about the proper scope of the writ are normally for Congress to make," *Felker v. Turpin*, 518 U.S. 651 (1996). One would have thought it too obvious to mention that this Court is duty bound to enforce AEDPA, not amend it.

III

Three years ago, in *Holland v. Florida*, 560 U.S. 631 (2010), we held that AEDPA's statute of limitations is subject to equitable tolling. That holding offers no support for importing a novel actual-innocence exception. Equitable tolling—extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute—seeks to vindicate what might be considered the genuine intent of the statute. By contrast, suspending the statute because of a separate policy that the court believes should trump it ("actual innocence") is a blatant overruling. Moreover, the doctrine of equitable tolling is centuries old. . . .

American courts' adoption of the English equitable-tolling practice need not be regarded as a violation of the separation of powers, but can be seen as a reasonable assumption of genuine legislative intent. Colonial legislatures would have assumed that equitable tolling would attend any statute of limitations they adopted. In any case, equitable tolling surely represents such a reasonable assumption today. "It is hornbook law that limitations periods are customarily ubject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43 (2002). Congress, being well aware of the longstanding background presumption of equitable tolling, "may provide otherwise if it wishes to do so." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The majority and dissenting opinions in *Holland* disputed whether that presumption had been overcome, but all agreed that the presumption existed and was a legitimate tool for construing statutes of limitations.

Here, by contrast, the Court has ambushed Congress with an utterly unprecedented (and thus unforeseeable) maneuver. Congressional silence, "while permitting an inference that Congress intended to apply ordinary background" principles, "cannot show that it intended to apply an unusual modification of those rules." *Meyer v. Holley*, 537 U.S. 280 (2003). Because there is no plausible basis for inferring that Congress intended or could have anticipated this exception, its adoption here amounts to a pure judicial override of the statute Congress enacted. "It is wrong for us to reshape" AEDPA "on the very lathe of judge-made habeas jurisprudence it was designed to repair." *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (SCALIA, J., dissenting).

. . . "It would be marvellously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault." *Bousley v. United States*, 523 U.S. 614 (1998) (SCALIA, J., dissenting). I suspect it is this vision of perfect justice through abundant procedure that impels the Court today. Of course, "we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could." Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim. The Court notes "that tenable actual-innocence gateway pleas are rare." That discouraging reality, intended as reassurance, is in truth "the condemnation of the procedure which has encouraged frivolous cases." *Brown* at 537 (Jackson, J., concurring in result).

It has now been 60 years since *Brown v. Allen*, in which we struck the Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. "[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones." *Id*. at 536.

The "inundation" that Justice Jackson lamented in 1953 "consisted of 541" federal habeas petitions filed by state prisoners. By 1969, that number had grown to 7,359. In the year ending on September 30, 2012, 15,929 such petitions were filed. Today's decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.

I respectfully dissent.

Page 789. Insert after Note 5:

6. In *White v. Woodall*, 134 S.Ct. 1697 (2014), in an opinion authored by Justice Scalia, the Court described the standard of review applicable in habeas proceedings:

II
A

Section 2254(d) of Title 28 provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "This standard," we recently reminded the Sixth Circuit, "is 'difficult to meet.'" *Metrish v. Lancaster,* 569 U.S. ___, 133 S.Ct. 1781, 1786 (2013). "'[C]learly established Federal law'" for purposes of § 2254(d)(1) includes only "'the holdings, as opposed to the dicta, of this Court's decisions.'" And an "unreasonable application of" those holdings must be "'objectively unreasonable,'" not merely wrong; even "clear error" will not suffice. *Lockyer v. Andrade,* 538 U.S. 63, 75–76 (2003). Rather, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. ___, 131 S.Ct. 770, 786–787 (2011). . . .

B

. . .[R]espondent leans heavily on the notion that a state-court "'determination may be set aside . . . if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.'" Brief for Respondent 21 (quoting *Ramdass v. Angelone,* 530 U.S. 156, 166 (2000) (plurality opinion)). The Court of Appeals and District Court relied on the same proposition in sustaining respondent's Fifth Amendment claim. See 685 F.3d, at 579; App. to Pet. for Cert. 37a–39a, 2009 WL 464939.

The unreasonable-refusal-to-extend concept originated in a Fourth Circuit opinion we discussed at length in *Williams,* our first in-depth analysis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We described the Fourth Circuit's interpretation of § 2254(d)(1)'s "unreasonable application" clause as "generally correct," 529 U.S., at 407, and approved its conclusion that "a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." But we took no position on the Fourth Circuit's further conclusion that a state court commits AEDPA error if it "unreasonably refuse[s] to extend a legal principle to a new context where it should apply." We chose not "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)" because the Fourth Circuit's proposed rule for resolving them presented several "problems of precision."

Two months later, a plurality paraphrased and applied the unreasonable-refusal-to-extend concept in *Ramdass*. It did not, however, grant the habeas petitioner relief on that basis, finding that there was no unreasonable refusal to extend. Moreover, Justice O'Connor,

> whose vote was necessary to form a majority, cited *Williams* and made no mention of the unreasonable-refusal-to-extend concept in her separate opinion concurring in the judgment. See 530 U.S., at 178–181. *Ramdass* therefore did not alter the interpretation of § 2254(d)(1) set forth in *Williams*. Aside from one opinion *criticizing* the unreasonable-refusal-to-extend doctrine, see *Yarborough v. Alvarado,* 541 U.S. 652, 666 (2004), we have not revisited the issue since *Williams* and *Ramdass*. During that same 14–year stretch, however, we have repeatedly restated our "hold[ing]" in *Williams, supra,* at 409, that a state-court decision is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case
>
> Thus, this Court has never adopted the unreasonable-refusal-to-extend rule on which respondent relies. It has not been so much as endorsed in a majority opinion, let alone relied on as a basis for granting habeas relief. To the extent the unreasonable-refusal-to-extend rule differs from the one embraced in *Williams* and reiterated many times since, we reject it. Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L.Rev. 888, 949 (1998). Thus, "if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." *Yarborough,* 541 U.S., at 666. AEDPA's carefully constructed framework "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."
>
> This is not to say that § 2254(d)(1) requires an "'identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman,* 551 U.S. 930, 953 (2007). To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case. *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009). "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough, supra,* at 666. The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fairminded disagreement" on the question, *Harrington,* 562 U.S., at ——, 131 S.Ct., at 787.

Justice Breyer issued a dissent joined by Justices Ginsburg and Sotomayor.

7. In *Burt v. Titlow*, 134 S.Ct. 10 (2013), the Court found:

> When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a "'doubly deferential'" standard of review that gives both the state court and the defense attorney the benefit of the doubt. *Cullen v. Pinholster,* 563 U.S. ——, ——, 131 S.Ct. 1388, 1403 (2011). In this case, the Sixth Circuit failed to apply that doubly deferential standard by refusing to credit a

state court's reasonable factual finding and by assuming that counsel was ineffective where the record was silent. Because the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and *Strickland v. Washington,* 466 U.S. 668 (1984), do not permit federal judges to so casually second-guess the decisions of their state-court colleagues or defense attorneys, the Sixth Circuit's decision must be reversed.

8. In *Johnson v. Williams*, 133 S.Ct. 1088 (2013), the Court expounded on what constitutes a claim that has been "adjudicated on the merits in State court."

II

A

As noted above, AEDPA sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). In *Richter,* 562 U.S., at ——, 131 S.Ct., at 785, we held that § 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.' " Rather, we explained, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."

Our reasoning in *Richter* points clearly to the answer to the question presented in the case at hand. Although *Richter* itself concerned a state-court order that did not address *any* of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims. There would be a reason for drawing a distinction between these two situations if opinions issued by state appellate courts always separately addressed every single claim that is mentioned in a defendant's papers. If there were such a uniform practice, then federal habeas courts could assume that any unaddressed federal claim was simply overlooked.

No such assumption is warranted, however, because it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference. On the contrary, there are several situations in which state courts frequently take a different course.

First, there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right. In California, for example, the state constitutional right to be present at trial "'is generally coextensive with'" the protections of the Federal Constitution. *People v. Butler,* 209 P.3d 596, 606 (2009); see also, *e.g., Commonwealth v. Prunty,* 462 Mass. 295, 305, n. 14, 968 N.E.2d 361, 371, n. 14 (2012) (standard for racial discrimination in juror selection "'is the same under the Federal Constitution and the [Massachusetts] Declaration of Rights'"); *State v. Krause,* 817 N.W.2d 136, 144 (Minn.2012) ("'The due process protection provided under the Minnesota Constitution is identical to the due proces[s] guaranteed under the Constitution of the United States'"); *State v. Engelhardt,* 119 P.3d 1148, 1158 (2005) (observing that a

Kansas statute is "analytically and functionally identical to the requirements under the Confrontation Clause and the Due Process Clause of the federal Constitution"). In this situation, a state appellate court may regard its discussion of the state precedent as sufficient to cover a claim based on the related federal right.

Second, a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim. Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development. State appellate courts are entitled to follow the same practice.

Third, there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion. Indeed, the California Court of Appeal has expressly stated that it has no obligation to address claims that lack arguable merit. See *People v. Rojas,* 118 Cal.App.3d 278, 290, 174 Cal.Rptr. 91, 93 (1981). That court has explained: "In an era in which there is concern that the quality of justice is being diminished by appellate backlog with its attendant delay, which in turn contributes to a lack of finality of judgment, it behooves us as an appellate court to 'get to the heart' of cases presented and dispose of them expeditiously." See also *People v. Burke,* 18 Cal.App. 72, 79, 122 P. 435, 439 (1912) ("The author of an opinion . . . must follow his own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and *as to the questions which are worthy of notice at all* " (emphasis added)). While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, see R. Aldisert, Opinion Writing 95–96 (3d ed. 2012), federal courts have no authority to impose mandatory opinion-writing standards on state courts, see *Coleman v. Thompson,* 501 U.S. 722, 739, (1991) ("[W]e have no power to tell state courts how they must write their opinions"). The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind.

In sum, because it is by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked, we see no sound reason for failing to apply the *Richter* presumption in cases like the one now before us. When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.

Chapter 14 – State Barriers to Federal Habeas Review

Page 817. Add after Note 2.

3. In *Wood v. Milyard*, 132 S.Ct. 1826 (2012), the Supreme Court, per Justice Ginsburg, held that a federal court of appeals has the authority, but not the duty, to address the timeliness of a state prisoner's federal habeas petition on the court's own initiative. Under the facts presented in *Milyard*, the Court concluded that the Court of Appeals abused its discretion in considering sua sponte the timeliness of the state prisoner's federal habeas petition, because the State had deliberately and intelligently forfeited its limitations defense.

Page 846. Insert before Maple v. Thomas:.

TREVINO v. THALER
___ U.S. ___, 133 S.Ct. 1911 (2013)

Justice BREYER delivered the opinion of the Court.

In *Martinez v. Ryan*, 566 U.S. 1 (2012), we considered the right of a state prisoner to raise, in a federal habeas corpus proceeding, a claim of ineffective assistance of trial counsel. In that case an Arizona procedural rule required a defendant convicted at trial to raise a claim of ineffective assistance of trial counsel during his first state collateral review proceeding—or lose the claim. The defendant in *Martinez* did not comply with the state procedural rule. But he argued that the federal habeas court should excuse his state procedural failing, on the ground that he had good "cause" for not raising the claim at the right time, namely that, not only had he lacked effective counsel during trial, but also he lacked effective counsel during his first state collateral review proceeding.

We held that lack of counsel on collateral review might excuse defendant's state law procedural default. We wrote:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."

At the same time we qualified our holding. We said that the holding applied where state procedural law said that "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding."

In this case Texas state law does not say "must." It does not on its face require a defendant initially to raise an ineffective-assistance-of-trial-counsel claim in a state collateral review proceeding. Rather, that law appears at first glance to permit (but not require) the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal. The structure and design of the Texas system in actual operation, however, make it "virtually impossible" for an ineffective assistance claim to be presented on direct review. We must now decide whether the *Martinez* exception applies in this procedural regime. We conclude that it does.

I

[Carlos Trevino was convicted of capital murder and sentenced to death. During the penalty phase his lawyer presented a single mitigation witness, Trevino's aunt. She testified "that Trevino had a difficult upbringing, that his mother had an alcohol problem, that his family was on welfare, and that he had dropped out of high school." Eight days after sentencing, a new lawyer was appointed to represent Trevino on appeal. He filed an appeal when the trial transcript became available, but did not include a claim that Trevino's trial counsel had been ineffective at the penalty phase. The Texas Court of Criminal Appeals rejected Trevino's appellate claims. While the appeal was pending, the trial court appointed another lawyer to seek state collateral relief. This lawyer sought relief on multiple claims, including ineffectiveness of counsel at the penalty phase. However, the claims did not include a claim that Trevino's trial

attorney had been ineffective for failure to investigate and present mitigating evidence. The trial court denied relief, and the Texas Court of Criminal Appeals affirmed.]

[Trevino then sought habeas corpus in the federal district court, and the court appointed new counsel (his fourth attorney) to represent him. This lawyer, for the first time, claimed that Trevino's trial counsel was ineffective for failing to investigate and present mitigation evidence. To support this claim, the lawyer presented an abundance wealth of new information about Trevino, including "that throughout his life Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, that as a child Trevino had suffered numerous head injuries without receiving adequate medical attention, that Trevino's mother had abused him physically and emotionally, that from an early age Trevino was exposed to, and abused, alcohol and drugs, that Trevino had attended school irregularly and performed poorly, and that Trevino's cognitive abilities were impaired." The federal court stayed proceedings to allow Trevino to raise this claim in state court. Ultimately, the state court held that, because Trevino had not raised this claim during his initial postconviction proceedings, he had procedurally defaulted the claim. The district court then denied the claim, and the Fifth Circuit affirmed.]

II

A

We begin with *Martinez*. We there recognized the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law. In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.

We similarly recognized the importance of federal habeas corpus principles designed to prevent federal courts from interfering with a State's application of its own firmly established, consistently followed, constitutionally proper procedural rules. Those principles have long made clear that a conviction that rests upon a defendant's state law "procedural default" (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires), normally rests upon "an independent and adequate state ground." *Coleman v. Thompson*, 501 U.S. 722 (1991). And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim.

At the same time, we pointed out that "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." And we turned to the issue directly before the Court: whether Martinez had shown "cause" to excuse his state procedural failing.

Martinez argued that his lawyer should have raised, but did not raise, his claim of ineffective assistance of trial counsel during state collateral review proceedings. He added that this failure, itself amounting to ineffective assistance, was the "cause" of, and ought to excuse, his procedural default. But this Court had previously held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause,'" primarily because a "principal" such as the prisoner, "bears the risk of negligent conduct on the part of his agent," the attorney.

Maples v. Thomas, 565 U.S. ___, 132 S.Ct. 912 (2012) (quoting *Coleman*, *supra*; emphasis added). Martinez, in effect, argued for an exception to *Coleman*'s broad statement of the law.

We ultimately held that a "narrow exception" should "modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." We did so for three reasons. First, the "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."

Second, ineffective assistance of counsel on direct appellate review could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim."

Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings, could (were *Coleman* read broadly) deprive a defendant of any review of that claim at all.

We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of here being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

B

Here state law differs from that in *Martinez* in respect to the fourth requirement. Unlike Arizona, Texas does not expressly require the defendant to raise a claim of ineffective assistance of trial counsel in an initial collateral review proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal. Does this difference matter?

1

Two characteristics of the relevant Texas procedures lead us to conclude that it should not make a difference in respect to the application of *Martinez*. First, Texas procedure makes it "virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim" on direct review. *Robinson v. State*, 16 S.W.3d 808 (Tex.Crim.App. 2000). As the Texas Court of Criminal Appeals itself has pointed out, "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to

"contai[n] the information necessary to substantiate" the claim. *Ex parte Torre*s, 943 S.W.2d 469 (1997) (en banc).

As the Court of Criminal Appeals has also noted, a convicted defendant may make a motion in the trial court for a new trial in order to develop the record on appeal. And, in principle, the trial court could, in connection with that motion, allow the defendant some additional time to develop a further record. But that motion-for-new-trial "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Torres*, *supra*. Thus, as the Court of Criminal Appeals has concluded, in Texas "a writ of habeas corpus" issued in state collateral proceedings ordinarily "is essential to gathering the facts necessary to . . . evaluate . . . [ineffective-assistance-of-trial-counsel] claims." *Torres*, supra. See *Robinson*, *supra* (noting that there is "not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions" and that "[t]he time requirements for filing and presenting a motion for new trial would have made it virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court").

This opinion considers whether, as a systematic matter, Texas affords meaningful review of a claim of ineffective assistance of trial counsel. The present capital case illustrates why it does not. The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She hen may have had an additional 45 days to provide support for the motion but *without the help of a transcript* (which did not become available until much later—seven months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances.

Second, were *Martinez* not to apply, the Texas procedural system would create significant unfairness. That is because Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review. As noted, they have explained why direct review proceedings are likely inadequate. They have held that failure to raise the claim on direct review does not bar the defendant from raising the claim in collateral proceedings. See, *e.g*., *Robinson*, supra. They have held that the defendant's decision to raise the claim on direct review does not bar the defendant from also raising the claim in collateral proceedings. See, *e.g*., *Lopez v. State*, 343 S.W.3d 137 (Tex.Crim.App. 2011). They have suggested that appellate counsel's failure to raise the claim on direct review does not constitute "ineffective assistance of counsel." See *Sprouse v. State*, 2007 WL 283152 (Tex.Crim.App. 2007) (unpublished). And Texas' highest criminal court has explicitly stated that "[a]s a general rule" the defendant "should not raise an issue of ineffective assistance of counsel on direct appeal," but rather in collateral review proceedings. *Mata v. State*, 226 S.W.3d 425 (2007).

The criminal bar, not surprisingly, has taken this strong judicial advice seriously. See Guidelines and Standards for Texas Capital Counsel, 69 Tex. B.J. 966 Guideline 12.2(B)(1)(d) (2006) ("[S]tate habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel"). Texas now can point to only a comparatively small number of cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal and then received a hearing on his ineffective assistance of trial counsel claim on direct appeal. And, of those, precisely one case involves trial counsel's

investigative failures of the kind at issue here. How could federal law deny defendants the benefit of *Martinez* solely because of the existence of a theoretically available procedural alternative, namely direct appellate review, that Texas procedures render so difficult, and in the typical case all but impossible, to use successfully, and which Texas courts so strongly discourage defendants from using?

Respondent argues that Texas courts enforce the relevant time limits more flexibly than we have suggested. Sometimes, for example, an appellate court can abate an appeal and remand the case for further record development in the trial court. But the procedural possibilities to which Texas now points seem special, limited in their application, and, as far as we can tell, rarely used. We do not believe that this, or other, special, rarely used procedural possibilities can overcome the Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim.

Respondent further argues that there is no equitable problem to be solved in Texas because if counsel fails to bring a substantial claim of ineffective assistance of trial counsel on direct appeal, the ineffectiveness of appellate counsel may constitute cause to excuse the procedural default. But respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective. And that lack of authority is not surprising given the fact that the Texas Court of Criminal Appeals has directed defendants to bring such claims on collateral review.

2

For the reasons just stated, we believe that the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course. And, that being so, we can find no significant difference between this case and *Martinez*. The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for the application of that exception here.

The right involved—adequate assistance of counsel at trial—is similarly and critically important. In both instances practical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review. In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim.

Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference. In saying this, we do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide. And, as

we have said, there are often good reasons for hearing the claim initially during collateral proceedings.

III

For these reasons, we conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."

Given this holding, Texas submits that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim. We leave that matter to be determined on remand. Likewise, we do not decide here whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective.