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The evolving right to counsel on state post-conviction review

Fifty years after *Gideon v. Wainwright* announced that lawyers at state criminal trials are constitutional necessities and not luxuries, the metes and bounds of the right to counsel are still being hashed out in the courts.

In particular, the law is evolving on the right to counsel during state post-conviction review, with the U.S. Supreme Court recently acknowledging, in *Martinez v. Ryan*, that sometimes lawyers are necessary (albeit not constitutionally compelled) during state collateral proceedings. 132 S.Ct. 1309, 1320 (2012).

But the importance of *Martinez* has not yet been recognized by either the Illinois courts or its legislature. Of particular concern is a decision this summer from the Illinois Appellate Court, which refused to excuse a procedural default where the petitioner — who had been convicted of murder — failed to raise an “ineffective assistance of trial counsel” claim in his initial post-conviction proceeding.

The petitioner argued that the cause of his procedural default was the state’s failure to provide him a lawyer to help with his first post-conviction application. The court should, he urged, therefore listen to his ineffective assistance claim now, in a second post-conviction proceeding. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 1 (2013).

The appellate court didn’t buy the argument, refusing to excuse the default or hear the merits of the underlying ineffective assistance claim.

To be sure, *Sutherland* is consistent with the Illinois Post-Conviction Hearing Act and state decisional law on procedural defaults. Under the act, a petitioner gets one chance to raise his claims in post-conviction proceedings, implicitly waiving any claim that he fails to raise in his first go-round. If he wants to raise a new claim in a second petition, he must show “cause” for failing to raise it the first time — that is,

“an objective factor that impeded his ... ability to raise a specific claim.” 725 ILCS 5/122-1(f).

Because a petitioner isn’t entitled to a lawyer on post-conviction review in Illinois, he simply can’t argue that the lack of a lawyer was sufficient cause to excuse a default.

That’s all well and good, but the *Sutherland* holding is in deep tension with emerging U.S. Supreme Court case law emphasizing the importance of providing lawyers to petitioners to help them raise “ineffective assistance” claims in post-conviction proceedings.

In *Martinez v. Ryan*, the court dealt with a federal habeas petitioner who had procedurally defaulted his ineffective assistance claim by failing to raise it in his first state post-conviction proceeding. Because the state required that ineffective assistance of counsel be raised on collateral review instead of direct review (where there’s an undisputed right to counsel), the failure of the state to provide a lawyer was sufficient “cause” to excuse the procedural default. 132 S. Ct. at 1320.

The court accordingly authorized the federal habeas court to reach the merits of the petitioner’s ineffective assistance claim *de novo*.

Then, last term, the court extended the rule of *Martinez* to situations where the state doesn’t absolutely require that ineffective assistance claims be raised in collateral proceedings (where a petitioner has no right to a lawyer at state expense), at least when “as a matter of procedural design and systemic operation” such claims can only realistically be raised on post-conviction review. *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013). Illinois’ procedures arguably fall within the category described in *Trevino*.

To be clear, neither *Martinez* nor *Trevino* modified long-standing precedent that there is no constitutional right to counsel in state post-conviction proceedings. And the court explicitly noted that because its new rule was “equitable” in nature, states like Illi-



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nois remain free not to provide counsel to state collateral petitioners who wish to raise ineffective assistance claims. *Martinez*, 132 S.Ct. at 1319–20.

But the continued refusal of Illinois to supply counsel to post-conviction petitioners is nonetheless unwise and should be reconsidered by both the Illinois Supreme Court and the General Assembly. First, Illinois should respect the sound judgment of the U.S. Supreme Court that there’s something profoundly unfair about forcing defendants with claims of constitutional trial error — as routinely happens in Illinois — to litigate *pro se*.

Second, even though the state

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has no constitutional obligation to provide a lawyer to post-conviction petitioners, after *Martinez* and *Trevino* the failure to do so assures that those petitioners will have their ineffective-assistance claims decided on the merits by a federal habeas judge. And that decision will be made with no deference to any state rulings because the claims will have been defaulted rather than decided on the merits in state court.

In contrast, if Illinois were to provide counsel to the post-conviction petitioner, as is done in nearly half the other states, any procedurally defaulted claim would not even be entertained by the federal courts.

It’s unclear to me why the Illinois courts would want to surrender their right and responsibility to adjudicate these claims. And yet, that’s exactly the result the *Sutherland* holding will achieve if the Illinois Supreme Court allows it to stand — or if the Post-Conviction Hearing Act is not amended by the legislature.

As it happens, earlier this year the Illinois Supreme Court already called on the General Assembly to revisit the Post-Conviction Hearing Act. In *People v. Evans*, the court pointed to a host of “important deficiencies” in the act’s treatment of “successive petitions,” including the failure of the legislature to prescribe evidentiary and pleading requirements that would guide the courts in determining when “cause” was adequate to excuse procedural defaults. 2103 IL 113471, ¶ 18 (2013).

The General Assembly should heed the court’s request. And while they’re at it, they should consider establishing at least a limited right to counsel on post-conviction review, to conform with U.S. Supreme Court guidance and assure that our courts retain all the prerogatives of state sovereignty.

In the meantime, the Illinois Supreme Court should itself consider whether *Sutherland* accurately captures the state of Illinois law in the wake of *Martinez* and *Trevino*.