EXPANDING CAUSE: HOW FEDERAL COURTS SHOULD ADDRESS SEVERE PSYCHIATRIC IMPAIRMENTS THAT IMPACT STATE POST-CONVICTION REVIEW

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ABSTRACT

A state prisoner must comply with state procedural rules to obtain federal judicial review of one's detention or sentence of death, but what if a severe psychiatric impairment or illness prevents the prisoner—or one's counsel—from complying with those rules? Federal habeas courts have not agreed on whether this type of impairment can excuse a procedural default. This Article argues that courts refusing to recognize severe psychiatric impairments as valid excuses for defaults are asking the wrong questions, like whether an impairment is "external to the petitioner." Courts instead should ask whether an impairment impeded a petitioner's ability to comply with a procedural rule or caused a breakdown in an attorney-client relationship. Declining to recognize severe impairments as valid excuses in these circumstances is out of step with the Supreme Court's guidance and creates hard-to-justify inconsistencies with the principles underlying procedural default and other areas of habeas law.

* I was a Supervising Attorney/Clinical Fellow with the Appellate Litigation Clinic at Georgetown University Law Center when I wrote this article. Many thanks to Eve Brensike Primus, Erica Hashimoto, Carol Steiker, Joshua Freiman, and Rosemary Auge for their thoughtful insights, guidance, and feedback. Additional thanks to the editors at the *American Criminal Law Review* for their support throughout the editing process.

INTRODUCTION

No matter how strong a state prisoner's claim for relief from wrongful detention or a sentence of death may be, procedural rules can stand in the way of judicial review. If the prisoner does not adhere to a state's rules for presenting a claim, state courts may decline to review whether that claim has merit. And, if the prisoner then seeks relief in federal court, a state may raise the affirmative defense of "procedural default," using the earlier failure in state court to bar federal review.

What if a severe psychiatric impairment prevented the prisoner—or one's counsel—from complying with a state procedural rule? The Supreme Court has not provided "a comprehensive catalog" on when to excuse procedural defaults,[1] but it has explained that a showing of "cause" for such an excuse would "ordinarily" be something "external to the defense" or, in post-conviction proceedings, "external to the petitioner."[2] Litigants and scholars have argued that a psychiatric impairment or illness should excuse a default, often explaining that it constitutes an "objective factor external to the defense."[3] Some lower federal courts, however, have appeared reticent to adopt this argument and have diverged when deciding what "external to the petitioner" means in this context.[4]

This Article analyzes the issue in depth and argues that courts presented with evidence that a petitioner—or one's counsel—experienced a psychiatric impairment when a default occurred should ask only whether that impairment impeded one's ability to comply with a procedural rule or caused a breakdown in an attorney-

1. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3 n.10 and accompanying text (2020) (quoting Smith v. Murray, 477 U.S. 527, 533–34 (1986)).

2. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986); Coleman v. Thompson, 501 U.S. 722, 753 (1991) (emphasis omitted); *see also* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 534 (2014) ("Cause for a procedural default . . . has been only loosely defined to require something 'external' to a petitioner . . . ." (quoting *Carrier*, 477 U.S. at 488)) (cited in Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 107 n.194 (2017) [hereinafter *Structural Approach to Adequacy*]).

3. *See Coleman*, 501 U.S. at 753 (quoting *Carrier*, 477 U.S. at 488); *infra* Part I.B.

4. *See infra* Part III.

client relationship that itself caused a default.[5] Recognizing psychiatric impairment as a category of "cause" in these circumstances would align procedural default doctrine with other areas of habeas law.[6] As scholars have emphasized, procedural default has "equitable origins"[7] and its "exceptions" are designed to "ensur[e] that state prisoners have a realistic opportunity to present their federal claims in state court."[8] And numerous courts have recognized that either an attorney's or a litigant's psychiatric impairment can be an "extraordinary circumstance" for purposes of equitably tolling the federal habeas statute of limitations Congress established in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[9] To rule severe impairment out as a valid excuse for a procedural default without even so much as an individualized analysis of what brought about the default would allow a breakdown in state-court proceedings to stand in the way of any meaningful judicial review of a potentially meritorious claim.

Yet only one circuit has held in a published opinion that a petitioner's psychiatric illness or impairment can constitute "cause" to excuse a default.[10] Courts that have refused to recognize a severe-psychiatric-impairment category of "cause" have been asking the wrong questions and creating serious procedural due process issues. Three circuits have viewed what the Supreme Court called "ordinarily" a sufficient kind of "cause" as the only kind.[11] And these circuits have interpreted a phrase the Court appeared to use figuratively—"external to the petitioner"—as if the Court used it literally to mean outside someone's body.[12] Other courts have

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5. *See infra* Parts II–III.

6. *See infra* Part II. In addition, one treatise explains that the Supreme Court has, outside "the habeas corpus context," "suggest[ed] that the 'objective/external factors' capable of excusing a default may include all 'extraordinary circumstances suggesting that the party [including counsel] is faultless' in causing the default or that the party was 'prevented from complying by forces beyond its control.'" HERTZ & LIEBMAN, *supra* note 1, at § 26.3 n.20 and accompanying text (quoting Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 387–88, 393–95 (1993), and citing other examples); *see also id.* at § 26.3 n.20 (adding that, "[u]nder this approach, 'cause' includes situations in which a party's or his attorney's 'incarceration' or 'ill health' or 'an act of God or unforeseeable human intervention' prevented compliance with a state procedural rule" (quoting *Pioneer Inv. Serv. Co.*, 507 U.S. at 387–88, 393–94)).

7. *See* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 150–63 (2013) [hereinafter Equitable Heritage] (explaining that procedural default, along with three other "gatekeeping bars," have "equitable origins," as shown, in part, by their "individualized exceptions based on equitable considerations").

8. *See* Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 ARIZ. L. REV. 291, 309 (2019) [hereinafter *Equitable Gateways*]; *see also id.* at 305 (explaining that "federal courts have been willing to look past procedural defects in state prisoners' petitions if those defects resulted from some unforeseen external obstacles (whether state created or not) that prevented prisoners who were otherwise diligently pursuing their rights from complying with the procedural rules"); *id.* (adding that a "federal court bypasses the procedural restrictions on equitable grounds, because the prisoners, through no fault of their own, have never had a full and fair opportunity to have the federal claims considered").

9. *See infra* Part II.C.; *infra* notes 191–93 and accompanying text.

10. *See infra* Part III.C.

11. *See infra* Part III.A.

12. *See id.*

declined to recognize this type of impairment as a cognizable excuse, albeit without expressly or consistently requiring that cause be "external" in some literal sense.[13] The upshot is that the lower courts are diverging on whether psychiatric impairments, no matter how debilitating, can result in petitioners losing any path to state or federal review of wrongful detention or sentences of death.

Part I of this Article introduces the procedural default doctrine through an example of how a petitioner's psychiatric impairments can lead to a state court default of a potentially meritorious claim. It presents a hypothetical case in which an individual has been sentenced to death and describes what could be symptoms of severe illness. The hypothetical petitioner then seeks to waive state statutory rights to post-conviction counsel and post-conviction proceedings. The Article aims to illustrate how symptoms of severe illness can impact individuals attempting to litigate from death row, but these issues are not unique to petitioners sentenced to death, let alone petitioners with statutory rights to counsel.

Part II explains why Supreme Court precedent and the principles underlying the procedural default doctrine support the recognition of a severe-psychiatric-impairment category of excuse for defaults. This Part describes the Supreme Court's approach to "cause" to excuse otherwise applicable procedural defaults and then explains why lower courts need not stop to ask whether an impairment is an "external" factor to excuse a default, because the Court's identification of such factors was—and still is—illustrative of only one type of excuse. And focusing only on whether an impairment impeded a petitioner's or an attorney's ability to comply with a procedural rule would align procedural default law with the willingness of many courts to equitably toll AEDPA's statute of limitations on account of the same type of impairment. The nature of these impairments—and the breakdowns in attorney-client relationships as well as state-court proceedings they can cause—make them different in kind from another type of cause for which the Supreme Court has been less willing to provide a remedy: "[a]ttorney negligence" when petitioners had counsel at the time of a procedural default.[14]

Part III discusses lower courts' inconsistent approaches regarding whether to excuse defaults that were caused by psychiatric issues. It then explains how and why courts should recognize that severe psychiatric impairments can provide "cause" to excuse procedural defaults, both to follow the Supreme Court's guidance on procedural default and to avoid unnecessary practical difficulties that arise when closing off this pathway to relief.

13. *See infra* Part III.B.

14. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1735 (2022) (quoting Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam)).

I. HOW SEVERE IMPAIRMENTS CAN LEAD TO PROCEDURAL DEFAULTS

State prisoners may petition for a federal writ of habeas corpus to be released from wrongful detention and to vacate wrongful sentences of death.[15] But they must comply with numerous state and federal procedural requirements to obtain federal review.[16] This Articles focuses on one common barrier to this type of review: a state's affirmative defense of procedural default.[17] If a state successfully raises this defense, a federal court will dismiss a claim for habeas relief without ever reviewing its merit.[18]

To illustrate how procedural defaults might arise in practice and interact with psychiatric impairments, this Article begins with a hypothetical case. This hypothetical is based on recurring issues that arise in both capital and non-capital cases. Although this piece uses a hypothetical in which a petitioner is sentenced to death and has state and federal statutory rights to counsel during state post-conviction and federal habeas litigation, most individuals seeking these types of relief do not have counsel because they are indigent and not sentenced to death.[19] Yet all can be barred from obtaining federal review under some lower courts' misreading of the procedural default doctrine as this Article discusses in subsequent Parts.

A. From a Trial in State Court through State Post-Conviction Review

To begin, assume the hypothetical petitioner was found guilty in state court of capital murder and sentenced to death by lethal injection. Trial counsel contested guilt, but the state's case was overwhelming. During a subsequent sentencing phase before a jury, trial counsel presented testimony from numerous coworkers and friends of the petitioner who described him as a hard worker, a generous

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15. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 297 ("The writ of habeas corpus permits a prisoner to file a civil action in federal court asking a judge to order the warden of the prison where he or she is being held—the one who has ('habeas') the prisoner's body ('corpus')—to release the prisoner from unlawful custody.").

16. *See id*. at 298–304.

17. Other barriers to review include AEDPA's statute of limitations, *see* 28 U.S.C. § 2244(d), and limitations on filing "second or successive" federal habeas petitions, *see id*. § 2244(b). And, short of dismissal without reaching a claim's merits, petitioners' or their attorneys' "fault" in earlier stages of state litigation can trigger limitations on evidentiary development in federal court. *See* Williams v. Taylor, 529 U.S. 420, 432 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

18. For helpful treatises and scholarship elaborating on each area of habeas law, see generally HERTZ & LIEBMAN, *supra* note 1; BRIAN R. MEANS, POSTCONVICTION REMEDIES (2021); and *Equitable Gateways*, *supra* note 8.

19. *See* Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996* 15, 23 (Aug. 2007), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf (noting that 92.3% of a sample of non-capital federal habeas cases filed in 2003 and 2004 were litigated pro se and that "95[%] . . . of the petitioners were pro se at the beginning of the case") (cited in Huq, *supra* note 2, at 532 n.47); Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2443–44 (2013) [hereinafter *Enforcing Effective Assistance*] (explaining that, while "[a] minority of states do routinely appoint counsel in [state] postconviction cases," "[m]ost states authorize the appointment of counsel for noncapital petitioners only if a judge first decides the case has merit or orders a hearing or discovery") (cited in *Structural Approach to Adequacy*, *supra* note 2, at 78 n.13).

person, and a kind friend.[20] Trial counsel did so to respond to "the principle that punishment should be directly related to the personal culpability of the criminal defendant."[21] Sentencing an individual to death requires "an individualized assessment of the appropriateness of the death penalty," including "'evidence about the defendant's background and character.'"[22] This type of evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[23] The state, however, responded by presenting evidence of the petitioner's prior violent convictions, and the jury ultimately sentenced him to death.

Represented by the same counsel, the petitioner appealed from that judgment and presented claims based on the record created at trial. But both a state appellate court and a state supreme court affirmed, after which the U.S. Supreme Court denied a petition for certiorari. The petitioner's judgment of death, therefore, is "final."[24]

Assume the petitioner still has one potentially meritorious claim that he has not presented to any court: a claim that trial counsel focused almost exclusively on building a case against a guilty verdict and failed to conduct an effective investigation into the petitioner's life and medical history to convince at least one juror not to sentence him to death.[25] Call this claim the petitioner's ineffective assistance of trial counsel ("IATC") claim.[26]

Next, assume the petitioner was tried in a state that required him to present his IATC claim in post-conviction proceedings separate from, i.e., collateral to, the trial and direct-appeal proceedings. The state appointed post-conviction counsel, thanks to a state statutory right to counsel for petitioners sentenced to death. Even

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20. Because most individuals seeking habeas relief after having been convicted of capital murder and sentenced to death are men, this Article refers to the petitioner in this hypothetical using male pronouns. *Cf. Equitable Heritage*, *supra* note 7, at 143 n.21 (using male pronouns when discussing "habeas applicants because the overwhelming majority of applicants in federal court are male").

21. Penry v. Lynaugh, 492 U.S. 302, 319 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

22. *Id.* (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see also id.* (explaining that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime" (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring))).

23. *Id.*

24. *See* Burton v. Stewart, 549 U.S. 147, 156 (2007) (per curiam) (quoting Berman v. United States, 302 U.S. 211, 212 (1937)).

25. *But see, e.g.*, Allen v. Woodford, 395 F.3d 979, 1001 (9th Cir. 2005) ("[L]egal experts agree that preparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase[.]").

26. A petitioner demonstrates a violation of the Sixth Amendment right to counsel by showing (1) counsel's "deficient performance," i.e., that "counsel's representation fell below an objective standard of reasonableness" according to "prevailing professional norms," Strickland v. Washington, 466 U.S. 668, 687–88 (1984), and (2) "prejudice," i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

where this type of right exists, however, it does not guarantee timely appointment of counsel, as Professor Lee Kovarsky has discussed.[27]

For purposes of this hypothetical though, new counsel was appointed and investigated the petitioner's background. That investigation focused on his health, family, and upbringing. Trial counsel had never investigated this type of evidence. When asked why, trial counsel explained to post-conviction counsel that the petitioner was adamant at the beginning of the representation that he was healthy, did not want his immediate family to have to describe his upbringing, and would not ask his family to testify in front of a jury.[28] Trial counsel followed that guidance and, ultimately, presented to the jury only the testimony from former coworkers and friends.[29] Post-conviction counsel, however, obtained medical and school records that raised red flags: signs of delusions, hallucinations, and that the petitioner had struggled to adapt to day-to-day obligations throughout his life.[30]

After further investigation, interviews with family, friends, and acquaintances, as well as numerous conversations between new counsel and the petitioner about the nature of capital sentencing, the petitioner agreed to present information about his life history in a state post-conviction petition raising the IATC claim. He told

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27. *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1372 (2020) [hereinafter *Delay in the Shadow of Death*] (describing "[d]irect representation during the capital punishment sequence" as "frequently an incomplete patchwork of state and federal appointments"). For example, over 350 individuals sentenced to death in California have not had state post-conviction counsel appointed yet. *See* HABEAS CORPUS RESOURCE CENTER, 4.561 COMPLIANCE, PERSONS UNDER SENTENCE OF DEATH IN CALIFORNIA (June 1, 2021), http://hcrc.ca.gov/4.561/HCRC_4.561-list.pdf. Many thanks to the California Appellate Project for identifying this source and for their work on capital litigation generally.

28. *Cf.* Kirkpatrick v. Chappell, 872 F.3d 1047, 1051–54 (9th Cir. 2017)*, opinion withdrawn on reh'g*, 926 F.3d 1157 (9th Cir. 2019)*, opinion amended and superseded on denial of reh'g*, 950 F.3d 1118 (9th Cir. 2020) (noting that a petitioner declined to be evaluated by a psychiatrist and "stated that he did not want any of his family members brought to court or even contacted at all").

29. *Cf.* Kirkpatrick v. Chappell, 950 F.3d 1118, 1123 (9th Cir. 2020).

30. *See* Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295, 306 (2014) (citing and discussing evidence of psychological, neurological, and neuropsychological issues among individuals on death row, generally (i.e., not just among those who seek to waive rights)); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1185–86 (2010) (citing evidence that "approximately 15% of state prison inmates reported experiencing symptoms within the preceding twelve months that met the criteria for a psychotic disorder, including hallucinations or delusions" (citing DORIS J. JAMES & LAUREN E. GLAZE, DEP'T OF JUST., NCJ-213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006))); Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 765 n.137 (2014) (noting "that inmates with unquestioned severe psychiatric impairments are nonetheless eligible for execution," a result of the Supreme Court having "left to the states" how to "implement[]" the Court's "ban on executing inmates who are 'insane' at the time of their execution" (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986))); *Kirkpatrick*, 872 F.3d at 1051–54 (explaining that "no evidence of [a petitioner]'s difficult upbringing, his disadvantaged social background, his history of mental health problems and drug abuse, or his relationships with friends and family was ever presented to the court or even investigated by the defense team"); Petition for Writ of Certiorari at 3, Gonzales v. Davis, 140 S. Ct. 1143 (2020) (No. 19-6823) (describing a petitioner's history of dementia, "severe depression with psychotic features," schizoaffective disorder, paranoia, "significant impairments in verbal processing and deficits in attention," and that he had been "prescribed powerful anti-psychotic medication").

post-conviction counsel that he wanted to live. And he was willing to present his life history—which had not been investigated or presented before—to try to prove IATC and obtain federal habeas relief from his death sentence.[31] That life history included evidence of possible schizophrenia,[32] plus an inability to adapt to many day-to-day challenges.[33]

Assume there is evidence of past episodes involving delusions and hallucinations that impacted the petitioner's daily life before the crime for which the petitioner was convicted. This type of evidence could have been admissible as mitigating evidence at sentencing.[34] And assume it would have led trial counsel to even more admissible (and previously unpresented) evidence of childhood trauma, substance use connected to that trauma, and an absence of meaningful access to medical treatment for any serious or severe illness or impairment throughout the petitioner's life.

Throughout its analysis, this Article uses the phrase "severe psychiatric impairment" and, in doing so, is referring broadly to a "serious" or "severe" mental illness as well as to limitations that might not arise from a diagnosed illness.[35] The

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31. *Cf. Kirkpatrick*, 872 F.3d at 1052 (noting that the petitioner obtained a stay of federal habeas proceedings, then filed a new state petition with numerous claims that had not been presented previously); Petition for Writ of Certiorari, *supra* note 30, at 11–13 (noting that federal habeas counsel raised issues regarding a petitioner's competency after the petitioner had purportedly waived state post-conviction proceedings and, later, had expressed an interest in obtaining federal relief).

32. This hypothetical relies on the American Psychiatric Association's definition of schizophrenia. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION: DSM-5 99 (2013) [hereinafter DSM-5] (including as potential symptoms of schizophrenia among other criteria for a clinical diagnosis: (1) "[d]elusions," (2) "[h]allucinations," (3) "[d]isorganized speech (e.g., frequent derailment or incoherence)," (4) "[g]rossly disorganized or catatonic behavior," and (5) "[n]egative symptoms (i.e., diminished emotional expression or avolition)"); *id.* (requiring "[t]wo or more" of this set of symptoms).

33. To be diagnosed with schizophrenia, one's "level of functioning in one or more major areas, such as work, interpersonal relations, or self-care" must be "markedly below the level achieved prior to the onset [of a disturbance]." *Id.* Independent of schizophrenia, another potential cause of "adaptive deficits" is an intellectual disability. *See, e.g.*, Moore v. Texas, 137 S. Ct. 1039, 1045, 1049–51, 1053 (2017) (considering the definitions of intellectual disability recognized by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the DSM-5 when describing how lower courts must decide whether an individual has an intellectual disability and, as a result, must not be executed); *Definition of Intellectual Disability*, AAIDD, https://www.aaidd.org/intellectual-disability/definition (last visited Nov. 5, 2022) ("Intellectual disability is a condition characterized by significant limitations in both intellectual functioning and adaptive behavior that originates before the age of [twenty-two].").

34. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) ("requir[ing] that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death" (footnotes omitted)).

35. As background regarding these types of illnesses, the American Bar Association's (ABA) Criminal Justice Standards on Mental Health "adopt[ed] the definition of 'mental disorder' found in the current Diagnostic and Statistical Manual of the American Psychiatric Association." ABA, CRIM. JUST. STANDARDS ON MENTAL HEALTH 7-1.1(a) (2016), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf [hereinafter ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH]. The DSM-5, in turn, "defines mental disorder as 'a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.'" *Id.* at n.* (quoting DSM-5). The ABA also used the term

aim is not to define the boundaries of a category of illness or impairment that warrants legal attention.[36] Rather, it is to direct attention to how numerous health-related issues can impact an individual during post-conviction litigation before explaining how courts should respond to such issues.

In most circumstances, a petitioner cannot raise any IATC claim until state post-conviction proceedings.[37] Assume that was the case in this hypothetical too: Only through post-conviction litigation could the petitioner present evidence outside the record created at trial to prove a claim, and only then were new counsel appointed who could review prior counsel's work without any conflict of interest.[38] Before this point, the petitioner was represented by trial counsel who never conducted the investigation demanded by professional norms or explained to him the nature of an

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"severe mental disorder or disability" when recommending against the execution or sentencing to death of individuals who, "at the time of [an] offense," experienced such a "disorder or disability that significantly impaired" a "capacity" set forth in the recommendation. ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668, 670 (2006) [hereinafter *ABA Recommendation and Report*] (cited in Robert J. Smith, Sophie Cull & Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1240 (2014)); ABA CRIM, JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-9.2(b); *see also* Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendation*, 54 CATH. U. L. REV. 1133, 1141, 1149–50 (2005) (discussing the recommendation's requirement that such a "disorder or disability" be "severe"); Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123–30 (2005) (providing additional background for, and explanation of, the ABA's recommendation). The ABA made the same recommendation for individuals who, "at the time of [an] offense," "had significant limitations in both their intellectual functioning and adaptive behavior . . . resulting from intellectual disability, dementia, or a traumatic brain injury." ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-9.2(a). And it recommended against executing any individual who, "after [s] entencing," "has a mental disorder or disability that significantly impairs" one of multiple capacities identified in the recommendation, including the "capacity" "to make a rational decision to forgo or terminate post-conviction proceedings." *Id*. 7-9.9(a); *ABA Recommendation and Report*, *supra* note 35, at 668; *see also id*. at 673–77 (discussing the same recommendation); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1177–92 (2005) (discussing the recommendation and additional issues that can arise when clients have an "impaired capacity to assist in post-conviction litigation" or "seek to forgo or abandon" such litigation).

36. *Cf*. DSM-5, *supra* note 32, at 25 (noting an "imperfect fit between the questions of ultimate concern to the law and the information in a clinical diagnosis" before explaining that legal determinations often require additional "information about [an] individual's functional impairments and how these impairments affect the particular abilities in question").

37. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689, 692 (2007) [hereinafter *Structural Reform in Criminal Defense*] (cited in Justin Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2152 n.393 (2014)).

38. *See Structural Reform in Criminal Defense*, *supra* note 37, at 689, 692, 706; Marceau, *supra* note 37, at 2152. The Supreme Court has recognized that attorneys "cannot reasonably be expected to make . . . an argument" that "denigrate[s] their own performance" and "threatens their professional reputation and livelihood." Christeson v. Roper, 574 U.S. 373, 378 (2015) (per curiam) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 (AM. L. INST. 1998); and then citing Maples v. Thomas, 565 U.S. 266, 285–86, n.8 (2012)).

investigation and penalty-phase presentation that could have convinced at least one juror to vote for life.[39]

In contrast to trial counsel, state post-conviction counsel regularly communicated with the petitioner about his life history and medical concerns. And the petitioner began to describe abuse by correctional officers[40] as well as behavior and beliefs about his case that raised additional questions about his psychiatric health.[41] Post-conviction counsel responded by retaining a psychiatrist who reviewed the evidence that had been collected regarding the petitioner's background and met with the petitioner. The psychiatrist expressed confidence that the petitioner was not malingering, but did not reach a conclusion regarding whether all of the petitioner's descriptions of his treatment in the prison were a product of (a) mistreatment by prison staff; (b) delusions and hallucinations, perhaps associated with schizophrenia; or (c) a combination of both (a) and (b).[42] As this Article explains,

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39. *See Structural Approach to Adequacy*, *supra* note 2, at 92 ("Despite widespread understanding of the structural problems of trial attorney ineffectiveness, the procedural systems of a vast majority of states systematically prevent defendants from ever having their IATC claims considered on the merits."); *id*. at 92–93 (noting that, in states that require individuals to bring IATC claims in post-conviction proceedings and that require those proceedings to follow direct-appeal proceedings, petitioners "have to wait four or five years" before litigating such claims).

40. *Cf.* Kirkpatrick v. Chappell, 950 F.3d 1118, 1138 (9th Cir. 2020) (citing "multiple letters to the state court asserting that [a petitioner] believed prison guards were trying to kill him, retaliate against him by withholding showers and food, and that the prison denied him medical attention, medication, legal documents, access to the library, and access to the prison yards"); St. Pierre v. Cowan, 217 F.3d 939, 942 (7th Cir. 2000) (quoting a petitioner who had sought to waive his right to present mitigating evidence at sentencing: "I'd just like to say one thing, a full aggravation-mitigation hearing would mean a lot more time at Cook County jail and I just want to say if this Court wants to have me go insane, go crazy, that's it"); Potts v. Zant, 638 F.2d 727, 750 (5th Cir. 1981) (explaining the need for an evidentiary hearing to address a petitioner's allegations of "harassment from prison authorities, pressure from some family members to dismiss his habeas petitions, constant pain resulting from a bullet wound and inadequate medical care of the wound, and a 'circus atmosphere' surrounding his case").

41. *Cf.* Holt v. Bowersox, 191 F.3d 970, 972, 975 (8th Cir. 1999) (relying on medical records that demonstrated that, at key moments in time, a petitioner had been "diagnosed with schizoaffective disorder," experienced "delusions," and "'was not oriented to time, place, or date'"); *Kirkpatrick*, 950 F.3d at 1125–26 (explaining that a petitioner asked to waive pending legal proceedings and, after an initial evaluation "by a court-appointed psychiatrist," "declined to take part in the process any further," leaving another set of experts unable "to express a diagnostic conclusion" regarding his competence); Petition for Writ of Certiorari, *supra* note 30, at 3–13, (asserting that a need to evaluate a petitioner's competency arose after "outbursts" and a "suicidal threat" during trial, in addition to the petitioner's "long history of mental illness and brain damage").

42. *Cf.* Comer v. Schriro, 463 F.3d 934, 947 (9th Cir. 2006) (quoting a doctor's report that a petitioner felt "compelled, as a symptom of his mental disorder, to continually manufacture [metal] shanks," which led prison officials to impose "ever more restrictive conditions," which themselves "exacerbate the mental disorder that is reflected (in part) in the compulsion to manufacture shanks"), *rev'd en banc*, 480 F.3d 960 (9th Cir. 2007) (per curiam); Petition for Writ of Certiorari, *supra* note 30, at 3–6 (discussing evidence of a petitioner's "brain damage" and "paranoia" before he "spent seven years in solitary confinement" at a prison where "he was not treated for his mental illnesses" and where a "poorly controlled" diagnosis of "diabetes may have worsened his brain impairments"). *Compare* Kirkpatrick v. Chappell, 872 F.3d 1047, 1051 (9th Cir. 2017) (noting that a petitioner's trial team did not investigate or present evidence of his "history of mental health problems"), *with Kirkpatrick*, 950 F.3d at 1138 (addressing federal habeas counsel's argument that a waiver arose "under duress," citing writings from the petitioner regarding abuse and retaliation by prison guards).

infra Part III, some lower federal courts appear willing only to excuse a procedural default arising from (a) and possibly (c). Not (b).

After the petitioner met with the psychiatrist, the relationship between the petitioner and state post-conviction counsel began to deteriorate.[43] At times, the petitioner expressed a desire to be executed immediately.[44] Hearing an individual express such an interest is jarring, but recurring: "About [eleven percent] of those executed in the United States are death-sentenced prisoners who sought their own execution."[45] And individuals initially may seek to waive a right or a set of proceedings only to retract the waiver later and proceed with further litigation.[46] Unknown is the number of individuals who have asked their attorneys—or another confidante—to waive litigation before backing away from that decision without having made a formal request to a court.[47]

Assume the hypothetical petitioner here wrote pro se to the state post-conviction court before it ruled on the pending petition with the IATC claim. He asked to remove counsel from his case and, after that, to withdraw the petition.[48] That is, he expressed a desire to make any decision he needed to make to end the proceedings and speed up the process leading to his execution.[49]

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43. *Cf. Kirkpatrick*, 950 F.3d at 1125 (noting that a petitioner "refused to be interviewed" by defense experts after a court-appointed psychiatrist had conducted a competency evaluation); Fitzgerald v. Myers, 402 P.3d 442, 445 (Ariz. 2017) (noting that, after reports of an individual "experiencing audio and visual hallucinations," he "met with defense team members but accused them of conspiring to harm him" and, at one point, "refused to be evaluated" for competency).

44. *Cf.* Petition for Writ of Certiorari, *supra* note 30, at 11 (quoting a petitioner's statement at one point after a second sentencing resulted in a death sentence: "I want to waive all my appeals and . . . have execution set as soon as possible"); Comer v. Stewart, 215 F.3d 910, 915–18 (9th Cir. 2000) (remanding for an evidentiary hearing after a petitioner sought to dismiss a capital habeas appeal and expressing "grave concerns that a mentally disabled man may be seeking th[e] court's assistance in ending his life").

45. Rountree, *supra* note 30, at 295 (footnote omitted); *see also id.* (noting that, as of January 2014, "[t]he same number of volunteers (143) ha[d] been executed as death-sentenced prisoners ha[d] been exonerated (143)" (footnote omitted)); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 955–67 (2005) [hereinafter *Killing the Willing*] (exploring the potential causes of litigation waivers in death penalty cases).

46. *See, e.g.*, Rountree, *supra* note 30, at 301; *Killing the Willing*, *supra* note 45, at 940; St. Pierre v. Cowan, 217 F.3d 939, 940–46 (7th Cir. 2000).

47. *See* Rountree, *supra* note 30, at 301, 327; *Killing the Willing*, *supra* note 45, at 940.

48. *Cf.* Gonzales v. Davis, 924 F.3d 236, 243 (5th Cir. 2019) (per curiam) (quoting a petitioner's statement that he did not want an attorney or "appeals"); Fahy v. Horn, 516 F.3d 169, 177–78 (3d Cir. 2008) (noting that a petitioner, at one point, stated in court "that he did not want to be represented by his attorneys and that he did not want to pursue any further appeals"); *St. Pierre,* 217 F.3d at 943–46 (describing a "pattern" in which a petitioner filed, then withdrew, pro se motions "to waive further appeals").

49. *Cf. Ex parte* Gonzales, 463 S.W.3d 508, 509 (Tex. Crim. App. 2015) (per curiam) (finding that a petitioner had "stated that he wanted no appeals filed on his behalf and no attorneys appointed," which the court interpreted to be an "expressed desire to waive habeas" (quoting *Ex parte* Gonzales, No. WR-40,541-03 (Tex. Crim. App. Nov. 10, 2010))). Until 2019, there appeared to be a consistent trend among courts reviewing waivers of the "right to proceed" that occurred in state post-conviction proceedings: The court decided that whether an individual had made a knowing, intelligent, and voluntary waiver involved a question of federal law. *See Kirkpatrick*, 950 F.3d at 1133; MEANS, *supra* note 18, § 24:11 n.14 and accompanying text; Petition for Writ of Certiorari, *supra* note 30, at 16–21. Recently, however, the Fifth Circuit appeared to buck this trend. It treated a waiver of state post-conviction counsel followed by a pro se decision not to seek timely post-conviction relief as

The state post-conviction court scheduled a hearing to decide whether to accept the petitioner's waiver of his right to state post-conviction counsel and to withdraw his petition.[50] At the hearing, the court asked the petitioner whether he was making his decision with knowledge of the rights he was giving up and whether anyone was threatening him. The petitioner responded that he knew what he was doing, did not want anyone questioning his competency, and wanted to die. Assume the court took notice of the psychiatrist's opinion discussed above but did not allow counsel to present additional evidence or testimony regarding the conditions of the petitioner's confinement.[51] Nor did the court attempt to learn more about why the petitioner was withdrawing his claims for relief.[52] Ultimately, the court accepted the client's decision to proceed pro se and withdraw the pending petition.

Assume next that the petitioner was left with no available path to either the appointment of counsel to attempt to file a new state post-conviction petition or any form of state post-conviction relief.[53] In turn, the state obtained a warrant of execution and scheduled his death by lethal injection.

This hypothetical reflects the types of daunting challenges that psychiatric-health and competency issues can create during post-trial proceedings.[54] When it

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a procedural default without requiring "a determination that the waiver [of state post-conviction proceedings] was knowing, intelligent, or voluntary, or was competently made." Petition for Writ of Certiorari, *supra* note 30, at i; *see also id*. at 15–22, 27; Reply in Support of Certiorari at 1–5, Gonzales v. Davis, 140 S. Ct. 1143 (No. 19-6823). Mr. Gonzales unsuccessfully sought certiorari review to resolve the circuit split and to adopt "[a] uniform federal standard for waivers of post-conviction process." *See* Petition for Writ of Certiorari, *supra* note 30, at 27. Although these issues are important, this Article's focus is on a potentially dispositive—but narrower—issue: whether one's psychiatric impairment can constitute "cause" to excuse noncompliance with an otherwise adequate and independent state procedural rule. *See Gonzales*, 924 F.3d at 244; *infra* Part I.B.–Part II.

50. *Cf. Gonzales*, 924 F.3d at 242–44; Petition for Writ of Certiorari, *supra* note 30, at 11–12 (noting that a state "trial court held an abbreviated hearing" at which a petitioner stated, in part, that he "want[ed] to waive all [his] appeals"); *Fahy*, 516 F.3d at 177–78 (noting that a state trial court held a hearing at which it asked a petitioner questions about a potential waiver).

51. *Cf. Fahy*, 516 F.3d at 183–85 (explaining that a state trial court prevented counsel from asking a petitioner about "the conditions of his incarceration," even after counsel noted that the petitioner "fell apart and started crying on the stand" in response to a prior question about those conditions).

52. *Cf. Ex Parte Gonzales*, 463 S.W.3d at 512 n.5 (Yeary, J., dissenting) (noting that a trial court never "attempt[ed] to ascertain on the record whether [a petitioner]'s decision to entirely waive his post-conviction habeas corpus *proceedings* was intelligent and voluntary," despite that "court's recommendation . . . that [the court of appeals] find [the petitioner's] waiver of *counsel* was knowing and voluntary"); People v. Urr, 748 N.E.2d 235, 237 (Ill. App. Ct. 2001) (noting that a defendant "confirmed that he was pleading guilty voluntarily," but, at another point, "explained that the only reason he was pleading guilty was because he had been sexually assaulted in the [Cook County Department of Corrections]").

53. *See Delay in the Shadow of Death*, *supra* note 27, at 1344 ("Virtually every state and federal jurisdiction has rules against the successive litigation of claims that were not presented in prior litigation, which are limits that operate on top of [statute of] limitations periods. These successive litigation restrictions, moreover, have gotten far more severe over time." (footnote omitted)); *id*. at 1378 (explaining that, for purposes of "the preparation and filing of subsequent state post-conviction applications," "Texas . . . statutorily forecloses the appointment of state post-conviction counsel" and "appointment of counsel in less capitally active states works in basically the same way" (footnotes omitted)).

54. *See generally* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 273–96 (2009) (discussing the need for, in part, revisions to a previous version of the ABA's Criminal Justice Mental Health Standards and "a more comprehensive, contextualized, and client-centered approach to defendant

comes to direct appeal, for instance, Professor Mae C. Quinn has explained that clients—not counsel—often must decide whether to present a particular issue or to seek a particular type of relief.[55] These decisions can entail serious risks, particularly in capital cases.[56] As one court of appeals observed, a petitioner's victory on a claim aimed at an error during the guilt phase of a trial could result in "a new trial, and if he were again convicted he might again be sentenced to death,"[57] whereas raising competency issues could result in one's life being spared but with indefinite—potentially lifelong—detention.[58] The decision whether "to press for a new trial even at the risk of another conviction and another death sentence," the court went on to observe, is "not really a lawyer's decision at all"; all the lawyer can do is provide advice (to the client or someone acting on the client's behalf) "on the likelihood that habeas corpus relief will be granted and, if so, that the petitioner will again be sentenced to death and perhaps have then no basis for seeking relief."[59]

Prompt intervention is essential to protect a petitioner's rights whenever issues related to competency arise.[60] As Professor Quinn explained, "[a]n immediate evaluation in the very court where the problem of possible incompetence arises" can, among other potential actions, "allow[] for a contemporaneous determination that could be important in later litigation to show cause for [an individual's] failure to pursue certain claims earlier."[61] It is unclear, however, how often state courts actually undertake these essential and comprehensive assessments in a timely manner. In Texas, for example, one study of thirty-one individuals who waived litigation that could have forestalled their executions between 1976 and 2015 found no such evidentiary development.[62]

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incapacity throughout all stages of a criminal case—including direct appeals"); ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-5.2(b), 7-8.8(a) (explaining the test for "[c]ompetence to proceed" in terms of "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration").

55. Quinn, *supra* note 54, at 290–93.

56. *See id.* at 290–93; *see also id.* at 301–02 (discussing, for example, Holmes v. Buss, 506 F.3d 576, 577–79 (7th Cir. 2007)).

57. Holmes v. Levenhagen, 600 F.3d 756, 758 (7th Cir. 2010) (cited in HERTZ & LIEBMAN, *supra* note 1, § 8.3 n.69); *see also* Quinn, *supra* note 54, at 290–92 (explaining that "risks" associated with "challenging [a] conviction" "are particularly acute when an avoided sentence of death is possible again after a successful reversal").

58. *Holmes*, 600 F.3d at 757–59.

59. *Id.* at 758–59.

60. *See* Quinn, *supra* note 54, at 290–94, 298–99, 307–09.

61. *Id.* at 308 (footnotes omitted); *see also id.* at 290–94, 307–09 (calling for "a constitutional right to be competent during criminal appeals" and noting issues that can result from waiting until subsequent post-conviction proceedings to assess and address incompetence).

62. *See* Meredith M. Rountree, *Criminals Get All the Rights: The Sociolegal Construction of Different Rights to Die*, 105 J. CRIM. L. & CRIMINOLOGY 149, 163, 173 (2015) (explaining that no individual who was permitted to waive proceedings and subsequently executed in the state as of 2015 "appear[ed] to have had an adversarial

B. Moving to Federal Court, but Facing Procedural Default

An individual who fails to obtain relief from wrongful detention or a wrongful sentence of death in state court may seek relief in federal court by filing a petition for a writ of habeas corpus. But whether a federal court will review any claim for such relief turns on what occurred during earlier state-court proceedings and whether a petitioner complied with certain state procedural rules. This Article next addresses the doctrines that govern these issues: exhaustion of remedies and procedural default.

Individuals sentenced to death who cannot afford to hire counsel in federal habeas proceedings have a statutory right to appointed counsel in these proceedings.[63] In contrast, individuals who were not sentenced to death almost universally must navigate state post-conviction and federal habeas processes without counsel.[64] Only if they can afford to hire an attorney, benefit from pro bono assistance, or convince a court to appoint counsel will they receive representation.[65] The latter two options are rare and, when factoring in the challenges of navigating health-related concerns from prison, extremely unlikely.[66] Imagine a petitioner who is not sentenced to death, but who experiences impairments like the hypothetical petitioner above or another impairment, like an intellectual disability. If that petitioner fails to present claims for state post-conviction relief in accordance with the requisite state statutes of limitations and state-court procedural rules, she, too, would face procedural bars to any meaningful judicial review.

Even for individuals who have been sentenced to death and have a statutory right to federal habeas counsel, whether an individual benefits from early appointment of qualified counsel will depend on where the case arose.[67] For the hypothetical petitioner in this Article though, assume that qualified counsel received news of the scheduled execution date and successfully requested that a federal district court appoint them for federal habeas proceedings.[68]

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hearing in which counsel marshaled lay and expert witnesses to attack the assertions that the prisoner was competent and waiving his rights knowingly, voluntarily, and intelligently").

63. *See* 18 U.S.C. § 3599(a).

64. *See* King, Cheesman II & Ostrom, *supra* note 19, at 15, 23; *Enforcing Effective Assistance*, *supra* note 19, at 2443–44; *Equitable Gateways*, *supra* note 8, at 301.

65. *See Equitable Gateways*, *supra* note 8, at 317.

66. *See id*. at 317–18.

67. *See Delay in the Shadow of Death*, *supra* note 27, at 1372–79.

68. *Cf*. Petition for Writ of Certiorari, *supra* note 30, at 12–13 (explaining that "counsel monitoring Texas capital habeas cases discovered that [a petitioner] was on the verge of execution, unrepresented, and nearing his federal habeas statute of limitations," visited the petitioner, and acted upon the petitioner's request "to pursue federal habeas remedies"); Appel v. Horn, 250 F.3d 203, 207–08 (3d Cir. 2001) (noting that, after a governor signed a death warrant setting an execution date, a petitioner "requested counsel and filed a" state post-conviction petition to "argue[], among other things, that he was mentally ill and incompetent during [earlier] proceedings resulting in his guilty plea and death sentence, and that he was denied effective assistance of counsel").

The hypothetical petitioner's health improved by the time he met with federally appointed counsel. And he indicated to newly appointed counsel a desire to assist with and litigate all potential claims for relief. To put it bluntly, he expressed hope that his attorneys could stop the state from killing him. For simplicity, assume the strongest claim for relief was the earlier-presented—but subsequently-withdrawn—IATC claim. Federal counsel filed a timely federal habeas petition to seek sentencing relief for that claim and to stay the execution.[69] Faced with the timely petition, the state conceded that all remedies in state court were exhausted but raised the affirmative defense of procedural default to stop the federal court from reviewing the merits of the IATC claim.[70]

As background on the interaction between exhaustion and procedural default, one treatise describes exhaustion as an "*ordering* device."[71] If there are potentially available remedies in state court for a claim a petitioner includes in a federal habeas petition, a federal court generally cannot grant relief on any claim within that petition.[72] Instead, it often must follow one of three paths: dismiss the petition as a whole; allow a petitioner to remove claims for which state-court remedies have not been exhausted and proceed on claims for which remedies have been exhausted; or "stay" federal proceedings while the petitioner exhausts any still-available remedies, pursuant to a set of requirements set forth in *Rhines v. Weber* (to avoid any dismissal that would leave a petitioner vulnerable to AEDPA's one-year statute of limitations).[73]

When the hypothetical petitioner filed in federal court, there were no potentially available remedies left in state court for his IATC claim. He had a chance to access one set of remedies during initial state post-conviction proceedings. But, because the state court allowed him to remove counsel and withdraw the state post-conviction petition, he never litigated that petition to a conclusion in the state court system. And assume the hypothetical state here has both a statute of limitations that would render any new petition untimely as well as strict limitations on what petitioners may include in a "second or successive" petition that this petitioner could not meet.[74] So,

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69. AEDPA requires that individuals file a federal habeas petition within one year of a specified date to avoid being subject to its statute of limitations. *See* 28 U.S.C. § 2244(d)(1)–(2).

70. *See* Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability." (quoting Gray v. Netherland, 518 U.S. 152, 161 (1996))).

71. HERTZ & LIEBMAN, *supra* note 1, § 23.1 nn.21–25 and accompanying text; *see also id.* at § 23.1 (distinguishing the exhaustion-of-remedies requirement, which "allows the state court system *if it chooses*, to decide the merits of [a] claim *first*" and which "never wholly forecloses, but only postpones, federal relief," from a procedural default, which "*foreclose*[*s*]" federal habeas relief "if the state asserts it as a defense . . . and if none of the exceptions to the procedural default rule apply" (footnotes omitted)).

72. *See* Rose v. Lundy, 455 U.S. 509, 510, 522 (1982); HERTZ & LIEBMAN, *supra* note 1, §§ 23.1, 23.5.

73. *See* Rhines v. Weber, 544 U.S. 269, 274–78 (2005); HERTZ & LIEBMAN, *supra* note 1, §§ 23.1, 23.5.

74. *See, e.g.*, 28 U.S.C. § 2244(d)(1); *id.* § 2244(b)(2); ARK. R. CRIM. P. 37.2(b). Assume as well that there is no avenue outside these types of statutory provisions to obtain review in state court, e.g., an equitable exception rooted in state or federal due process. *See, e.g.*, Jackson v. State, 37 S.W.3d 595, 597, 599 (Ark. 2001)

state-court remedies for the IATC claim are "exhausted."[75]

A potentially harsher affirmative defense than exhaustion kicks in: procedural default. According to this doctrine, federal habeas courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is" (1) "independent of the federal question" and (2) "adequate to support the judgment," unless the petitioner can excuse the failure to comply with state-court rules during the earlier exhaustion proceedings.[76] The petitioner's failure allowed the state to invoke this affirmative defense, which, if successful, would bar any federal court review of the IATC claim.

When faced with this defense, the petitioner's first set of questions are: Can I avoid procedural default altogether? More specifically, can I avoid the imposition of a default in federal court because the state-law ground that led to a dismissal of my IATC claim was not applicable, was not "independent" of federal law, or was not "adequate" as a matter of federal law?[77] This set of questions regarding the applicability of procedural default—as well as questions this Article discusses next regarding how to excuse an otherwise applicable default—involve what Professor Eve Brensike Primus has termed "equitable gateways."[78] And federal courts often may review the merits of state prisoners' claims if "equitable concern[s]" counsel in favor of doing so.[79] In this vein, Justice Scalia described the procedural default doctrine—both its imposition and its exceptions—as "judge-made."[80] And Professor Brensike Primus has identified two categories of "equitable gateways" that have led courts to review potentially meritorious constitutional claims in spite of potential "procedural barriers": (1) strong cases for innocence and (2) cases in which litigants "did not have a full and fair opportunity to have their federal claims adjudicated in the convicting state's system."[81] Similar to Professor Brensike

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(explaining that, in a capital case in which there had been "a breakdown in the State-provided postconviction proceeding [that] led to the dismissal of [an] appellant's petitions on procedural grounds," "fundamental fairness" called for merits review); *see infra* note 220 (citing arguments regarding the possibility of federal Due Process and Suspension Clause challenges). Still, even "uncertain[ty]" as to "whether state remedies are still available" could justify providing a petitioner an opportunity to exhaust them. *See* HERTZ & LIEBMAN, *supra* note 1, § 23.1 nn.28–29 and accompanying text.

75. *See* Coleman v. Thompson, 501 U.S. 722, 732 (1991) (explaining that a default "meets the technical requirements for exhaustion; there are no state remedies any longer 'available'" (citing 28 U.S.C. § 2254(b); Engle v. Isaac, 456 U.S. 107, 125–26, n.28 (1982))); HERTZ & LIEBMAN, *supra* note 1, § 26.1 n.25 (collecting additional sources).

76. *Coleman*, 501 U.S. at 729–30; *see also* HERTZ & LIEBMAN, *supra* note 1, § 26.1 nn.1–9 and accompanying text.

77. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.1 nn.3–9 and accompanying text (describing "five requirements" for the "doctrine [to] bar[] federal court review of [a] state court ruling"); *see also Structural Approach to Adequacy*, *supra* note 2, at 112 (explaining that "[a]dequacy . . . analyzes the soundness of the state's rules and procedures," not "whether a failure to comply with legitimate rules should be excused").

78. *See Equitable Gateways*, *supra* note 8, at 293.

79. *See id.*

80. McQuiggin v. Perkins, 569 U.S. 383, 402–03 (2013) (Scalia, J., dissenting).

81. *See Equitable Gateways*, *supra* note 8, at 293.

Primus's approach, this Article focuses on the second category.[82]

This Article does not focus on the "adequacy" or "independence" of state-law grounds though, because it directs attention toward a narrower way federal courts could excuse defaults caused by severe psychiatric impairments.[83] Even if a procedural bar is "adequate" and "independent" of federal law, federal courts still have the power to "'excuse' the default."[84] They may do so if a petitioner can show both "cause" for the default and "prejudice" that would result if the court does not excuse it.[85] "Cause" focuses on why the default occurred, whereas "prejudice" relates to the underlying merit of a ground for relief, i.e., a federal claim seeking a new trial or resentencing.[86]

This Article focuses on "cause," in particular. Although the Supreme Court has not clearly defined the term,[87] the Court has explained that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural

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82. *See id.*; *see also id.* at 293 n.8 (citing Huq, *supra* note 2, at 519–20, and Marceau, *supra* note 37, at 2071–72, as examples of "recent scholarship that is focused on determining as a descriptive matter what motivates federal courts to provide more robust review of state-court convictions in certain cases"); Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 108, 109, 119–27 (2014) [hereinafter *Habeas Optimist*] (describing the Roberts Court's development of "a 'merits-opportunity' regime," which "differs from earlier models of habeas reform in that it focuses only on the availability of merits disposition, and not on whether the state afforded process that tends to produce accurate outcomes").

83. *See* Maples v. Thomas, 565 U.S. 266, 279–80 (2012) (noting a dissent in a lower court that focused on adequacy of a state-law ground, but deciding the case based on "whether the uncommon facts presented [t]here establish[ed] cause adequate to excuse [a petitioner's] procedural default").

84. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.1 nn.8–9 and accompanying text; *id.* § 26.3 nn.1–5 and accompanying text.

85. *See, e.g.*, Huq, *supra* note 2, at 533–34; *see also id.* at 534 (describing "cause" as having "been only loosely defined to require something 'external' to a petitioner whereas the definition of prejudice has remained somewhat fuzzy at the edges" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986); and then citing HERTZ & LIEBMAN, *supra* note 1, § 26.3[c])). Another way to "overcome" a default is by showing that, absent this type of excuse, a "fundamental miscarriage of justice" would result. *See* Schlup v. Delo, 513 U.S. 298, 314–15 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)). But, to date, the Court has recognized only one type of "miscarriage of justice" rooted in a showing that someone is "'actually innocent' of the crime of conviction or the penalty imposed." Waldrop v. Comm'r, Ala. Dep't of Corr., 711 F. App'x 900, 925 (11th Cir. 2017) (Martin, J., concurring in judgment) (citations omitted); *see also id.* (recognizing the Court's precedent, but questioning "how a person being sentenced to death based on his race could be anything other than a fundamental miscarriage of justice").

86. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.3; MEANS, *supra* note 18, § 24:18; Coleman v. Thompson, 501 U.S. 722, 750 (1991). Although this Article focuses on "cause," rather than "prejudice," it deserves mention that the Court later explained that "actual prejudice" means a showing "not merely that . . . errors . . . created a *possibility* of prejudice, but that they worked to [a petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Carrier*, 477 U.S. at 494 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The Court, however, has provided "little guidance" when it comes to prejudice and has not "identif[ied] the standard by which the courts should determine whether the alleged error caused *enough* or the *right kind* of prejudice." HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.53–56 and accompanying text.

87. *See, e.g.*, HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.9–10 and accompanying text (explaining that "the Supreme Court has not yet 'given the term . . . precise content' or 'essayed a comprehensive catalog of the circumstances that would justify a finding of cause'" (quoting first Reed v. Ross, 468 U.S. 1, 13 (1984); then quoting Smith v. Murray, 477 U.S. 527, 534 (1986))).

default."[88] And the Court has stated—and repeated in various ways—"that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[89]

Prompting this Article's focus on "cause" is a trend among lower federal courts that has not yet received the type of scrutiny provided below. Many federal courts have been unwilling to recognize "cause" even when severe psychiatric impairments led to defaults. These courts have declined to do so in spite of litigants and scholars' arguments that they should.[90] For instance, Professor Brensike Primus recommended that a petitioner "whose severe mental illness prevented him from timely filing his petition should argue that the illness interfered with his chance to have his federal claims presented to any court," such that a "federal habeas court [could] view[] the mental illness as an external obstacle" to any "full and fair review of" such claims.[91] Some federal courts have responded to "process failure[s]" in state courts and to showings that "some objective factor external to the state prisoner . . . prevented that prisoner from obtaining a full and fair review of his or her federal claims."[92] Yet multiple courts have homed in on a presumed need for petitioners to show that something "external" caused a default, then excluded psychiatric impairment as one such cause.[93] Such reasoning would mean that the petitioner in the

88. *Carrier*, 477 U.S. at 486.

89. *Id.* at 488. This Article does not intend to detract attention from calls to challenge the "inadequacy" of states' procedural bars though. These types of challenges are essential and should be made alongside "cause" arguments, in Professor Brensike Primus's words, "to paint a complete picture of the systemic state-process failures that stood in [a petitioner's] way." *Equitable Gateways*, *supra* note 8, at 317; *see also id.* at 309 (explaining that "[a] state's procedural rules can be inadequate because they violate due process, unduly burden a state prisoner's attempts to raise federal challenges, are inconsistently applied, or are applied in novel and unforeseen ways" (footnotes omitted)).

90. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 305, 321; HERTZ & LIEBMAN, *supra* note 1, § 26.3 n.20 and accompanying text; *see also* Bonnie, *supra* note 35, at 1179 (arguing that one's "incompetence" that "[p]revented [p]otentially [v]alid [c]laims from [b]eing [r]aised, or [o]bscured [p]otentially [r]elevant [e]vidence in [e]arlier [p]ost-[c]onviction [p]roceedings, [s]hould [c]onstitute '[c]ause' for [a]ddressing [o]therwise [d]efaulted [c]laims on the [m]erits in [s]ubsequent [p]roceedings . . ."); ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-8.8(b) ("[I]ncompetence of the defendant during the time of appeal should be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence"); Quinn, *supra* note 54, at 308 (explaining that a "contemporaneous determination" of incompetence "could be important in later litigation to show cause for the defendant's failure to pursue certain claims earlier" (footnote omitted)); Hannah Robertson Miller, *"A Meaningless Ritual": How the Lack of A Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 286–87 (2008) (arguing for "a state competency standard," as well as "a federal competency requirement" and allowance for "a finding of incompetency during federal habeas review [to] constitute cause" to excuse a procedural default and "suspend the AEDPA's one-year statute of limitations . . .").

91. *Equitable Gateways*, *supra* note 8, at 321; *see also id.* at 296–97 (arguing that a litigant's claims might not be heard in state court because of, for example, a "severe mental defect or an unforeseen medical emergency," both of which can be "external and not fairly attributable to the prisoner" for purposes of "equitable gateways" like "cause" to excuse procedural defaults).

92. *Id.* at 305.

93. *See infra* Part III.

hypothetical discussed here would have no argument to use "cause" to excuse the default, even if he could show that he experienced severe symptoms, which led to a loss of counsel and any meaningful state post-conviction review.

II. WHY A CATEGORY OF "CAUSE" FOR SEVERE PSYCHIATRIC IMPAIRMENTS ALIGNS WITH SUPREME COURT PRECEDENT AND THE PRINCIPLES THAT GOVERN PROCEDURAL DEFAULT

Lower courts should undertake case-by-case analyses, permit evidentiary development, and recognize "cause" for procedural defaults attributable to severe impairments. Doing so would be in line with the Supreme Court's guidance as well as respond to evidence about how psychiatric impairments impact petitioner decision-making and attorney-petitioner relationships. This Article aims to explain why courts should recognize this category of cause and "expand" it as an "equitable gateway," continuing a discourse that Professor Brensike Primus and other scholars and litigants have facilitated.[94]

A. The Court's Guidance on "Cause," with Attorney Negligence as One—but Not the Only—Kind

This Section begins with a brief overview of the Supreme Court's major decisions on procedural default and its articulation of the "cause and prejudice" test to excuse adequate and independent state procedural bars. The Court did not settle on its current approach to procedural default and "cause and prejudice" until the 1970s and 80s. Authors have discussed at length the Court's development of the doctrine and its limitations on access to habeas review.[95] The Court's key decisions made clear what would not suffice to excuse a default but also illuminated what "ordinarily" would suffice: "some objective factor external to the defense."[96]

The Court first used a state procedural rule to bar federal habeas review in *Daniels v. Allen*, a case decided alongside *Brown v. Allen*.[97] There, an attorney had

94. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 294–97, 317–23 (presenting a case for "expanding equitable gateways," i.e., "ways to expand upon already-existing fair consideration gateways," and calling for more work to "increase the scope of federal habeas review of state criminal convictions, one equitable gateway at a time"); *id.* at 319 (calling for efforts "to broaden established equitable inroads by applying procedural bypasses obtained in one area of habeas to other obstacles to habeas relief"); *see also* HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.26–49 and accompanying text (providing examples of the types of "situations [that] satisfy the 'cause' requirement").

95. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 294–96, 298–301; Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 322–42 (1993).

96. Murray v. Carrier, 477 U.S. 478, 488 (1986).

97. 344 U.S. 443 (1953). The Court issued an opinion for three cases. *See id.* at 443. The issues discussed here pertain to one of the three cases, *Daniels v. Allen*. *See id.* at 482–87; *see also* Daniels v. Allen, 192 F.2d 763 (4th Cir. 1951), *cert. granted,* 342 U.S. 941 (1952), *aff'd sub nom.*, Brown v. Allen, 344 U.S. 443 (1953); Steiker, *supra* note 95, at 322. Justice Black dissented from this ruling and the Court's decision not to review the "manifest racial discrimination" presented by the underlying claims for relief. *See Brown*, 344 U.S. at 552–53 (Black, J., dissenting); *see also id.* at 556–60 (Frankfurter, J., dissenting); Carole C. Cooke, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 STAN. L. REV. 463, 470 (1986) ("As a result of the

missed a state court's deadline to "serve a statement of the case on appeal" from a state court conviction.[98] The Court held the default against the petitioner but did allude to possible exceptions: "Of course, federal habeas corpus is allowed . . . when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."[99] It did not define these excuses. But it suggested that "incapacity" meant legal incapacity by citing a case in which a state court had violated the due process rights of a defendant who was seventeen years old, unrepresented, and "hurried through unfamiliar legal proceedings" when convicted of first-degree murder.[100]

A decade after *Brown*, the Court adopted a test to excuse procedural default that turned on whether an individual "deliberately bypassed state procedures."[101] But that test did not last: The Court eventually replaced it with today's "cause and prejudice" standard.

The Court first adopted a "cause" basis to excuse a violation of a state procedural rule when it treated noncompliance with a state's pretrial-objection rule as a cognizable default in *Francis v. Henderson*.[102] It analogized the state's rule to a federal pretrial-objection rule.[103] That federal rule also contained a "cause" exception, which the Court applied in the federal habeas context as well.[104] The Court added that, on top of showing "cause" for the default, a petitioner must show "actual prejudice."[105] Yet it did not define either term.

Supreme Court's holding, two men were to be put to death without a rehearing by a federal appellate court of a facially meritorious constitutional claim because of a trivial procedural blunder by their attorney." (footnote omitted)).

98. *Brown*, 344 U.S. at 484–87.

99. *Brown*, 344 U.S. at 485–86 (first citing Dowd v. U.S. *ex rel.* Cook, 340 U.S. 206 (1951); then citing De Meerleer v. Michigan, 329 U.S. 663 (1947) (per curiam); and then citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

100. *See id.*; *De Meerleer*, 329 U.S. at 665; *see also id.* ("At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea.").

101. *See* Coleman v. Thompson, 501 U.S. 722, 744–45 (1991) (describing Fay v. Noia, 372 U.S. 391 (1963)).

102. *See id.* at 745–46; Francis v. Henderson, 425 U.S. 536, 537–38, 541–42 (1976).

103. *See Francis*, 425 U.S. at 539–42; *see also* Davis v. United States, 411 U.S. 233, 242 (1973) (concluding, in a case seeking federal collateral review from a federal conviction, "that the waiver standard expressed in [Fed. R. Crim. P.] 12(b)(2)," including its "cause" exception, "governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review").

104. *See Francis*, 425 U.S. at 539–42; *see also* Wainwright v. Sykes, 433 U.S. 72, 84–85 (1977) (explaining that *Francis* "incorporated" a "cause-and-prejudice standard . . . directly into the body of law governing the availability of federal habeas corpus review"). Justice Brennan dissented, *Francis*, 425 U.S. at 542, and later explained that *Francis* "justif[ied] [its] application" of a federal rule of criminal procedure to cases attacking state convictions only with "the shibboleth of 'considerations of comity and federalism.'" *Sykes*, 433 U.S. at 100 n.1 (Brennan, J., dissenting) (quoting *Francis*, 425 U.S. at 541). He viewed the doctrine as "a mere house of cards whose foundation has escaped any systematic inspection." *Id.* The Court later conceded that "[t]he cause and prejudice test may lack a perfect historical pedigree." Murray v. Carrier, 477 U.S. 478, 496 (1986); *see also* MEANS, *supra* note 18, § 24:2 n.64 and accompanying text (noting that the Court "imported" both the "sanction" and the "standards" associated with Fed. R. Crim. P. 12 into the habeas context "with little explanation" (citing *Francis*, 425 U.S. at 542)).

105. *Francis*, 425 U.S. at 542 (footnote omitted).

A subsequent set of decisions reflects what does not suffice to show "cause." In one case, a habeas petitioner's attorney "advanced no explanation whatever for his failure to object at trial" to the admissibility of an "inculpatory statement."[106] And the Court invoked the idea of "fault[]" when holding the petitioner responsible for his attorney's error; it noted that the trial judge was not at "fault[] for failing to question the admission of the confession himself."[107] In another case, the Court refused to excuse a default that arose from counsel's decision not to raise a federal claim that was "unknown" to them "at the time of trial" and, according to their view of the law, "would have been futile."[108] The Court saw no persuasive reason to impute an "ignorant or inadvertent attorney error" to the state and held the petitioner responsible for it.[109]

Justice Brennan dissented from each of these decisions, with harsh words for the majority's approach to attorney errors that led to defaults. He lamented the majority's continued failure "to say what 'cause' *is*."[110] Notably, he made two references that future decisions would echo (albeit from the opposite perspective). He first referred to what he viewed as "the *ordinary* procedural default."[111] It was one "born of the inadvertence, negligence, inexperience, or incompetence of trial counsel."[112] He criticized the Court for "insulat[ing] [an] alleged constitutional violation from any and all judicial review because of a lawyer's mistake."[113] Second, he referred to the "fictional relationship of principal-agent" in the context of attorney-petitioner relationships.[114] He did so to criticize any rule that would "hold[] the criminal defendant accountable for the naked errors of his attorney,"[115] particularly for "indigent defendants" who lack "any realistic choice in selecting who ultimately represents them at trial."[116]

The Court later suggested what would "ordinarily" suffice as cause, albeit in another case of "attorney error" that did not suffice.[117] *Murray v. Carrier* rejected an argument that attorney negligence in that case should have constituted cause.[118] Counsel included a particular claim in a notice of appeal to a state supreme court but then failed to comply with a state rule requiring counsel to present the claim in a subsequent "petition for appeal" to obtain a ruling on it.[119] When the client later

106. *Sykes*, 433 U.S. at 91 (footnote omitted).
107. *Id.*
108. Engle v. Isaac, 456 U.S. 107, 130–31 (1982).
109. *See Carrier*, 477 U.S. at 486–87 (describing *Isaac*).
110. *Isaac*, 456 U.S. at 144 (Brennan, J., dissenting); *see also id.* (adding that "the Court is more than eager to say what 'cause' is *not*").
111. *Sykes*, 433 U.S. at 104 (Brennan, J., dissenting) (emphasis added).
112. *Id.*
113. *See id.* at 108.
114. *Id.* at 114.
115. *Id.* (footnote omitted).
116. *Id.* (footnote omitted).
117. *See Carrier*, 477 U.S. at 487–89, 492.
118. *See id.* at 481–82, 487–88.
119. *Id.* at 482.

attempted to present the claim while proceeding pro se in state and federal habeas proceedings but facing a procedural-default defense in the latter,[120] the Court emphasized the "costs" to the state of excusing the default.[121] Excusing defaults "undercuts the State's ability to enforce its procedural rules," and "the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy."[122] Faced with this type of attorney negligence, and absent a constitutional violation of the right to effective assistance of counsel, the Court "discern[ed] no inequity in requiring [a defendant] to bear the risk of attorney error that results in a procedural default."[123]

Carrier did provide some guidance on what could amount to cause though. It explained that cause "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[124] It added, however, that it was not "attempting an exhaustive catalog of such objective impediments . . . ."[125] Among a set of examples it provided was "a showing that the factual or legal basis for a claim was not reasonably available to counsel."[126]

Another example of what could excuse a default was attorney error that violated the constitutional entitlement to effective assistance of counsel.[127] In such a scenario, the Court would "impute[]" the "responsibility" for ineffective assistance to the state, "which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'"[128] Without this type of constitutional violation though, a petitioner asserting that attorney negligence caused a procedural default would need to present some other basis for cause. Here, the Court again referred to an "external impediment," noting that the existence of one could constitute cause if it "prevent[ed] counsel from constructing or raising [a] claim."[129]

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120. *Id.* at 482–83.

121. *Id.* at 487.

122. Coleman v. Thompson, 501 U.S. 722, 752 (1991) (describing *Carrier*).

123. *Carrier*, 477 U.S. at 488.

124. *Id.*

125. *Id.*

126. *Id.* (citing Reed v. Ross, 468 U.S. 1, 16 (1984)). Although *Reed* "opened the door for habeas review when a constitutional claim was not reasonably foreseeable by defense counsel," the Court "effectively closed" it for many claims in "Teague v. Lane, 489 U.S. 288 (1989), which restricted habeas relief in most cases to the law at the time of the state court decisions." 2 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 31:38 n.5 (3rd ed. 2011); *see* HERTZ & LIEBMAN, *supra* note 1, § 26.3 n.27 (noting that "the demonstration that . . . the claim is 'novel' may simultaneously convince the federal court that the claim is a 'new' rule and thus barred by the nonretroactivity defense of *Teague v. Lane*, 489 U.S. 288 (1989)").

127. *See Carrier*, 477 U.S. at 488, 492; *see also* Brown v. Allen, 344 U.S. 443, 485–86 (1953) (referring to "lack of counsel" as one circumstance in which "federal habeas corpus is allowed where time has expired without appeal when the petitioner is detained without opportunity to appeal").

128. *Carrier*, 477 U.S. at 488 (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

129. *See id.* at 492.

Five years after *Carrier*, the Court addressed "cause" again in *Coleman v. Thompson*.[130] There, a default arose when an attorney filed an untimely notice of appeal from a state trial court's denial of post-conviction relief.[131] The Court declined to excuse the default because it viewed the attorney's late-filing error as the same type of "ignorance or inadvertence" at issue in *Carrier*.[132] And the error arose during a proceeding in which the Court has never recognized a constitutional guarantee of counsel (an appeal from a denial of an initial state post-conviction petition).[133] As a result, there could be no ineffective assistance as a matter of constitutional law.[134]

Coleman invoked "well-settled principles of agency law" to require the petitioner to "bear the burden" of this type of attorney negligence.[135] If ineffective assistance of constitutionally guaranteed counsel had caused the default, the Court might have recognized "cause."[136] But it indicated that doing so would not have been rooted in any principles of agency law; doing so would have enforced the constitutional right to counsel against the state.[137] In that scenario, the Court would have "seen [the attorney's error] as an external factor, i.e., 'imputed to the State.'"[138] Importantly, *Coleman* addressed only whether to excuse attorney error or negligence.[139] In this attorney-negligence category of potential "cause," the Court applies "well-settled principles of agency law" to hold the petitioner responsible for an attorney's "inadvertence," just as a principal is liable for the acts an agent undertakes "within the scope of employment."[140]

The Court has continued to treat "attorney negligence" as its own category[141] and expanded that category through *Martinez v. Ryan* and *Trevino v. Thaler* without using any language regarding an "external" factor.[142] Whereas *Coleman* had

130. *See* Coleman v. Thompson, 501 U.S. 722, 747–50 (1991).

131. *Id.* at 727–28.

132. *Id.* at 752–53.

133. *Id.* at 752–57.

134. *Id.*

135. *Id.* at 754.

136. *See id.* (emphasizing that "the State ha[d] no responsibility to ensure that the petitioner was represented by competent counsel").

137. *Id.*

138. *Id.* (quoting *Carrier*, 477 U.S. at 488; and citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

139. *See id.* at 753–54.

140. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 242 (AM. L. INST. 1958)).

141. *See, e.g.*, Maples v. Thomas, 565 U.S. 266, 280–82 (2012); *see also* Edwards v. Carpenter, 529 U.S. 446, 458 (2000) (Breyer, J., concurring in the judgment) (questioning why the Court appears to treat "cause" in the form of "an 'ineffective-assistance-of-counsel' claim" differently from how it treats "any of the many other 'causes' or circumstances that might excuse a failure to comply with state rules"); Wendy Zorana Zupac, *Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct After* Maples v. Thomas, 122 YALE L. J. 1328, 1358 (2013) (distinguishing the Court's application of "a performance-based standard . . . to post[-] conviction attorneys' conduct with respect to" certain claims of trial-counsel negligence from the Court's approach to post-conviction representation more generally, which focuses on "the continued existence of a principal-agent relationship" or lack thereof).

142. *See* Martinez v. Ryan, 566 U.S. 1, 9–10 (2012); *id.* at 24 (Scalia, J., dissenting); Trevino v. Thaler, 569 U.S. 413, 422–23, 429 (2013).

made an "unqualified statement . . . that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default,"[143] *Martinez* "qualifie[d]" it with a "narrow exception."[144] After *Martinez* and *Trevino*, ineffective assistance of counsel, or the absence of counsel, during an "initial-review collateral proceeding" can constitute cause to excuse the default of a "substantial" IATC claim if a "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 [IATC] on direct appeal."[145] As Justice Scalia pointed out in a dissent in *Martinez*, the Court articulated this rule without mentioning an "externality requirement," something he had considered "the North Star" of the Court's "excuse-for-cause jurisprudence."[146]

Attorney negligence—the type of "cause" at issue in *Martinez* and *Trevino*—is separate from other potential categories of cause though. And the Court has since refused to excuse attorney errors during state post-conviction proceedings when those errors led to defaults of claims of ineffective assistance of *appellate* counsel.[147] The Court also has severely limited the ability to obtain relief on an IATC claim when a post-conviction attorney has "negligently" defaulted the claim and "failed to develop" a record in state court to support that claim.[148] In *Shinn v. Ramirez*, the Court recently interpreted a provision of AEDPA to preclude federal courts from holding evidentiary hearings in such circumstances, unless petitioners can meet a different set of "narrow exceptions" set forth in the statute.[149] More specifically, the Court now treats a state post-conviction petitioner as "'at fault'" when that petitioner had counsel during state post-conviction proceedings and counsel "negligently failed to develop the state-court record" for a claim—even an IATC claim.[150] How lower federal courts will respond to this interpretation of AEDPA

143. *Martinez*, 566 U.S. at 9.

144. *Id.*

145. *Trevino*, 569 U.S. at 429 (quoting *Martinez*, 566 U.S. at 17) (internal quotation marks omitted).

146. *Martinez*, 566 U.S. at 24 (Scalia, J., dissenting).

147. Davila v. Davis, 137 S. Ct. 2058, 2065 (2017).

148. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728, 1733–38 (2022).

149. *See id.* at 1728, 1734; *see also* 28 U.S.C. § 2254(e)(2) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless" one of two statutory exceptions can be met). Justice Sotomayor wrote for three dissenters that *Ramirez* "all but overrules" *Martinez* and *Trevino*. *See Ramirez*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting); *see also* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 596 (2013) ("*Martinez* will do nothing to help the federal habeas petitioner if the District Court considers his underlying claim of trial court ineffectiveness on the very record that he asserts was flawed by the ineffective assistance of state post-conviction counsel."). Now, to benefit from the "attorney negligence" type of cause to excuse defaults, a petitioner must either navigate this strict reading of § 2254(e)(2) or rely on a record previously developed in state court to demonstrate ineffective assistance of state post-conviction counsel and IATC. *See* Buck v. Davis, 137 S. Ct. 759, 759, 767, 772, 774–75, 777, 779–80 (2017) (recognizing IATC and the ability to show state post-conviction counsel's ineffectiveness from a state-court record when trial counsel for a capital defendant, who was Black, presented testimony during a penalty phase "that one of the factors pertinent in assessing a person's propensity for violence was his race").

150. *Ramirez*, 142 S. Ct. at 1728, 1733–38 (quoting Williams v. Taylor, 529 U.S. 420, 432 (2000)).

remains uncertain, but it is critical to observe that the *Ramirez* Court only applied its prior attorney-negligence rule, i.e., that "under AEDPA and [the Court's] precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner."[151] The Court repeatedly referred to negligence—thirteen times—and analyzed only that form of cause to excuse default.[152] As important as *Martinez* and *Trevino* are (or could have been), these decisions only apply to one type of constitutional violation (IATC) and one type of cause for a default (ineffective assistance—or the absence—of state post-conviction counsel during an initial state post-conviction proceeding).[153]

B. Other Types of "Cause" and Circumstances Justifying Equitable Relief

Independent of attorney negligence, breakdowns in attorney-petitioner relationships have led the Court to excuse two types of procedural lapses: procedural default in one case and AEDPA's statute of limitations in another. The Court also has applied reasoning from the latter context to the former. This reasoning deserves attention when it comes to severe psychiatric impairments because circuits have permitted equitable tolling of the statute of limitations if either an attorney or a litigant has experienced such impairments—at least ones that leave a petitioner incompetent or lead to a breakdown in an attorney-client relationship. And this reasoning warrants even more attention after the Court's limitations on the "attorney negligence" category of cause to excuse procedural defaults in state post-conviction proceedings.[154]

In *Maples v. Thomas*, the Court recognized that a set of "extraordinary circumstances . . . beyond [a petitioner's] control" provided "ample cause" to excuse a default.[155] Those circumstances included the "sever[ance]" of an attorney-

151. *See id.* at 1734.

152. *See id.* at 1728, 1730, 1733–35, 1737–38.

153. Professor Justin Marceau initially predicted that *Martinez* and *Trevino*, plus two decisions I discuss next (*Holland* and *Maples*), represented a shift away from a "four-decade-long fixation on guilt/innocence" and toward "a very real possibility of judicial recognition that prisoners are entitled to one full and fair adjudication of their constitutional claims." Marceau, *supra* note 37, at 2137–38 (footnote omitted). Yet he noted the possibility the Court would limit *Martinez* as it eventually did in *Davila* and *Ramirez*. *Compare id.* at 2156–64 *with* Davila v. Davis, 137 S. Ct. 2058, 2065 (2017), *and Ramirez*, 142 S. Ct. at 1728, 1733–38. He also warned that "reading § 2254(e)(2) as trumping *Martinez* would be a substantial death-knell to the full and fair model of habeas adjudication." Marceau, *supra* note 37, at 2163–64 (footnote omitted). Still uncertain is whether courts will attempt to extend the reasoning in *Ramirez* to other sorts of cases Professor Marceau identified though, like when a petitioner did not have counsel at all during state post-conviction proceedings, or did have counsel who either was "unreasonably denied" factual development in state court or "requested an evidentiary hearing but did not comply with every state procedure in advancing the request." *See id.* at 2159–64. Congress could step in too. *Cf.* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 8 & n.36 (1997) (noting that "Democrats in Congress responded [to earlier Supreme Court decisions on procedural default] with bills that would have made defense counsel's 'ignorance or neglect' the basis for cause" (citing H.R. 4737, 101st Cong. § 7 (1990))).

154. *See supra* Part II.A.

155. *See* Maples v. Thomas, 565 U.S. 266, 289 (2012).

petitioner relationship during a state post-conviction proceeding.[156] Remember from *Coleman* that the Court has not recognized any constitutional right to appointed counsel at that stage.[157]

Maples received significant attention for the events that led to a procedural default, as well as the Court's discussion of Alabama's indigent defense system and conclusion about how the system failed petitioner Cory Maples.[158] Among the case's attention-grabbing facts was the involvement of two pro bono attorneys from a large law firm.[159] They represented Mr. Maples in state post-conviction proceedings to challenge his capital murder convictions and death sentence.[160] And the attorneys received the aid of local counsel to be admitted pro hac vice in a state court.[161] After they filed a state post-conviction petition on Mr. Maples's behalf,[162] but before any ruling on that petition, both attorneys left their law firm "without leave of court, without informing [him] they could no longer represent him, and without securing any recorded substitution of counsel."[163] A state trial-level post-conviction court then denied the petition.[164] And the time to file a notice of appeal ran—a lapse that triggered a potential procedural default.[165] Eventually, in federal habeas proceedings, the state successfully raised a procedural-default defense based on the time bar.[166]

The Supreme Court reversed that procedural-default ruling on "cause" grounds. It applied a well-established principle that, when an attorney has "severed the principal-agent relationship, [that] attorney no longer acts, or fails to act, as the client's representative."[167] This principle situated the case outside the *Coleman* category of attorney/agent "ignorance or inadvertence" that is generally "attributed" to a petitioner/principal.[168] As the Court put it, the two post-conviction attorneys "abandoned [Mr. Maples] without a word of warning," leaving him "disarmed by extraordinary circumstances quite beyond his control."[169]

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156. *Id*. at 270–71, 280–81.

157. *See id*. at 279.

158. *See, e.g*., Carol S. Steiker, *Raising the Bar:* Maples v. Thomas *and the Sixth Amendment Right to Counsel*, 127 HARV. L. REV. 468, 470–72 (2013) (analyzing the case and "the window [it] opens onto the structure of indigent criminal defense in Alabama, especially in capital cases"); Adam Liptak, *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 MICH. L. REV. 875, 875, 882–85 (2012) (summarizing the case after asking whether it "make[s] sense to consider" a "volunteer" or court-appointed attorney to be an "authentic agent" of "a client who is poor, uneducated, mentally troubled, scared, or imprisoned—or perhaps all of these things at once").

159. *Maples*, 565 U.S. at 274.

160. *Id*. at 273–74.

161. *Id*. at 274.

162. *Id*. at 274–75.

163. *Id*. at 271, 275–76.

164. *Id*. at 276.

165. *See id*. at 277–78.

166. *Id*. at 278–79.

167. *Id*. at 281 (citing 1 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 31, Comment f (AM. L. INST. 1998)).

168. *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991); *Maples*, 565 U.S. at 281.

169. *Maples*, 565 U.S. at 289.

The Court did repeat the line that "[c]ause . . . exists where 'something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . impeded [his] efforts to comply with the State's procedural rule,'" without including the "ordinarily" qualifier.[170] And all nine Justices agreed that if an attorney "sever[s]" an attorney-client relationship, that attorney's actions or inaction can constitute an "external" factor to excuse a default without running afoul of *Coleman*.[171] But none suggested that this sufficient way of showing cause was the only way. The majority included the *Coleman* line when explaining the "general rule" for attorney negligence before explaining why the case landed outside its reach.[172] The Court noted another type of case outside that general category too: one involving "a conflict of interest."[173] It gave no hint it was defining the universe of potential "causes" though. Once the Court avoided *Coleman*'s attorney-negligence category, it could reach an easy result: It described the facts as "extraordinary," opined that "no just system would lay the default at [Mr.] Maples' death-cell door," and identified "ample cause" to excuse the relevant default.[174]

Maples also relied on reasoning from an AEDPA case from the prior term, reasoning which indicated that an attorney's "mental impairment" could excuse a failure to comply with another procedural bar.[175] In *Holland v. Florida*, the Court reversed the Eleventh Circuit's rule for equitably tolling AEDPA's statute of limitations.[176] To justify equitable tolling, petitioners must show they have been "'pursuing [their] rights diligently'" and "'that some extraordinary circumstance stood in [their] way' and prevented timely filing."[177] The Eleventh Circuit had defined the "extraordinary circumstances" necessary to justify tolling in a way that only included attorney misconduct plus "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part."[178] *Holland* described that test as "too rigid" because it wrongly failed to account for circumstances falling between negligence, on one end, and circumstances like "divided loyalty" or "mental

170. *Id.* at 280 (quoting *Coleman*, 501 U.S. at 753, and *Carrier*, 477 U.S. at 488) (internal quotation marks omitted).

171. *See id.* at 281; *id.* at 293–94 (Scalia, J., dissenting). Justice Scalia and Justice Thomas were willing to treat an "attorney's acts and omissions" "as an 'external factor'" for purposes of "cause" to excuse a default "once the attorney has ceased acting as the client's agent." *Id.* at 294 (Scalia, J., dissenting) (quoting *Coleman*, 501 U.S. at 754). They dissented because they would not conclude that the petitioner had been abandoned by counsel; they viewed the petitioner as represented at all times by the large law firm, other attorneys at that firm, and local counsel. *Id.* at 294–99.

172. *Id.* at 280–81 (majority opinion).

173. *Id.* (citing Jamison v. Lockhart, 975 F.2d 1377, 1380 (8th Cir. 1992)).

174. *Id.* at 271, 289.

175. *See id.* at 281–82; Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008) (per curiam)).

176. *See Holland*, 560 U.S. at 649, 653–54.

177. *Id.* at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

178. *Id.* (quoting *Holland*, 539 F.3d at 1339).

impairment," on the other.[179] To the Court, even circumstances in between those two poles could justify equitable tolling of AEDPA's statute of limitations.[180]

Now, authors like Professor Justin Marceau have highlighted ways in which *Maples* and *Holland* could be limited to the types of extraordinary circumstances they presented.[181] Litigants and lower courts are being tasked with distinguishing the "extraordinary" cases from the "ordinary" ones.[182] Even if the Court were to read *Maples* and *Holland* narrowly in the future though, both point in the direction of *attorney* psychiatric impairments serving as "cause" to excuse a default and justifying equitable relief from one of AEDPA's rules, if such an impairment leads to a conflict of interest or some other breakdown in an attorney-client/agency relationship.[183] And including such impairments as "cause" would fit with continuing reform within the profession to address psychiatric health and prevent or remedy breakdowns in attorney-client relationships that result from attorney impairments.[184]

If attorney psychiatric impairments justify equitably tolling AEDPA's statute of limitations when they lead to breakdowns in attorney-client relationships, then petitioner impairments that lead to defaults and breakdowns in attorney-client relationships should be cognizable forms of "cause" too. Principles of agency law support the point: "The capacity to do a legally consequential act by means of an

179. *See id*. at 649–52.

180. *Id*. at 651–53.

181. *See* Marceau, *supra* note 37, at 2132, 2138–41.

182. *See id*. at 2138–41.

183. *See supra* notes 173, 178–80 and accompanying text; *see also* MEANS, *supra* note 18, § 25:45 n.1 and accompanying text (explaining that "[a]n attorney's or pro se petitioner's 'severe mental impairment may serve as an extraordinary circumstance, at least where the petitioner is able to show that it affected his lawyer's work'" (quoting Thomas v. Att'y Gen., 795 F.3d 1286, 1295 (11th Cir. 2015))); Zupac, *supra* note 141, at 1335–43, 1346–58 (observing that the Court has at times, but not consistently, focused on the attorney-petitioner "relationship" and agency principles in the post-conviction context, distinct from its focus on attorney "mistakes" or "performance" "in contexts in which the Sixth Amendment right to counsel applies"); *id*. at 1366 (describing United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977), a civil case, that illustrated, in effect, a severance of the attorney-client/agency-law relationship when an attorney "was 'allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it'"); Jonathan Atkins, Danielle B. Rosenthal & Joshua D. Weiss, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 456–58 (2016) (describing a trend in "nonhabeas civil cases" away from a "formalist" view of agency set forth in Link v. Wabash R.R. Co., 370 U.S. 626 (1962), and toward a "principled agency approach" the authors describe). This basis for cause is "objective." *Cf.* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by* Martinez v. Ryan, 68 FLA. L. REV. 765, 786–87 (2016) (explaining that *Holland* pointed to "[a]n objective standard," which "requires lawyers to measure up to the standards set by others within the profession").

184. *See, e.g.*, STATE BAR OF CAL. STANDING COMM. ON PRO. RESP. & CONDUCT, FORMAL OP. 2021-206, 3–4 (2021), https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2021-206-Colleague-Impairment.pdf (explaining that, though an attorney's "mental impairment, standing alone, does not raise ethical issues[,]" such an impairment could "prevent or inhibit a lawyer from recognizing and/or appreciating the existence or extent of the impairment and its effect on the lawyer's performance of legal services").

agent is coextensive with the principal's capacity to do the act in person."[185] And the Court's original list of excuses for a default in *Brown v. Allen* also supports the point; that list included petitioner "incapacity."[186]

At the same time, decisions like *Holland* and the more recent *Ramirez* recognize that excusing procedural default brings potential federalism concerns that are not implicated by equitably tolling AEDPA's statute of limitations.[187] *Maples* saw "no reason" to treat severance of an agency relationship any less seriously in the procedural-default context though.[188] *Maples* treated any state concerns as outweighed by equitable considerations in favor of a petitioner who "was disarmed by extraordinary circumstances quite beyond his control."[189] The extent to which any distinction between the doctrines should matter remains unclear, but *Maples* puts a thumb on the side of a scale that already has on top of it a treatise's collection of decisions outside "the habeas corpus context" that "suggest that the 'objective/external factors' capable of excusing a default may include all 'extraordinary circumstances suggesting that the party [including counsel] is faultless' in causing the default or that the party was 'prevented from complying by forces beyond its control,'" including by "'incarceration' or 'ill health.'"[190]

C. Supreme Court Precedent and the Principles Underlying Procedural Default Demand a Category of "Cause" for Severe Psychiatric Impairments

The Court's decisions outside the attorney-negligence context support the idea that lower courts should use "cause" to address breakdowns in state post-conviction proceedings and attorney-client relationships, particularly when these breakdowns arise out of severe impairments. Judges should recognize a severe-psychiatric-impairment category of "cause" to excuse procedural defaults and allow further factual development, if necessary, to review and remedy petitioners' claims for relief in federal court.

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185. RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (AM. L. INST. 2006); *see also id.* (recognizing that "minors lack full capacity, as do those persons who suffer from mental disease or disturbance, or a physical condition that reduces awareness"); Maples v. Thomas, 565 U.S. 266, 289 (2012) (considering "principles of agency law and fundamental fairness" when identifying "cause to excuse [a] procedural default"); Atkins, Rosenthal & Weiss, *supra* note 183, at 443–48 (describing the "core" or "fundamental principles of agency law" and a "principled agency approach" to equitable tolling in federal habeas cases, including the idea that "conduct both beyond the agent's authority (as constrained by his other duties to the principal), and also beyond the principal's ability to control the agent" is "conduct outside the scope of the agency relationship").

186. *See* Brown v. Allen, 344 U.S. 443, 485–86 (1953).

187. *See* Holland v. Florida, 560 U.S. 631, 650–51 (2010); Shinn v. Ramirez, 142 S. Ct. 1718, 1739–40 (2022).

188. *See Maples*, 565 U.S. at 282 n.7, 289.

189. *See id.* at 289.

190. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.3 n.20 and accompanying text (alteration in original) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 387–88, 393–95 (1993)); *see also* Huq, *supra* note 2, at 556–57 (explaining that, although concerns about federalism occupy "one side of the scale," "the other side has not been wholly evacuated" and "[a]ttending solely to one side of the scale . . . does not speak to how the scale is calibrated" and "cannot explain . . . cases such as *Martinez*, *Holland*, or *Trevino*").

Now that the Court has drawn a connection between "extraordinary circumstances" (to toll AEDPA's statute of limitations) and "cause" (to excuse defaults), lower courts' approaches to severe psychiatric impairments that lead to statute-of-limitations problems should guide their procedural-default analyses. And there already is support among many lower courts that a petitioner's psychiatric impairment can serve as an "extraordinary circumstance" for purposes of equitably tolling the statute of limitations.[191] Circuits recognize that a "severe" "mental impairment" can be "beyond [a prisoner's] control"[192] and that a "mental illness" can "severely impair[] [one's] ability to comply with [a] filing deadline, despite her diligent efforts to do so."[193]

Treating severe impairments as valid "causes" also would fit with principles that long have guided the Court's procedural default doctrine. As one treatise explains, the Court's approach to cause "is best understood with reference to the two underlying purposes of the independent and adequate state procedural grounds doctrine": "to discourage petitioners and their lawyers from 'sandbagging,'—i.e., making 'tactical decision[s] to forego a procedural opportunity' to raise a claim in the state courts in order to raise the claim later,"[194] while ensuring "that state officials and the state courts actually *gave* the petitioner a fair 'procedural opportunity' to present the claim."[195] That is, courts should encourage compliance with state procedure at the first *meaningful* opportunity to present a claim.[196] And it bears repeating the same treatise's point that "'objective/external factors' capable of excusing a default may include all 'extraordinary circumstances suggesting that the party [including counsel] is faultless' in causing the default or that the party was 'prevented from complying by forces beyond its control.'"[197] This point has

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191. *See* MEANS, *supra* note 18, § 25:45 (describing decisions that permit equitable tolling "based on a petitioner's mental or physical impediments," despite the absence of a "consensus . . . on what specific showing is required to warrant [it]"); HERTZ & LIEBMAN, *supra* note 1, § 5.2 nn.82, 85–86 and accompanying text (collecting examples of equitable tolling when "some or all of the delay can be attributed to" among other examples, "the prisoner's mental incompetence" or "other psychiatric, physical, or medical impairments").

192. Bills v. Clark, 628 F.3d 1092, 1099–1100 (9th Cir. 2010) (cited in MEANS, *supra* note 18, § 25:45 nn.6–27 and accompanying text; HERTZ & LIEBMAN, *supra* note 1, § 5.2 n.85).

193. Bolarinwa v. Williams, 593 F.3d 226, 232 (2d Cir. 2010) (cited in MEANS, *supra* note 18, § 25:45 nn.28–33 and accompanying text; HERTZ & LIEBMAN, *supra* note 1, § 5.2 n.85); *see also Equitable Gateways*, *supra* note 8, at 306 (explaining the possibility of equitable tolling for "something external to both a state and a prisoner" and giving the example of tolling "when a prisoner suffers from an extreme medical condition, whether physical or psychiatric, which interfered with the ability to file federal claims on time" (footnotes omitted)).

194. HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.16–18 and accompanying text (quoting Murray v. Carrier, 477 U.S. 478, 490 (1986), and Reed v. Ross, 468 U.S. 1, 14 (1984), among other examples); *see also* Shinn v. Ramirez, 142 S. Ct. 1718, 1739–40 (2022) (referring to this same consideration).

195. HERTZ & LIEBMAN, *supra* note 1, § 26.3 n.18 and accompanying text (quoting *Reed*, 468 U.S. at 14).

196. *See, e.g.*, Marceau, *supra* note 37, 2125–69 (analyzing the "preoccupation with procedural fairness—that is, a requirement of a meaningful, or full and fair, opportunity to challenge one's conviction"—in the "*Holland-Maples-Martinez* trilogy" of cases); *id.* at 2146 n.357, 2152–53 (describing the Court's requirement that a state provide "a 'meaningful opportunity' to litigate [an IATC] claim" to avoid the *Martinez* rule (quoting Trevino v. Thaler, 569 U.S. 413, 428 (2013))).

197. HERTZ & LIEBMAN, *supra* note 1, § 26.3 (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 387–88, 393–95 (1993)) (internal quotation marks omitted). In this vein, Professor

particular salience now that the Court has held that a petitioner is "at fault" in a meaningfully distinct scenario: when one is represented by a post-conviction attorney who "negligently failed to develop the state record for a claim of [IATC]" in state post-conviction proceedings.[198]

In addition to lining up procedural default doctrine with the law governing AEDPA's statute of limitations, recognizing this category of "cause" would fit with how some courts approach this type of impairment in the "exhaustion of state-court remedies" context. Some state courts have acknowledged the possibility that incompetence during an earlier proceeding could excuse noncompliance with procedural rules if a petitioner later attempts to present a claim.[199] In a federal habeas case arising in a state with this type of mechanism, the state court's willingness to address the effects of incompetency could avert any need for a federal district court to address procedural default. How so? An individual in federal habeas proceedings who can pursue this type of relief in state court has not exhausted available state-court remedies while this path remains open. A federal habeas court therefore could stay federal proceedings while the petitioner exhausts those remedies, so long as a petitioner met the additional requirements for such a stay.[200] Among those requirements is a showing of "good cause" for failure to exhaust the remedies before that point in time.[201] Some federal district courts have identified "good cause" based on a petitioner's "severe mental illness," as Professor Brensike Primus has noted.[202]

So, one might ask: If severe psychiatric impairments can be "good cause" to explain a petitioner's earlier failure to exhaust state-court remedies, should they also be "cause" to excuse a default in states that do not provide this additional

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Kovarsky has described "extraordinary circumstances" for equitable tolling as "cause, roughly." *Habeas Optimist*, *supra* note 82, at 114; *see also* Huq, *supra* note 2, at 542 n.104 (observing that the language in Holland v. Florida, 560 U.S. 631, 649 (2010), regarding "'extraordinary' interference . . . aligns it closely with the cause-and-prejudice standard . . .").

198. *See Ramirez*, 142 S. Ct. at 1733–38 (citations and internal quotation marks omitted).

199. *See, e.g.*, Quinn, *supra* note 54, at 297–99 (discussing State v. Debra A.E., 523 N.W.2d 727 (Wisc. 1994)); Brief of State of Wisconsin, Wisconsin v. Scott, 914 N.W.2d 141 (2018) (No. 2016AP2017), 2017 WL 6622203, *23–24 (collecting examples); Fitzgerald v. Myers, 402 P.3d 442, 447, 450 (Ariz. 2017) (noting a statutory requirement of "a capital defendant's competence before he may validly waive [post-conviction] counsel" as well as the possibility of a "successive [post-conviction] petition that asserts that a new claim could not have been raised at the initial [post-conviction] proceeding due to the petitioner's incompetence"); Ferguson v. State, 677 S.E.2d 600, 602 (S.C. 2009) (permitting the tolling of a state post-conviction statute of limitations when "an applicant demonstrates the failure to timely file for [post-conviction relief] was due to mental incompetency"); *see also* sources cited *supra* note 90.

200. *See Equitable Gateways*, *supra* note 8, at 308.

201. *See id.* (quoting Rhines v. Weber, 544 U.S. 269, 277–79 (2005)).

202. *See id.* at 308–09 (noting that some courts "have found that a prisoner's severe mental illness may provide good cause for a failure to exhaust," and explaining "that something external to the state prisoner has interfered with the ability to comply with the exhaustion requirement . . ." (citing Shotwell v. Lamarque, No. 104CV06496OWWTAGHC, 2005 WL 1556296, at *2 (E.D. Cal. June 24, 2005))); *see also* Randle v. Grounds, No. CV-14-2611-DSF(JC), 2018 WL 6027120, at *4 (C.D. Cal. Sept. 28, 2018) (collecting district-court examples in a pro se case), *report and recommendation adopted*, 2018 WL 6025838 (C.D. Cal. Nov. 15, 2018).

remedy? Yes, and potential comity arguments states might raise simply demand the same type of individualized, case-by-case analyses the Court applied in *Maples* and *Holland*. District courts, which must answer exhaustion questions alongside procedural-default ones, are well situated to resolve factual issues related to psychiatric impairments, e.g., what happened (or did not happen) during earlier state proceedings, whether the evidence demonstrates a valid impairment over the objection of a state that might contest its validity or raise concerns about "sandbagging."[203]

One still might ask: Why should federal habeas courts allow psychiatric impairments to constitute "cause" for procedural defaults if there is no statutory or constitutional right for counseled petitioners to be competent during state post-conviction or federal habeas proceedings? After all, the Supreme Court in *Ryan v. Gonzales* reversed decisions that had "entitled" death-sentenced individuals seeking federal habeas relief "to a suspension of proceedings" in federal court "when found incompetent."[204] Neither the federal statutory right to counsel in 18 U.S.C. § 3599 nor the Due Process Clause provided a right to that type of stay or a right to be competent during federal habeas proceedings.[205]

These decisions, however, are inapplicable to an equitable exception to procedural default.[206] Neither identifying "cause" nor equitably tolling AEDPA's statute of limitations requires a constitutional or statutory violation. And critical to the Court's rejection of indefinite stays of federal habeas proceedings when a death-sentenced petitioner is mentally incompetent was "the backward-looking, record-based nature of most federal habeas proceedings," in which appointed "counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence."[207] *Gonzales* did not address circumstances in which individuals might have been barred from meaningful review during earlier "exhaustion" proceedings through no fault of their own because of severe psychiatric impairments, as in the hypothetical presented *supra* Part I. In fact, before *Gonzales*, authors distinguished the issue of staying litigation from creating a basis for "cause" to excuse defaults.[208] In short, the Court's rejection of indefinite stays

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203. *See infra* Part III.D. (discussing how courts can address these types of factual issues); HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.16–20 and accompanying text (quoting Murray v. Carrier, 477 U.S. 478, 490 (1986), and Reed v. Ross, 468 U.S. 1, 14 (1984), among other examples); MEANS, *supra* note 18, § 25:45 (citing numerous examples of courts remanding for "factual development" and fact-intensive analyses in the equitable-tolling context).

204. 568 U.S. 57, 64 (2013); *see also* Miller, *supra* note 90, at 277–78 (explaining that "death row inmates in most states . . . have no right to competency during the collateral review of their death sentences").

205. *Gonzales*, 568 U.S. at 64–71.

206. *See id.* at 67 n.6 (reasoning that "the propriety of equitably tolling AEDPA's statute of limitations in the case of a mentally incompetent petitioner has nothing to do with the statutory right to counsel").

207. *Id.* at 68.

208. *See* Bonnie, *supra* note 35, at 1178–80, 1193 n.61; *ABA Recommendation and Report*, *supra* note 35, at 674–75; Quinn, *supra* note 54, at 298–99, 307–09.

does not pose any obstacle to the meaningfully distinct remedy of excusing a prior default and allowing further evidentiary development in federal court, if necessary.

III. WHAT LOWER COURTS HAVE DONE SO FAR: TAKEN INCONSISTENT POSITIONS ON WHETHER SEVERE PSYCHIATRIC IMPAIRMENTS CAN EXCUSE A PROCEDURAL DEFAULT

Justice Brennan once predicted that "it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause'" to excuse a procedural default.[209] Lending support to this view, only one circuit has recognized a severe psychiatric impairment as "cause" to excuse a default in a published opinion.[210] Among the circuits that have refused to recognize this category of "cause," three have justified the refusal by suggesting in published opinions that cause must be something "external to the petitioner" and interpreting that phrase to mean something arising literally outside one's body.[211] Others have not expressly relied on that language in that way but have yet to recognize a psychiatric-impairment category of "cause" or a case with facts that would fit within it.[212]

This Part discusses lower courts' various approaches as well as some intra-circuit tensions. Rather than define "external obstacles" to include health-related impairments (as some litigants and scholars have argued)[213] or compare diagnoses in the abstract (as some courts have done),[214] this Article argues that courts should follow the path discussed above to recognize severe psychiatric impairments as a type of "cause" to excuse procedural defaults when they lead to breakdowns in state-court processes or attorney-client relationships.

A. Courts Looking for "External Obstacles," Perhaps Only Literal Ones

In published opinions, three circuits have treated *Carrier*'s example of "cause" being something "external" to the petitioner as if that were the only way to show "cause."[215] And these circuits have declined to recognize a petitioner's psychiatric impairment—even "alleged mental incompetency" in one case[216]—as "cause,"

209. Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting).

210. *See* MEANS, *supra* note 18, § 24:13 nn.12–13 and accompanying text (explaining that only the Eighth Circuit has "ruled that cause exists if there is 'a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding his or her case at the time during which he or she should have pursued post-conviction relief'" (quoting Holt v. Bowersox, 191 F.3d 970, 974 (8th Cir. 1999))).

211. *See infra* Part III.A.

212. *See infra* Part III.B.

213. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 321; HERTZ & LIEBMAN, *supra* note 1, § 26.3 n.20 and accompanying text.

214. *See infra* Part III.B.

215. *See, e.g.*, Gonzales v. Davis, 924 F.3d 236, 244 (5th Cir. 2019) (per curiam); Hull v. Freeman, 991 F.2d 86, 91 (3d Cir. 1993); Harris v. McAdory, 334 F.3d 665, 668–69 (7th Cir. 2003).

216. *Gonzales*, 924 F.3d at 244 & n.4.

because this type of impairment "is not a cause *external* to the petitioner,"[217] presumably because it literally arises from "within" a petitioner's body.[218] Among the health issues these courts have excluded are intellectual impairments, schizoaffective disorder, and depression.[219] Taken to its logical conclusion, this approach would apply to petitioners who submit clear and convincing evidence in federal habeas proceedings that severe psychiatric impairments—even periods of mental incompetence—caused a default in state post-conviction proceedings. In these courts then, after a failed "cause" argument, petitioners would need to rely on a challenge to the "adequacy" of the default, a Due Process Clause challenge, or a Suspension Clause challenge.[220]

A recent decision from the Fifth Circuit exemplifies this approach. The Fifth Circuit declined to review a set of federal habeas claims filed by Michael Dean Gonzales, who had purportedly waived state post-conviction counsel and proceedings.[221] Mr. Gonzales submitted evidence that he had experienced "dementia," "severe depression with psychotic features," "schizoaffective disorder," "paranoia," "significant impairments in verbal processing[,] and deficits in attention," and had been "prescribed powerful anti-psychotic medication."[222] After a conviction for capital murder, he went through two sentencing proceedings and endured more than seven years on death row.[223] The record of the state court resentencing proceedings included multiple "outbursts" and disruptions, which federal habeas counsel connected to his documented impairments.[224] Those proceedings culminated in a death sentence and a hearing at which Mr. Gonzales stated that he did not want to be appointed state post-conviction counsel.[225] The state trial court did not appoint counsel, after which Mr. Gonzales failed to file a timely petition for post-conviction relief, leading to what the Fifth Circuit held to be an adequate and independent state procedural default.[226] The Fifth Circuit then excluded psychiatric impairment as a possible "cause" for Mr. Gonzales's default.[227] It reasoned in a

217. *See id.* at 244 (emphasis added); *see also Hull*, 991 F.2d at 91; *Harris*, 334 F.3d at 669.

218. *See Harris*, 334 F.3d at 669.

219. *See id.* at 668–69 & n.1; *Gonzales*, 924 F.3d at 244–45; Petition for Writ of Certiorari, *supra* note 30, at 3–15; Cawley v. DeTella, 71 F.3d 691, 696 (7th Cir. 1995).

220. *See, e.g.*, Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 958, 992–1005 (2012) (discussing such challenges) (cited in *Equitable Gateways*, *supra* note 8, at 319 n.193); Petition for Writ of Certiorari, *supra* note 30, at 15–27 (challenging the adequacy of a state's acceptance of a waiver of post-conviction proceedings and raising due process issues).

221. *See Gonzales*, 924 F.3d at 242–44; *Ex parte* Gonzales, 463 S.W.3d 508, 509 (Tex. Crim. App. 2015) (per curiam); Petition for Writ of Certiorari, *supra* note 30, at 11–15.

222. Petition for Writ of Certiorari, *supra* note 30, at 3.

223. *Id.* at 2–13.

224. *Id.* at 4–15.

225. *Id.* at 11–12.

226. *See Gonzales*, 924 F.3d at 243–44.

227. *See id.* at 244.

categorical way "that mental impairments are not factors external to the petitioner's defense and do not excuse procedural default."[228]

Two other circuits have drawn this type of line around "external" factors when presented with arguments regarding similar impairments. The Seventh Circuit did so when a litigant argued that his "pro se status," "borderline" intellectual disability, and "organic (frontal lobe) brain dysfunction" provided cause to excuse a failure to present an IATC claim in an earlier state post-conviction petition.[229] And the Third Circuit drew a similar line when reasoning that one's "borderline" intellectual disability and illiteracy were "not 'external' to his defense within the meaning of *Carrier*."[230]

These courts, asking whether "cause" arose from an "external impediment" and excluding psychiatric impairments among such impediments, appear to base this understanding of "cause" on the Supreme Court's approach to attorney negligence in *Carrier* and *Coleman*.[231] But a close look at both cases shows that neither justifies such a narrow view of the doctrine. Recall that, in the attorney-negligence context, *Coleman* reiterated *Carrier*'s point "that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[232] Must cause always arise from some "factor external to the defense"?[233]

The short answer is: No, and these circuits are asking the wrong question. As discussed *supra* Part II, in neither *Coleman* nor *Carrier* did the habeas petitioner point to a basis for cause other than "attorney error" or create any reason for the Court to elaborate upon its statement that cause "ordinarily" arises from something "external" to the attorney or petitioner.[234] And neither case decided anything about potential forms of cause outside this one category. So, a narrow and exclusive focus on when the Court used the word "ordinarily" in these attorney-negligence cases raises more questions than answers when it comes to predicting how the Court would approach an entirely separate category of "cause," e.g., psychiatric impairments that prevent an individual from complying with state procedural rules or that lead to a breakdown in an attorney-client relationship.[235]

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228. *Id.* at 244 n.4. It separately rejected the petitioner's argument that he had been incompetent "as a factual matter." *Id.* at 244–46.

229. Harris v. McAdory, 334 F.3d 665, 667–69 (7th Cir. 2003).

230. Hull v. Freeman, 991 F.2d 86, 91 (3d Cir. 1993) (first citing United States v. Flores, 981 F.2d 231, 236 (5th Cir. 1993); then citing Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992)). Although the Third Circuit cited the Eighth Circuit as having reasoned along these lines, the Eighth Circuit no longer takes this approach, at least not when presented with evidence of incompetency. *See infra* Part III.C.

231. *See Harris*, 334 F.3d at 669.

232. Coleman v. Thompson, 501 U.S. 722, 753 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

233. *See id.*

234. *See Carrier*, 477 U.S. at 488–90; *Coleman*, 501 U.S. at 752–53.

235. *Cf. Equitable Gateways*, supra note 8, at 296–97 (recognizing a difference between "lack of access to the state courts" due to "an overly complicated state procedural regime" and other "causes" like "a severe mental

Start with *Coleman*, which made the following statement about how petitioners should approach "cause": "We explained clearly [in *Carrier*] that 'cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him . . . ."[236] If that were all the Court said in *Coleman*, plus a complete and accurate description of what it had said in *Carrier*, a search for "external" factors might be the right way to approach cause. But the Court followed this statement up with the quotation from *Carrier* "that the existence of cause for a procedural default must *ordinarily* turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[237] *Carrier* never said "clearly that 'cause' . . . *must* be" an external factor.[238] It said cause "must ordinarily turn on"[239] or "ordinarily requires"[240] an external factor: illustrative—not exclusive—language.

Did *Coleman* mark a meaningful change from *Carrier*'s understanding of what "cause" "ordinarily requires"? Maybe the three circuits discussed above view it that way. And a Note quickly criticized *Coleman* for "distort[ing] *Carrier* by transforming its observation that cause will often be external to the defense into a hard and fast rule."[241] Plus, the Court has not consistently included the "ordinarily" caveat when discussing attorney negligence.[242]

Reading this change into *Coleman* seems shaky on closer examination though. Each opinion should be analyzed with an eye toward the category of cause it was addressing. *Coleman* was adamant that all it was doing was "[a]pplying the *Carrier* rule as stated" to a case that, just like *Carrier*, involved attorney negligence as the only proposed basis for "cause."[243] And it quoted the *Carrier* language

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defect or an unforeseen medical emergency"—as well as a role for "equitable principles" to play in either circumstance).

236. *Coleman*, 501 U.S. at 753.

237. *Id.* at 753 (emphasis added) (quoting *Carrier*, 477 U.S. at 488).

238. *See id.* (emphasis added).

239. *Carrier*, 477 U.S. at 488.

240. *Id.* at 492.

241. *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 329, 337 (1991) [hereinafter *The Supreme Court 1990 Term*]; *see also id.* at 333 n.37 (asserting that the *Coleman* Court "mischaracterized *Carrier*, which said only that 'the existence of cause . . . must *ordinarily* turn on" the presence of an "external" factor, before noting that the Court "did place this quotation in [the] opinion" (quoting *Carrier*, 477 U.S. at 488)).

242. *See Carrier*, 477 U.S. at 497; *Coleman*, 501 U.S. at 753–54; Davila v. Davis, 137 S. Ct. 2058, 2065 (2017); Shinn v. Ramirez, 142 S. Ct. 1718, 1733, (2022). Outside the state procedural default context, the Court similarly omitted the word "ordinarily" when it "adopt[ed]" *Carrier*'s "cause and prejudice" test to assess whether filing a subsequent federal habeas corpus petition constituted an "abuse of the writ." *See* McCleskey v. Zant, 499 U.S. 467, 493–98 (1991); *see also id.* at 497 (quoting *Carrier*, 477 U.S. at 492, to state: "[C]ause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising the claim."). But *McCleskey*, like *Carrier*, was in no position to limit "cause" to external impediments: The only potential "cause" at issue in the case was a state's failure to provide a document to a petitioner until after the conclusion of a set of initial state habeas and federal habeas proceedings. *See id.* at 498–99 (reasoning that, even without the newly disclosed document, the petitioner had sufficient "notice to pursue the [pertinent] claim in his first federal habeas petition").

243. *See Coleman*, 501 U.S. at 752.

about "external" factors "ordinarily"—not exclusively—constituting cause.[244] It gave no indication that it intended to deviate from *Carrier*'s guidance.

There also is no reason to think *Coleman* literally meant a petitioner's body when referring to something "external to the petitioner." Referring to some factor "external to the defense" or "external to the petitioner" sounds like shorthand for the very idea the Court has attached to the "external" language: "something that cannot fairly be attributed to [a petitioner],"[245] or "some reason beyond the prisoner's control," as Professors Mark Tushnet and Larry Yackle put it.[246] Since *Coleman* too, the Court has said, "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner."[247] This also is an apt place to remember the Court's own refrain that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute."[248]

There also are signs that two of these circuits that have focused on a search for literal "external" factors may themselves stray from that line-drawing. After the Third Circuit provided its adverse procedural default reasoning discussed above, the court decided that a petitioner's impairments "and lack of notice from [post-conviction] counsel" regarding an "appeal deadline" independently justified permitting the petitioner to present his claims in state court for exhaustion purposes before litigating further in federal court.[249] That makes its reasoning about procedural default unnecessary to the disposition, plus serves as a reminder of how

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244. *Id.* at 753 (quoting *Carrier*, 477 U.S. at 488); *The Supreme Court 1990 Term*, *supra* note 241, at 333 n.37.

245. *Coleman*, 501 U.S. at 753.

246. Tushnet & Yackle, *supra* note 153, at 39. Professors Tushnet and Yackle did provide illustrative examples of factors that are both literally "external to the defense" and "beyond the petitioner's control": a tornado or a state actor's decision-making. *Id.* But those easy examples should not give the impression that "cause" must literally arise from outside the petitioner in every case.

247. *Davila*, 137 S. Ct. at 2065 (quoting *Coleman*, 501 U.S. at 753). Similarly, the Supreme Court of Connecticut (which uses the federal "cause and prejudice" standard when applying its state procedural default doctrine) views an "internal" cause "as 'something fairly attributable to the petitioner,'" adding that "whether cause is internal presumes a level of participation by the petitioner in his defense." Saunders v. Comm'r of Corr., 272 A.3d 169, 177, 185 (Conn. 2022) (footnote omitted). That state court specifically declined "to consider pertinent to a determination of . . . cause whether that cause comes from 'within the petitioner' (e.g., within his mind or body)." *Id.* at 184–85; *see also id.* (describing as "flawed" the reasoning of what it viewed to be four circuits that "have concluded that incompetency is internal"). It did so when considering an underlying constitutional claim of a petitioner's trial-stage incompetency plus an argument to excuse a prior default of that claim based on the petitioner's incompetency. *See id.* at 182, 185, 186 n.12.

248. Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979) (quoted in Brown v. Davenport, 142 S. Ct. 1510, 1528 (2022)).

249. *See* Hull v. Freeman, 991 F.2d 86, 91 (3d Cir. 1993). In an era before Congress passed AEDPA's statute of limitations and the Supreme Court approved the *Rhines v. Weber*, 544 U.S. 269 (2005), stay-and-abeyance procedure, the Third Circuit dismissed this federal petition without prejudice to the petitioner filing a new state-court petition and, after exhausting potential state-court remedies, refiling a federal petition. *See Hull*, 991 F.2d at 92 ("refrain[ing] from deciding 'cause and prejudice' and" instead "allow[ing] [the petitioner] to attempt to establish a basis for waiver [of procedural default] in state court, after which he may obtain federal habeas review if the [state supreme court] rejects his claim on the merits").

recognizing psychiatric impairments as valid causes would align procedural default doctrine with exhaustion law.

And the Seventh Circuit has defined the term "external" for purposes of equitably tolling AEDPA's statute of limitations in a way that is irreconcilable with the court's understanding of the term in the procedural default context. Recall that petitioners seeking to equitably toll that statute of limitations must show that they have been "pursuing [their] rights diligently" and "'that some extraordinary circumstance stood in [their] way' and prevented timely filing."[250] A Seventh Circuit panel recently explained "that an 'external obstacle' is a barrier beyond a litigant's control," thereby allowing a medical issue or "mental limitation" to qualify as one for purposes of equitable tolling.[251] That explanation rejected a district court's reasoning that should sound familiar: According to the district court, "Aphasia[252] is not an 'external' obstacle . . . ; it is instead a limitation within the petitioner. It follows, the judge thought, that aphasia (and presumably any other mental limitation) never supports equitable tolling."[253] The Seventh Circuit panel considered this reasoning "inconsistent with the law of the circuit," noting that "[m]any cases have concluded that an applicant's mental limitations can support equitable tolling."[254]

Focusing on what someone could control, the Seventh Circuit distinguished lack of "legal information"—which can be controlled by "go[ing] to the prison library and look[ing] up [a] deadline (or ask[ing] [a] librarian or a jailhouse lawyer to do so . . .)"—from "mental shortcomings" that "may limit a prisoner's power to engage in self-help."[255] The former was not an "external obstacle." But the latter could be. For example, "[a] prisoner with an IQ of 50 cannot do legal research. A prisoner with global aphasia (that is, inability to use or understand any words) could not even ask someone else to assist him."[256]

This panel did not address the Seventh Circuit's contrary reasoning in the procedural-default context, even though one judge on the panel had written an earlier opinion explaining that "[s]omething that comes from a source within the petitioner is unlikely to qualify as an external impediment" for purposes of procedural default.[257] The state even raised procedural default as a reason why any remand after a favorable opinion on equitable tolling would be futile, but the panel saw things differently: "Procedural defaults may be excused under some circumstances. A brain

250. Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).
251. Perry v. Brown, 950 F.3d 410, 412 (7th Cir. 2020).
252. *See id.* (defining "global aphasia" as an "inability to use or understand any words").
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *See* Harris v. McAdory, 334 F.3d 665, 669 (7th Cir. 2003); *see also id.* (concluding that a petitioner's "low IQ and limited reading ability [we]re not factors . . . 'external' to his defense").

injury that prevents a prisoner from complying with the state's rules for prosecuting collateral attacks may be one such circumstance."[258]

B. Courts Declining to Recognize a Psychiatric Impairment as "Cause" Without Expressly Requiring an "External" Factor

A second group of courts has left open the question of whether a severe psychiatric impairment could constitute "cause."[259] But this group has not yet recognized in a published opinion a set of circumstances rooted in this type of impairment that passes muster.

The Ninth Circuit exemplifies the approach. It has drawn a line around cause that appears to exclude all but the most extreme impairments. Only when "a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance" did the court appear willing recognize cause for a default.[260] That is, the court will not recognize cause "when the petitioner on his own or with assistance remains 'able to apply for post-conviction relief to a state court.'"[261] A condition must "render[] [a petitioner] completely unable" to file a timely state post-conviction petition, not merely "impede[] his ability to file" one.[262] Insufficient was an expert's "credible and persuasive" opinion on which a

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258. *Perry*, 950 F.3d at 413. The panel did not need to answer that question, however, because the petitioner had another basis for cause at the time. *See id.* at 413–14 (noting the possibility of a *Martinez-Trevino* basis for "cause" to excuse the default of an IATC claim).

259. For example, the Eleventh Circuit has "assume[d] that a pro se habeas petitioner who lacked the mental capacity to understand the nature and object of habeas proceedings and to present his case for habeas relief in a rational manner would have cause for omitting a claim in such proceedings." Smith v. Newsome, 876 F.2d 1461, 1465 (11th Cir. 1989). *But see id.* at 1466 & n.4 (citing the "external to the petitioner" concept from Murray v. Carrier, 477 U.S. 478, 488 (1986), when declining to treat a pro se petitioner's illiteracy as cause, and describing his "mental ability" as "constitutionally irrelevant as long as he is 'competent' enough to be bound by his actions"). The Sixth Circuit has explained that it has not "directly addressed" whether "mental illness" could serve "as cause" before going on to assume that possibility and, then, rejecting as insufficient a petitioner's "general assertion of incompetence" without proof of "how her mental illness prevented her from understanding relevant legal deadlines and obligations." *See* Terry v. Jackson, No. 16-4330, 2017 WL 5664915, at *2 (6th Cir. July 17, 2017) (unpublished). *But see* Johnson v. Wilson, 187 F. App'x 455, 458 (6th Cir. 2006) (unpublished) (agreeing with other courts "that a borderline mental impairment is not a factor external to a defense and, therefore, is not cause for excusing procedural default"). The Fourth Circuit, after *Brown v. Allen*, 344 U.S. 443 (1953), and shortly before *Fay v. Noia*, 372 U.S. 391 (1963), excused a failure to file a direct appeal in state court because a petitioner alleged that he had been "laboring under the incapacitating effect of insanity at his trial." *See* Thomas v. Cunningham, 313 F.2d 934, 937–40 (4th Cir. 1963). In the current era, the Fourth Circuit has continued to "assum[e] that profound mental illness may constitute cause to excuse procedural default in certain circumstances," but said so in an unpublished disposition that declined to recognize cause. *See* Farabee v. Johnson, 129 F. App'x 799, 802–04 (4th Cir. 2005) (per curiam) (unpublished) (first citing *Thomas*, 313 F.2d at 937; then citing United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004)).

260. Schneider v. McDaniel, 674 F.3d 1144, 1154 (9th Cir. 2012).

261. *Id.* (quoting Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 909 (9th Cir. 1986)).

262. *Id.* at 1155; *see also Hughes*, 800 F.2d at 909 (rejecting argument that a pro se petitioner's illiteracy, and the fact that another prisoner who had helped prepare a state post-conviction petition "was released before the post-conviction petition needed to be appealed," could serve as "cause"); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (applying *Hughes* when a petitioner, in part, "contend[ed] he ha[d] been diagnosed as 'borderline mental defective,'" and reasoning that the petitioner was literate, "had an attorney for [multiple] post-

district court had relied to find that a pro se petitioner's "mental health conditions . . . made it unlikely that he would be able to maintain the focus, pace, consistent direction, and organizational ability required to complete the multiple steps required to prepare a post-conviction petition."[263] The panel affirmed the district court's comparison of the petitioner's "mental conditions" to other circumstances that had been insufficient to constitute "cause" in the circuit, e.g., a petitioner's "illiteracy and the loss of legal assistance by another inmate."[264] In essence, the panel reasoned that circuit precedent excluded illiteracy as cause and—based on a district court's factual finding—viewed the petitioner's impairments as no "greater impediment" than illiteracy.[265]

Independent of this adverse procedural default ruling, the district court *permitted* equitable tolling of AEDPA's statute of limitations on the basis of the expert report.[266] The Ninth Circuit observed that this "result seems strange at first glance," but it did not invoke the idea of external factors to justify it.[267] Nor did it provide a detailed analysis to explain the "strange[ness]"; it simply referenced "[p]rinciples of comity" that generally apply to federal review of "state procedural bars" but not to the tolling of the federal statute of limitations.[268] After *Holland* and *Maples* though, this type of generalized reference to comity cannot justify treating equitable tolling and procedural default differently from one another, as discussed *supra* Part II. The Ninth Circuit did not explain which particular state concerns outweighed the equitable concerns that favored reviewing the claims of a petitioner whose ability to present his constitutional claim in compliance with the state's rules had been impeded by health-related circumstances outside his control.[269]

C. The Eighth Circuit's Recognition that Certain Impairments Constitute Cause

Among lower federal courts, only the Eighth Circuit has recognized "mental illness" as a potential "cause" to excuse a default in a published opinion.[270]

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conviction petitions except the one raising the claim involved in the instant petition," and "had help from other inmates"). In an earlier memorandum disposition, a different panel had treated a petitioner's "mental incompetence and incarceration in [a] state mental hospital" as "objective external factors constituting 'cause.'" *See* Meade v. Or. State Hosp., Psychiatric Rev. Bd., No. 98-36063, 1999 WL 970537, at *4 (9th Cir. Oct. 25, 1999) (unpublished).

263. *Schneider*, 674 F.3d at 1154.

264. *Id.* at 1153–54 (citing *Hughes*, 800 F.2d at 909).

265. *See id.* at 1154–55.

266. *See id.*

267. *See id.*

268. *See id.*

269. *See id.* Judge Noonan dissented from the cause ruling and stated that the Ninth Circuit's decision in the case squarely conflicted with that of the Eighth Circuit (discussed *infra* Part III.C.). *See id.* at 1156–57 (Noonan, J., concurring in part and dissenting in part). The majority provided little in the way of pushback, only responding: "The cases are not necessarily inconsistent. However, to the extent our opinion cannot be reconciled with the Eighth Circuit's rule, the split was not created by us." *Id.* at 1155 n.1.

270. *See* MEANS, *supra* note 18, § 24:13 nn.12–13 and accompanying text (citing Holt v. Bowersox, 191 F.3d 970, 974 (8th Cir. 1999)). *Cf.* Saunders v. Comm'r of Corr., 272 A.3d 169, 184–85 (Conn. 2022) (applying state

At the same time, the Eighth Circuit has set a high bar, requiring "a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding his or her case at the time during which he or she should have pursued post-conviction relief."[271] Evidence that a petitioner had a schizoaffective disorder, experienced delusions, and "was not oriented to time, place, or date" meets this standard.[272] During the time a petitioner may have experienced these symptoms, a state statute of limitations for post-conviction relief ran.[273] Eight years later, the petitioner attempted to file state and federal habeas petitions while proceeding pro se.[274] Both petitions faced dismissal on procedural grounds, though: The state petition was untimely, and all of the claims in the federal petition were subject to a procedural-default defense based on the state timeliness rule.[275] The Eighth Circuit, however, granted a certificate of appealability and appointed counsel before reversing a district court's dismissal of the federal petition.[276] The circuit viewed the evidence in the record as sufficient to establish cause during the time periods when the petitioner experienced debilitating symptoms.[277] And it ultimately remanded to the district court to determine whether the petitioner experienced such symptoms—and their effects—during the entire period of time in which the state statute of limitations was running.[278]

To date, the Eighth Circuit appears to be alone among federal courts in its willingness to excuse a procedural default on account of a severe psychiatric impairment.

D. A Path Forward

Looking ahead, how should lower courts address these issues? Should district or circuit judges be concerned about reversal if they begin to recognize "cause" and, if necessary, permit further factual development when either a petitioner or one's

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procedural default law, but agreeing with the Eighth Circuit that "incompetency" can be "legally sufficient to satisfy the cause prong of the cause and prejudice standard").

271. *See Holt*, 191 F.3d at 974; *see also* Malone v. Vasquez, 138 F.3d 711, 719 (8th Cir. 1998) (reasoning that a record "include[d] no evidence that mental illness hindered [a petitioner's] ability to consult with counsel, file pleadings, or otherwise comply with [a state's] requirements for postconviction relief so mental illness is not cause to excuse his procedural default"); Nachtigall v. Class, 48 F.3d 1076, 1081–82 (8th Cir. 1995) (explaining that "[a] conclusive showing of incompetence is required before mental illness can constitute cause" for purposes of analyzing whether a petitioner's federal habeas petition was "successive or abusive").

272. *Holt*, 191 F.3d at 975 (citation omitted).

273. *Id.* at 972–73, 975.

274. *Id.*

275. *Id.* at 972–73.

276. *Id.* at 973–74.

277. *Id.* at 975.

278. *Id.* at 975; *see also id.* (remanding for the "district court to determine whether petitioner's mental illness prevented him from appreciating his position and from making rational decisions during the [relevant period] and whether his mental illness interfered with or impeded his ability to comply with the procedural requirements for pursuing post-conviction relief during that time"); Memorandum Ord. of U.S. Mag. J. at 2, Holt v. Bowersox, No. 4:97-CV-00938-AGF (E.D. Mo. July 24, 2001), ECF No. 65 (noting that the state "waived procedural default and addressed the merits of [the] petitioner's claim" on remand).

counsel experiences a severe psychiatric impairment? No. In fact, refusing to recognize this type of cause misreads the Supreme Court's precedent regarding procedural default. And principles underlying the Court's current approach support the recognition of a category of cause for any impairments that lead to breakdowns in state post-conviction proceedings or attorney-client relationships. At the same time, district courts are well equipped to consider potential costs to the state and to answer fact-intensive questions that might arise when deciding whether psychiatric impairments in fact impacted these proceedings and relationships in such a way as to warrant their recognition as "cause."

After *Martinez*, *Maples*, and *Holland*, authors like Professor Marceau directed attention toward the role of "process-based protections" in federal habeas.[279] Authors have differed, however, when searching for the Supreme Court's current benchmark for deciding which petitioners or claims are entitled to federal merits review. Yet even their disagreement reflects how out of step with current doctrine lower courts are when they hold petitioners accountable for the effects of psychiatric impairments that undisputedly are outside petitioners' control.

Take Professor Aziz Huq's contrast between one "track" on which habeas "relief is well-nigh impossible to secure" and a second one on which more "judicial attention"—and relief—is possible "usually by showing excuse for a procedural default."[280] Professor Huq offered an explanation for the two pathways: "fault."[281] And he provided an understanding of "fault" in habeas that is based on "a normative judgment about the degree to which both the state and its prisoners have complied with relevant legal norms."[282] He is not alone in having analyzed ways in which habeas doctrine has considered petitioner conduct and fault.[283] For instance, Professor Brensike Primus explained that federal courts have allowed individuals to avoid the effect of certain "procedural restrictions on equitable grounds," when the individuals, "through no fault of their own, have never had a full and fair opportunity to have [their] federal claims considered."[284] Professor Huq emphasized though that the Supreme Court recently has appeared focused not on a petitioner's "fault" or a claim's merit in isolation, but rather on "a large asymmetry in fault between the petitioner and the state."[285] What distinguishes successful cases under

279. *See* Marceau, *supra* note 37, at 2125–48; *see also id.* (comparing scholarship calling for "federal habeas courts [to] ensure that, at the very least, the state court process was full and fair" with "the *Holland-Maples-Martinez* trilogy" (footnote omitted)).

280. *See* Huq, *supra* note 2, at 526, 528–29, 540–49.

281. *See id.* at 528, 554–55, 581–86; *see also id.* at 581 (explaining that, "[o]n this account, postconviction jurisprudence has moved into alignment with its remedial kin—the law of constitutional tort").

282. *Id.* at 528.

283. *See, e.g.*, *Equitable Gateways*, *supra* note 8, at 305, 318, 322–23; *Equitable Heritage*, *supra* note 7, at 151–63.

284. *Equitable Gateways*, *supra* note 8, at 305.

285. *See* Huq, *supra* note 2, at 581, 583; *see also id.* at 583 ("[I]t can be established by showing an ordinary error coupled with an exceptional degree of blamelessness on the petitioner's part, as well as by pointing to an exceptionally culpable fumble by the state.").

this view are demonstrations of either petitioners' "own exceptional blamelessness" or states' "exceptional blameworthiness."[286]

Professor Kovarsky offered a different account: The Court "has constructed . . . an 'on-the-merits' paradigm," in which "a *diligent* state inmate receives at least one merits disposition on a constitutional claim."[287] The Court is less focused on "the presence or absence of fault"[288] and more on whether "a diligent state inmate gets at least one shot at a merits adjudication in a jurisdictionally competent court."[289] This "model involves fault, [but] it has nothing to do with the fault of the *state*; it involves the fault of the *inmate*."[290] Notably, Professor Kovarsky observed that "[w]hether an inmate obtains merits review is hugely sensitive to differences in postconviction representation and barely sensitive at all to the quality of the underlying claim."[291] Professor Kovarsky gave the example of the Court's willingness to excuse a procedural default "caused by something *external to the inmate*," noting that the Court modified its *Coleman* rule to remedy "inadequate state postconviction representation" that results in forfeitures of IATC claims without having done so for forfeitures of *Brady* claims, even though the latter involves "the culpability of the state."[292] In line with Professor Kovarsky's point, the Court has since limited that modification of *Coleman* to claims of ineffective assistance at the trial level (excluding the direct-appeal level) and explained when doing so that it was concerned with "ensur[ing] that meritorious claims of trial error receive review by at least one state or federal court."[293] The Court's more recent decision to treat petitioners as "'at fault'" when they had counsel through state post-conviction proceedings who "negligently failed to develop the state record for [an IATC claim]" might lend further support to Professor Kovarsky's view.[294] The Court is willing to deem a personally blameless petitioner "at fault," even when it was a post-conviction attorney who failed to diligently develop a state-court record, and even when the petitioner has a potentially meritorious claim.[295] So, "a diligent state inmate gets at least one shot at a merits adjudication,"[296] but perhaps an extremely limited shot.

What matters for purposes of expanding "cause" to include severe impairments is that either of these accounts supports the conclusion that lower courts have been overly restrictive when such impairments lead to procedural breakdowns, at least

286. *Id.* at 581.
287. *Habeas Optimist*, *supra* note 82, at 109.
288. *Id.* at 124.
289. *Id.* at 119–20.
290. *Id.* at 127.
291. *Id.* at 128.
292. *Id.* at 127; *see* Brady v. Maryland, 373 U.S. 83 (1963).
293. Davila v. Davis, 137 S. Ct. 2058, 2067 (2017).
294. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022) (quoting Williams v. Taylor, 529 U.S. 420, 432 (2000)).
295. *See id.* at 1728, 1733–38 (internal quotation marks and citation omitted).
296. *Habeas Optimist*, *supra* note 82, at 119–20.

during someone's first chance to present a claim. Neither a petitioner nor one's counsel (if one has counsel) should be considered "at fault" for a default caused by such an impairment, and this type of impairment can prevent any meaningful chance at post-conviction review in a way that is different in kind from attorney negligence.[297] Return to the hypothetical petitioner in Part I for one example: If the petitioner in fact was acting upon delusions over which he had no control, it would be difficult to say he was "at fault" and had any sort of meaningful opportunity for a merits adjudication in state court in the face of that impairment. Likewise for a petitioner proceeding without counsel and whose ability to seek post-conviction relief was impeded by an intellectual disability. To excuse defaults in these circumstances would not require any change to "cause" doctrine. Each "cause" would fall outside the attorney-negligence category and align with other types of breakdowns in process and attorney-client relationships that justify excusing procedural bars (for which neither the client nor the attorney is "at fault," depending on the particular factual circumstances), as discussed *supra* Part II.

Lower courts should not be concerned about potential "costs" to the state if they recognize a psychiatric-impairment category of cause either. One cost to the state is not being able "to enforce its procedural rules."[298] But it seems difficult to value that cost highly enough to matter when the state imposed its rules against an individual who was unable to comply with them in any meaningful sense because of a psychiatric symptom, perhaps even because of symptoms that rendered the individual incompetent to proceed pro se or with counsel.[299] Look back to the hypothetical petitioner in Part I. Identifying an overriding state interest to strictly enforce a procedural rule against an individual with a severe illness whose symptoms can be shown to have led to a loss of counsel and any chance at state post-conviction review would require a degree of defensiveness of state procedure in tension with *Maples v. Thomas*. A state might attempt to identify a factual reason to blame the individual for this type of procedural failure, but it would be hard-pressed to do so when confronting this Article's hypothetical.

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297. *See Williams*, 529 U.S. at 431–32 (explaining that the "customary and preferred" meaning of the word "'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something" (citations omitted)).

298. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991); *see also Davila*, 137 S. Ct. at 2070 (describing procedural default as "designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges to convictions in state court"); *Equitable Heritage*, *supra* note 7, at 153 (describing "the wrong" associated with procedural default in terms of "forcing the State to choose between its interest in enforcing its generally applicable procedural rules and its interest in having the state court reach the merits of the applicant's claim").

299. *See* Maples v. Thomas, 565 U.S. 266, 289 (2012) (acknowledging "States' finality and comity interests," but identifying "ample cause" when a petitioner "was disarmed by extraordinary circumstances quite beyond his control" (citation omitted)); Huq, *supra* note 2, at 556 (explaining that "[d]octrinal outcomes in habeas cases are no mechanical function of states' interests"); *Equitable Heritage*, *supra* note 7, at 148–50 (addressing the Court's "rote invocation" of "interests in comity, federalism, and finality," and arguing that "they cannot alone justify mechanical rules barring access to the equitable remedy" of habeas).

Looking beyond this Article's hypothetical though, individual cases inevitably will present unique and difficult factual issues.[300] For instance, the Eighth Circuit's approach to incompetency as a basis for cause still asks for some demonstration of a "mental illness" that "interfered with or impeded [a petitioner's] ability to comply with the procedural requirements for pursuing post-conviction relief" when such relief was still available.[301] And states may challenge diagnoses, dispute their impacts on petitioners or attorney-client relationships, or question whether petitioners themselves are at fault in spite of particular diagnoses.[302] All but one of the lower courts discussed above are not reasoning in this way however, opting instead to categorically exclude illnesses and disabilities without addressing the circumstances in which they arose, why they arose, or even whether prison officials should have been on notice of them. Perhaps courts conducting fact-intensive analyses would exclude any "disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs . . . standing alone," as the ABA did in its recommendation against sentencing to death or executing individuals with "a severe mental disorder or disability."[303] Or perhaps courts would identify instances of malingering or "sandbagging."[304] Regardless, declining to engage in fact-finding and declining to recognize any serious impairments that affect post-conviction review is a step too far, even for courts concerned with whether a petitioner deserves blame or is "at fault" for an impairment that led to a procedural breakdown.[305]

Lower courts that have not been conducting these analyses and that have stopped short of recognizing a category of "cause" for severe psychiatric impairments experienced by either attorneys or petitioners therefore cannot rely on precedent or the Court's guidance to justify their approach.

Refusing to excuse defaults on account of psychiatric impairments also risks creating unnecessary practical challenges in federal district courts, a key forum for

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300. Additional thanks to Professors Eve Brensike Primus and Carol Steiker for identifying and sharing ideas regarding these types of issues.

301. Holt v. Bowersox, 191 F.3d 970, 974–75 (8th Cir. 1999); *see also* MEANS, *supra* note 18, § 25:45 n.43 and accompanying text (explaining that, for equitable tolling of AEDPA's statute of limitations, "[t]here must be an inability on the part of the petitioner to pursue his legal rights, and a nexus between the petitioner's mental condition and his inability to file a timely petition," among other requirements).

302. *See, e.g.*, MEANS, *supra* note 18, § 25:45 nn.42–50 (discussing examples in the equitable-tolling context of courts deciding whether a "mental condition was the *cause* of [an] untimely filing," including courts' use of factors like whether a "petitioner supported his allegations of impairment with extrinsic evidence such as evaluations and/or medications" (footnotes omitted)).

303. *See ABA Recommendation and Report*, *supra* note 35, at 668; ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-9.2(b)–(c); *see also* OHIO REV. CODE ANN. §§ 2929.025(A)(2), 2953.21(A)(1)(a)(iv) (West) (including this type of exclusion in a statute barring the execution of individuals who "had a serious mental illness" at the time of an alleged offense); KY. REV. STAT. ANN. §§ 532.130, 532.140 (West) (including this type of exclusion in a statute barring the execution of individuals determined before trial to have a "serious mental illness" at the time of an alleged offense).

304. *See supra* note 194 and accompanying text.

305. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022) (quoting Williams v. Taylor, 529 U.S. 420, 432 (2000)).

habeas litigation. These challenges are rooted in the distinction between external forms of coercion and psychiatric impairments. The better approach is to focus on an impairment's debilitating effects on an individual litigating from prison—i.e., the cause of a procedural default—not to focus solely on the source or cause of the impairment. Why? To start, even an unwillingness to recognize psychiatric impairments as cause requires fact-intensive analyses in district courts. In fact, some courts that refused to recognize psychiatric impairments as "cause" because they were not "external" went on to reject the factual bases for assertions of incompetency or serious illness.[306] And analyses in courts like the Fifth Circuit direct attention away from the effects of an impairment and toward a head-scratching search for something "external." Return to the earlier hypothetical to see how. Remember that a psychiatric expert did not reach a conclusion regarding whether the petitioner was experiencing (a) genuine coercion and abuse by a third party, (b) delusions or hallucinations associated with schizophrenia, or (c) a combination of both (a) and (b). Is a petitioner experiencing persecutory delusions any more at fault than one suffering actual abuse?[307] Would someone experiencing persecutory delusions or abusive coercion have one meaningful chance to obtain judicial review?[308] The answer to both questions for this hypothetical should be: No. But a literal reading of the "external to the petitioner" requirement would excuse only a default caused by (a) and perhaps (c), depending on how much of a role (a) played. A simpler approach grounded in both precedent and the principles discussed above would focus on the effects of the petitioner's condition on his decision-making, independent of what caused that condition.[309] Courts should evaluate the petitioner's health and ability to make decisions, not solely whether a particular decision is a product of literally external coercion, a product of psychiatric impairment, or a product of both.

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306. *See, e.g.*, Gonzales v. Davis, 924 F.3d 236, 244–47 (5th Cir. 2019); Harris v. McAdory, 334 F.3d 665, 669 (7th Cir. 2003).

307. *Cf.* Huq, *supra* note 2, at 581.

308. *Cf. Habeas Optimist*, *supra* note 82, at 119–27.

309. *Cf.* Madison v. Alabama, 139 S. Ct. 718, 728 (2019) (explaining that the competency-to-be-executed standard under the Eighth Amendment "focuses on whether a mental disorder has had a particular *effect*," i.e., "an inability to rationally understand why the State is seeking execution," not "establishing any precise *cause*," e.g., "[p]sychosis or dementia, delusions or overall cognitive decline"). Plus, in cases like the hypothetical in this Article, there actually might be some additional "external" factor that explains a default. The default in the hypothetical, remember, arose only after a state court's decision to allow an individual who was experiencing abuse, psychiatric impairments, or a combination of both to waive his right to state post-conviction counsel and to withdraw his petition. No matter the driving force behind the decisions, the state court's action to enforce them could itself be a factor "external to the defense" that technically caused the default. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.42–49 and accompanying text; O'Rourke v. Endell, 153 F.3d 560, 567–70 (8th Cir. 1998); Saunders v. Comm'r of Corr., 272 A.3d 169, 182 n.9 (Conn. 2022). After all, when someone withdraws a petition or a court accepts a waiver over the objection of appointed counsel, state courts often must formalize the waiver or withdrawal under state law depending on the jurisdiction. *See* HERTZ & LIEBMAN, *supra* note 1, § 26.3 nn.44–49 and accompanying text; *see also* Petition for Writ of Certiorari, *supra* note 30, at 27 & n.13 (citing state court decisions governing the "enforc[ement]" of "waiver[s] of state habeas process").

To the extent federal habeas judges decline to expand their understanding of cause though, they are not the only individuals with the power to address the types of concerns that arise when severe psychiatric impairments stand in the way of meaningful post-conviction review. As Professors John Blume and W. Bradley Wendel have emphasized, "Procedural default is an affirmative defense and, as such, can be waived" by the state.[310] And state actors often bear responsibility for harms against petitioners during state post-conviction proceedings.[311] That may be the case when a prisoner experiences a health-related impairment that, because of inadequate treatment or for some other reason, impedes litigation or a relationship with counsel.[312] Prison officials, after all, "exercise nearly total control over [prisoners'] lives," including access to medications and "medical treatment."[313]

CONCLUSION

Litigants, states, and the federal courts should continue to fill a "catalog" of "cause."[314] In doing so, they should ensure that the doctrine of procedural default accounts for the types of severe psychiatric impairments that can stand in the way of compliance with state rules or lead to breakdowns in attorney-client relationships. And they should eschew any further debate over whether such an impairment is literally "external to the defense" or "petitioner."[315] This Article has set out to explain why lower courts that begin to do both will align procedural default law with the principles underlying the doctrine and the Supreme Court's approach to it in the "cause and prejudice" era. When petitioners or attorneys experience health-related impairments, lower courts should preserve meaningful access to federal habeas review by conducting individualized analyses and recognizing the power to excuse defaults on account of such impairments.[316]

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310. Blume & Wendel, *supra* note 183, at 813 n.221, 815–16; *see also Ramirez*, 142 S. Ct. at 1730 n.1 (recognizing the same about 28 U.S.C. § 2254(e)(2)).

311. *See* Blume & Wendel, *supra* note 183, at 816–17; *see also id.* at 816 n.227 (pointing out "unclean hands" arguments against the state because, for example, "[m]any lawyers for the state routinely oppose state post-conviction counsel's request for funding, time to conduct adequate investigations, and production of documents and other information that could lead to the identification of potentially meritorious issues").

312. *Cf.* ABA CRIM. JUST. STANDARDS ON MENTAL HEALTH, *supra* note 35, 7-4.3(a)–(b) (recognizing that both courts and prosecutors should act upon any "good faith doubt as to [a] defendant's competence"); *id.* 7-9.9(e)(i) (including correctional officers among those who may raise doubts about an individual's competence to proceed during capital post-conviction proceedings).

313. *See* West v. Atkins, 487 U.S. 42, 57 n.15 (1988).

314. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986); Wiseman, *supra* note 220, at 988–89 (noting that "a catalog . . . may be necessary after [Cullen v. Pinholster, 563 U.S. 170 (2011)]," and analyzing the potential for "cause" to arise out of a state court's "[d]eficient procedures").

315. *See Carrier*, 477 U.S. at 488; Coleman v. Thompson, 501 U.S. 722, 753 (1991).

316. *Cf. Killing the Willing*, *supra* note 45, at 984 (referring to "the fundamental lesson of death penalty jurisprudence: individualization").