YIKES! WAS I WRONG? A SECOND LOOK AT THE VIABILITY OF MONITORING CAPITAL POST-CONVICTION COUNSEL

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I. INTRODUCTION

When Albert Holland's capital post-conviction counsel filed his state post-conviction motion in September 2002, twelve days remained in the one-year statute of limitations for filing a federal habeas petition.[1] While Holland might not have known exactly how much time was left in the federal limitations period, he knew that he wanted to preserve his right to federal review,[2] that the limitations period was tolled during non-discretionary state post-conviction review,[3] and that he would be under the gun to get the federal petition filed once the Florida Supreme Court issued its decision.[4] And he made no bones about his desire to file a timely federal petition, sending his attorney several letters to that effect, and even sending accurate legal citations.[5] Reading those letters (and several others he wrote in an attempt to get information on his case), one can sense Holland's mounting fear that he might actually miss the federal filing deadline and, along with it, the opportunity for federal review of his constitutional claims.

Holland's fear became reality. Counsel not only failed to immediately inform Holland of the Florida Supreme Court's decision and December 1, 2005 mandate (which re-started the federal limitations period), but he also failed to file a federal

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[*] Professor of Law, Chapman University School of Law. B.A. 1988, Boston University; J.D. 1991 Georgetown University Law Center. I would like to thank Lisa M.J. Spillman and the California Appellate Defense Counsel for inviting me to speak at the Counsel's 2011 Annual Meeting, as this project is an outgrowth of that presentation. Thanks also to Scott Howe for our continuing dialogues on the issues addressed in the article, and to Tom McConville for his unwavering support. As always, any errors are my own.

1. A Florida court appointed post-conviction counsel to represent Holland 37 days after his conviction became final. Holland v. Florida, 130 S. Ct 2549, 2555 (2010). Counsel filed Holland's state post-conviction petition 316 days later, leaving 12 days in the one-year federal limitations period. *Id.*

2. Joint Appendix at 210, 212, 214, 216, 222, Holland v. Florida, 130 S. Ct 2549 (2010) (No. 09-5327) [hereinafter Joint Appendix] (letters from Holland to counsel indicating desire to file timely federal habeas petition).

3. *Id.* at 216, 220 (letters from Holland to counsel explaining that one-year limitations period is not tolled during *certiorari* review of state post-conviction decision).

4. In a letter dated January 9, 2006, Holland asked his lawyer to "send me a copy of said 'Mandate,' so that I can determine when the deadline will be to file my 28 U.S.C. Rule [sic] 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable 'Antiterrorism and Effective Death Penalty Act,' if my appeals before the Supreme Court of Florida are denied." Joint Appendix, *supra* note 2, at 214. *See id.* at 210, 212 (requesting information regarding status of case and requesting timely filing of federal habeas petition); *Holland*, 130 S. Ct. at 2556-59 (reciting letters from Holland to counsel).

5. Joint Appendix, *supra* note 2, at 210, 212, 214, 216; *see id.* at 222 (letter dated February 9, 2006 reminding counsel of Holland's prior requests to file timely federal habeas petition).

habeas petition within the remaining twelve-day window.[6] And even though Holland urged him to file a petition within the limitations period, counsel "appear[ed] to have been unaware of the date on which the limitations period expired," and "apparently did not do the research necessary to find out the proper filing date despite Holland's letters that went so far as to identify the applicable legal rules."[7] Holland ultimately discovered the Florida Supreme Court's decision in mid-January 2006 during a shift in the prison law library.[8] Holland immediately filed a *pro se* federal habeas petition,[9] which the federal district court denied as untimely.[10]

While counsel's failure to file a timely federal petition is striking given Holland's many reminders to keep on top of the matter, equally striking is the Florida Supreme Court's failure to do anything to prevent the untimely filing. The Florida Supreme Court, like all Florida courts that entertain capital post-conviction motions, has a statutory obligation to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation."[11] Moreover, Holland did not hesitate to share his feelings about counsel's

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6. *Holland*, 130 S. Ct. at 2556-57. Holland repeatedly asked counsel for information regarding "the status of my case . . . on appeal to the Supreme Court of Florida." Joint Appendix, *supra* note 2, at 210; *see id.* at 212, 214.

7. *Holland*, 130 S. Ct. at 2564.

8. *Id.* at 2557.

9. Joint Appendix, *supra* note 2, at 83 (referencing filing date); *Holland*, 130 S. Ct. at 2557.

10. Joint Appendix, *supra* note 2, at 81-94; *Holland*, 130 S. Ct. at 2559.

11. FLA. STAT. ANN. § 27.711(12) (West 2011). The Florida Supreme Court has acknowledged the obligation to monitor post-conviction counsel. *See, e.g.*, Coleman v. State, 930 So. 2d 580, 581 (2006) (invoking monitoring statute, court ordered counsel to file response to allegation challenging counsel's conduct); *id.* (recognizing that "the Legislature has charged the courts with closely monitoring the services provided by registry counsel.") (Anstead, J., concurring in part and dissenting in part); Ventura v. State, 2 So. 3d 194, 201 (2009) (exercising "supervisory authority under section 27.711(12) to monitor whether postconviction counsel is providing 'quality representation.'"); *In re* Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 188-89 (2002) (recognizing that "the Legislature has . . . provid[ed] for judicial oversight and monitoring of assigned counsel's performance in postconviction proceedings.").

It is unclear whether the monitoring obligation extends only to registry counsel (i.e. private counsel) or to all capital post-conviction counsel, including attorneys employed by the Capital Collateral Regional Counsel – a state entity dedicated to providing capital collateral representation. *See infra* note 58 and accompanying text. The provision of section 27.711 dealing with monitoring uses the term "*assigned* counsel," FLA. STAT. ANN. §27.711(12), which could be interpreted to include anyone assigned to represent the capital petitioner. But almost all other provisions of section 27.711 either specifically reference attorneys appointed under section 27.710 – registry attorneys – or deal with issues relating to registry attorneys (such as fees). *See* FLA. STAT. ANN. §27.711(1)(a), (2)-(4), (6), (8), (11). For purposes of this article, however, the issue is irrelevant because Holland's counsel is a registry attorney. *See Holland*, 130 S. Ct. at 2555 (noting counsel's appointment by the court and citing sections 27.710 and 27.711); *Registry Attorney*, COMMISSION ON CAPITAL CASES, http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm (last visited May 13, 2012) (listing Holland's counsel as current registry attorney); *cf.* Joint Appendix, *supra* note 2, at 54, 57, 63 (using private letter head to communicate with client).

One might argue that in cases where there are no outward signs of problems, a court might not think to inquire into the depth of counsel's knowledge regarding filing deadlines. But as explained *infra*, the monitoring obligation triggers such a duty, regardless of whether there are outward signs of problems.

performance with the Florida Supreme Court (and several others).[12] In 2004, he sent two motions to the Florida Supreme Court requesting that counsel be removed, leveling allegations not only about counsel's failure to include certain claims in the state habeas petition,[13] but also about counsel's failure "to establish any relationship of trust or confidence" with Holland,[14] his failure to communicate with Holland,[15] his "abandon[ment]" of Holland,[16] and Holland's lack of trust and confidence in counsel.[17]

After the second removal motion, the Florida Supreme Court ordered responses from the State of Florida and Holland's counsel.[18] Ultimately, the court denied the motion, agreeing with the State that Holland could not file *pro se*

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12. *Holland*, 130 S. Ct. at 2565 (Holland "repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have [counsel] . . . removed from his case.").

13. Joint Appendix, *supra* note 2, at 134-35. Under Florida law, the state post-conviction motion and the state habeas petition are separate. The post-conviction motion is the primary method of collateral attack, and is filed in the trial court. *See* FLA. R. CRIM. P. 3.851. The state habeas petition is filed in the Florida Supreme Court along with the appeal from the denial of the post-conviction motion, FLA. R. CRIM. P. 3.851(d)(3), and contains claims that were not, and could not be, raised on direct review or in the post-conviction motion. Barwick v. Buss, 2011 WL 2566310, at *14 (Fla. June 30, 2011) ("[b]ecause every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion [for post-conviction relief] . . . this claim is rejected as procedurally barred."); *see also* AM. BAR ASSOC., EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT 217 (2006) [hereinafter ABA FLORIDA DEATH PENALTY REPORT] (citing Nixon v. State, 932 So.2d 1009 (Fla. 2006), and describing Florida's post-conviction process).

Holland filed *pro se* motions attempting to include additional claims to both the initial post-conviction motion and the state habeas petition. Joint Appendix, *supra* note 2, at 8-9; *id.* at 113-21, 125-33. Early on in his representation of Holland, counsel correctly and thoroughly explained to Holland that some claims simply are not cognizable on collateral review (including many of the claims Holland wished to raise) and that, even when a claim is cognizable, it can be counter-productive to raise the claim if it lacks merit. *Id.* at 54-56 (undated letter from counsel to Holland); *id.* at 57-62 (letter from counsel to Holland dated December 23, 2002). Nevertheless, in an effort to preserve the claims, counsel sought to adopt Holland's *pro se* motion to add claims to the post-conviction motion. *Id.* at 11-14; *see id.* at 13 (explaining to trial judge that counsel was "filing [his] request to adopt the motion, to the extent that down the road you find the grounds justiciable or legally sufficient"). The trial court rejected counsel's efforts to adopt, and instead struck Holland's motion as a nullity. *Id.* A few months later, counsel successfully supplemented the record with additional material prepared by Holland. *Id.* at 17 (explaining to the trial judge "that as his counsel, I had filed what I thought to be the appropriate grounds. Albert has some of his own things he wants to raise. I think I would like it to be incorporated as part of the record.").

14. Joint Appendix, *supra* note 2, at 137 (February 18, 2004 Motion to Remove Conflict Counsel).

15. *Id.* at 152 (June 14, 2004 Motion to Remove Conflict Counsel).

16. *Id.* at 152.

17. *Id.* at 135, 152. Holland also sent a letter to the Florida Bar Association raising similar allegations, *id.* at 207, as well as numerous letters to the Clerk of the Florida Supreme Court asking for documents and information about his case. *Id.* at 122-24, 146-48 (letters dated September 8, 2003; November 20, 2003; and April 26, 2004); *see also* Holland v. Florida, 539 F.3d 1334, 1337 (11th Cir. 2008) (noting that "[i]n October 2005, [Holland] also contacted the Florida Supreme Court about the use of its website 'so that he could secure the assistance of outside supporters to keep him updated about the appeal.'").

18. *See* Joint Appendix, *supra* note 2, at 44 (referencing the court's order to respond to Holland's motion).

motions while he was represented by counsel.[19] Other than order and review the parties' responses to Holland's removal motion, it appears the Florida Supreme Court did little, if anything, to monitor the quality of counsel's performance.[20] At the least, these motions should have reminded the court of its general duty to monitor, spurring proactive monitoring of counsel's performance going forward.[21]

Holland's case ultimately made it to the Supreme Court of the United States, which held that the one-year federal limitations period "is subject to equitable tolling in appropriate cases."[22] While the Court generally has been unsympathetic to claims of error by post-conviction counsel,[23] it held that, at least in some circumstances, post-conviction counsel's "professional misconduct . . . could . . . create an extraordinary circumstance that warrants equitable tolling."[24] The Court declined to characterize Holland's complaint as a claim of simple negligence, instead asserting that the "facts . . . present far more serious instances of attorney misconduct"[25] and "suggest that this case may well be an 'extraordinary' instance in which petitioner's attorney's conduct constituted far more than 'garden variety' or 'excusable neglect.'"[26] Indeed, the Court stated that counsel's failures "seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence."[27] Because the lower court applied too rigid a standard for "extraordinary circumstances," the Court remanded for a determination of whether counsel's conduct met the Court's more relaxed standard.[28]

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19. *Id.* at 46; *see also* Holland v. Florida, 130 S. Ct. 2549, 2556 (2010) (interpreting court's ruling as adopting Florida's position). The Florida Supreme Court denied the first motion to remove counsel on the same ground. *Holland*, 130 S. Ct. at 2556.

20. At the direction of the state legislature, the Auditor General reviewed Florida's post-conviction representation system from July 2003 to June 30, 2006. Among other things, the Auditor General found that "[t]he court's monitoring of the performance of counsel assigned to capital cases, required by Section 27.711(12), . . . *has not occurred*." WILLIAM O. MONROE, CAPITAL COLLATERAL REGIONAL COUNSEL PILOT PROGRAM 1 (2007) [hereinafter AUDITOR GENERAL'S REPORT] (emphasis added). Albert Holland's case was pending before the Florida Supreme Court during most of the Auditor General's review period (from mid-2003 to December 2005).

21. *See infra* note 102.

22. *Holland*, 130 S. Ct. at 2560.

23. *See* Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("[P]etitioner . . . must bear the burden of [counsel's] failure to follow state procedural rules."); Murray v. Carrier, 477 U.S. 478 (1986) (post-conviction counsel's failure to raise claim not cause to excuse procedural default); Pennsylvania v. Finley, 481 U.S. 551 (1987) (no constitutional right to post-conviction counsel); Murray v. Giarratano, 492 U.S. 1 (1989) (no constitutional right to capital post-conviction counsel); Wainwright v. Torna, 455 U.S. 586 (1982) (effectiveness guarantee attaches only to constitutional rights to counsel).

24. *Holland*, 130 S. Ct. at 2563.

25. *Id.* at 2564.

26. *Id.*

27. *Id.* at 2565.

28. *Id.* The Eleventh Circuit held that even "gross negligence" will not warrant equitable tolling absent "allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth." Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008). Characterizing the Eleventh Circuit's standard as "too rigid," the Supreme Court held that "at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Holland*, 130 S. Ct. at 2563. The Eleventh Circuit remanded to the district court "for fact finding and further proceedings—including, if it is necessary, an evidentiary hearing—consistent with the Supreme Court's instructions." *Holland v.*

The Court's decision in *Holland* is an important one for several reasons. First, it reconfirms two core principles: that equity has deep roots in habeas corpus jurisprudence[29] and that "habeas corpus plays a vital role in protecting constitutional rights."[30] Second, at least with respect to "egregious behavior"[31] that causes a capital post-conviction petitioner to miss the federal habeas filing deadline, *Holland* deviates from the Court's traditional rule that a post-conviction petitioner must "bear the burden" of her attorney's errors.[32] Third (and relatedly), *Holland* provides the groundwork for reinterpreting (and relaxing) the meaning of "cause" in the cause and prejudice standard.[33]

Florida, 613 F.3d 1053 (11th Cir. 2010) (per curiam). On remand, the district court found that counsel's "egregious misconduct, in tandem with Holland's inability to extricate himself from any prejudice caused therefrom, constituted an extraordinary circumstance" that warranted equitable tolling. Holland v. Florida, No. 06-20182 (S.D. Fla. Nov. 22, 2010) (order allowing equitable tolling and amended petition, and setting briefing schedule). The district court then allowed Holland to file an amended petition, which the court granted in part and denied in part. Holland v. Tucker, 2012 WL 1193294 (S.D. Fla. 2012).

29. *Holland*, 130 S. Ct. at 2561 ("[H]abeas corpus[] pertains to an area of the law where equity finds a comfortable home"); *id.* at 2560 ("equitable principles have traditionally governed the substantive law of habeas corpus . . . .") (internal quotations omitted).

30. *Id.* at 2562.

31. *Id.* at 2563.

32. *See, e.g.,* Coleman v. Thompson, 501 U.S. 722, 754 (1991) (errors by post-conviction counsel do not constitute cause to excuse a procedural default).

33. In *Holland*, the Court attempted to distinguish excusing a procedural default from equitable tolling by arguing that the former has to do with federalism in a way the latter does not:

> *Coleman* was 'a case about federalism,' . . . in that it asked whether *federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, notwithstanding the state court's determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law.

Holland, 130 S. Ct. at 2563. But this distinction is weak, for both doctrines, when invoked to forgive error, inflict federalism injuries on the state in the form of delay. Whether a case moves forward at the federal habeas level because of equitable tolling or a finding of cause (and prejudice) to excuse a state procedural default, the state will be forced to endure delay that it otherwise would not have had to endure. The delay will be even longer if the petitioner receives relief at the federal level on the claims that went forward as a result of equitable tolling or a finding of cause (and prejudice).

The Court's distinction is also weak because equitable principles (which we know underlie habeas) would seem to suggest that if egregious attorney conduct warrants equitable tolling, then that same conduct ought to constitute cause for a procedural default. The reasoning in Justice Alito's concurring opinion shows why this is so:

> Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word . . . . That is particularly so if the litigant's reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond the petitioner's control.

Id. at 2568 (Alito, J., concurring). This "common sense" would seem to apply whether the attorney's error defaulted a state or a federal rule. Indeed, the Court appeared to recognize as much in its recent decision in *Maples v. Thomas*, which dealt with the question whether attorney conduct can ever constitute cause to excuse a state procedural default. 132 S. Ct. 912, 917 (2012). While acknowledging the "general rule" that counsel's failure to meet a deadline will not constitute cause, the Court noted that "[a] markedly different situation is presented . . . when an attorney abandons his client without notice, and thereby occasions the default." *Id.* at 922. In such a case, the Court held, counsel's conduct

But to someone who has argued that states have a constitutional obligation to monitor the performance of state-appointed capital post-conviction counsel,[34] the real significance of *Holland* lies not in its holding or reasoning, but in its facts, as they call into question the efficacy of monitoring as a tool for promoting the delivery of competent assistance of counsel. In the context of capital post-conviction counsel, Florida literally is a pioneer: unlike other death states, it explicitly requires capital post-conviction courts to monitor capital post-conviction counsel "to ensure that the capital defendant is receiving quality representation."[35] Yet despite this obligation, the Florida Supreme Court failed to spot a major (and preventable) error – the failure to properly calculate and meet the deadline for filing a federal habeas corpus petition. Florida's experience with its own monitoring requirement, as evidenced in particular (but not exclusively)[36] by the facts in *Holland*, raise a question about the utility of monitoring as a means of enhancing competent performance. Perhaps this author was wrong (*yikes!*), and monitoring is simply ineffective as a means of enhancing competent assistance. Or perhaps the problem lies elsewhere, such as with Florida's implementation of the monitoring requirement.

This article explores the reasons for – and thus the meaning of – the monitoring failure in *Holland.* It begins in Part II with a description of Florida's efforts to provide competent post-conviction counsel to capital petitioners, and a more detailed account of Holland's post-conviction odyssey. Part III briefly explains the scope of the monitoring requirement, as well as the three essential elements of a constitutionally meaningful monitoring program (elements the American Bar Association ("ABA") has recommended for years);[37] (1) a monitoring entity with expertise in post-conviction litigation and a commitment to the goals of monitoring; (2) a well-designed structure detailing precisely how the

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constitutes cause for the procedural default. *Id.* at 924. As support for its conclusion, the Court cited Justice Alito's "common sense" language and reasoning. *Id.* at 923.

Shortly after *Maples*, the Court issued yet another decision relaxing the cause standard. In *Martinez v. Ryan*, the Court ruled that ineffective assistance of counsel "at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. 1309, 1315 (2012).

34. This author is such a person. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 104-110 (2003) [hereinafter McConville, *Constitutional Implications of Statutory Grants of Capital Counsel*] (arguing that the decision to provide capital post-conviction counsel triggers constitutional obligation to monitor performance of counsel); Celestine Richards McConville*, Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521 (2005) [hereinafter McConville, *Scope of Constitutional Obligation to Monitor*] (explaining scope of constitutional monitoring obligation).

35. FLA. STAT. ANN. § 27.711(12) (West 2011).

36. *See* ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 183 (noting that "registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.").

37. *See* Am. Bar Assoc., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 31 HOFSTRA L. REV. 913, 944-51 (2003), (Guideline 3.1, discussing characteristics of monitoring entity) [hereinafter *2003 ABA Guidelines*]; *id* at 970-73 (Guideline 7.1, discussing monitoring requirement and need for "systematic review based upon publicized standards and procedures").

monitoring entity should exercise the monitoring function; and (3) actual use of that structure by the monitoring entity to identify conduct that has undermined, or could undermine, the delivery of effective assistance.

Part III then demonstrates how Florida's monitoring system fails to meet these elements. Although the Florida Supreme Court has acknowledged the general authority to monitor,[38] and through its then-Chief Justice has identified monitoring as a possible solution to the problem of poor lawyering by post-conviction counsel,[39] the Florida courts have not engaged in the statutorily required monitoring.[40] So while the courts possess the necessary expertise, their failure to monitor strongly suggests a lack of commitment to the monitoring enterprise. Moreover, neither the legislature nor the courts have established a structure for exercising the monitoring obligation, and this lack of structure not only makes it difficult to effectively and thoroughly monitor counsel's performance for signs of problems, but also decreases the likelihood that the courts will actually engage in monitoring.

In Albert Holland's case, the Florida Supreme Court arguably engaged in (limited) monitoring – ordering responses to Holland's removal motion and reviewing the relevant filings from the parties. Had the Florida Supreme Court utilized proper monitoring techniques, such as periodic conferences or check-lists to actively monitor the basic aspects of counsel's performance – including counsel's understanding or awareness of the federal statute of limitations – the odds are quite high that it could have prevented counsel from missing the federal deadline.

So what are the lessons from *Holland*? First, the ABA and other observers were correct about not using the judiciary as the monitoring entity. Going forward, the monitoring function must be performed by an independent entity that is dedicated to improving the performance of capital post-conviction counsel. The training, expertise and focus of such an entity will improve the quality of the monitoring, making it more likely that the entity will catch needless errors and problems.[41] Second, either the state legislature or the monitoring entity must establish a detailed structure for monitoring, including timelines, mechanisms for gathering information (conferences or checklists), guidelines for identifying the signs of actual or potential incompetent performance, and remedies for problems detected during monitoring.[42] And third, though it should go without saying, the monitoring entity must actually *use* that structure to search for signs of actual or potential problems with counsel's performance.[43] With a dedicated entity, a clear structure, and a pro-active stance, monitoring remains an efficacious tool in promoting the delivery of competent assistance of post-conviction counsel.

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38. *See supra* note 11.

39. *See* Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers, Current Standards for Post-Conviction Counsel Are "Inadequate,"* FLA. BAR NEWS, March 1, 2005, at 3 (statement by then-Chief Justice Barbara Pariente "endors[ing] . . . a continuing system of screening and monitoring to ensure minimum levels of competence.").

40. *See infra* notes 69-70 and accompanying text.

41. *See infra* notes 120-36 and accompanying text.

42. *See infra* notes 169-79 and accompanying text.

43. *See 2003 ABA Guidelines*, *supra* note 37, at 970 (Guideline 7.1).

II. THE FLORIDA EXPERIMENT

A. Efforts to Provide Competent Post-Conviction Counsel

In the area of capital post-conviction counsel, Florida is a pioneer. In 1985, several years before Congress funded capital post-conviction defender organizations,[44] Florida established and funded the Office of the Capital Collateral Representative (CCR), the nation's first state-funded entity dedicated to representing capital petitioners seeking state post-conviction review.[45] Equally important, in 1999 it became the first state to explicitly require post-conviction courts to monitor counsel's performance "to ensure that the capital defendant is receiving quality representation."[46] And while the American Bar Association and others have long endorsed monitoring as a means of enhancing effective performance,[47] Florida appears to be the only state to impose a statutory monitoring obligation.[48] To be sure, its leadership in the area of capital post-conviction representation is a source of great pride. As Harry Lee Anstead, then Chief Justice of the Florida Supreme Court explained to a committee of the state legislature, "Florida is without any doubt the No. 1 state in this country for its post-conviction proceedings in death penalty cases."[49]

But all that glitters is not gold. Complaints began to surface regarding delay (and other) tactics allegedly practiced by CCR attorneys, which in turn led to the

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44. *See* Roscoe C. Howard, Jr., *Symposium, Federalism and the Criminal Justice System: The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 865 (1996) ("Post Conviction Defender Organizations . . . were created by Congress in 1988 to provide a service that would identify, train and support competent death penalty counsel in state and federal proceedings."); *see id.* at 906-09 (explaining creation of post-conviction defender organizations).

45. Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons from Florida*, 34 AM. J. CRIM. L. 277, 278 (2007) (Office of the Capital Collateral Representative was "the country's first statewide, state-funded, capital post-conviction defense office. . . . These Florida developments were astonishing in 1985."). For a detailed description of developments in Florida's post-conviction counsel provisions, see generally *id.* at 287-90*;* ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 136-242; Olive, *supra* note 45, at 287-290.

46. FLA. STAT. ANN. § 27.711(12) (West 2011); McConville, *Constitutional Implications of Statutory Grants of Capital Counsel*, *supra* note 34, at 66.

47. *See 2003 ABA Guidelines*, *supra* note 37, at 970 (Guideline 7.1, recommending monitoring of counsel "to ensure that the client is receiving high quality legal representation"); AM. BAR ASSOC. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002) (recommending supervision of defense counsel in principle 10).

48. *See* McConville, *Constitutional Implications of Statutory Grants of Capital Counsel*, *supra* note 34, at 66.

49. Jan Pudlow, *The Pros and Cons of Privatizing Death Penalty Appeals*, FLA. BAR NEWS, March 1, 2003, at 1 (quoting Chief Justice Harry Lee Anstead); *see id.* ("We are called constantly by other states, and it's all because the legislature has created and funded a system that assures high quality review in those cases."); REPORT ON STUDY OF POSTCONVICTION REPRESENTATION OF DEATH ROW INMATES 2 (February 13, 1997) [hereinafter MCDONALD COMMISSION REPORT] (Feb. 13, 1997) ("Based on a survey prepared by the Attorney General, the Commission believes the State of Florida currently provides the most comprehensive system for providing legal services to already convicted death-row inmates.").

creation of the McDonald Commission[50] to study the representation provided to capital post-conviction petitioners in the State of Florida.[51] In its February 1997 Report, the Commission found that although the CCR had been successful in numerous cases and provided "a valuable resource" to private attorneys who represented death row inmates, fourteen capital inmates lacked representation despite an increase in the CCR's budget and staffing.[52] The Commission also found that the CCR engaged in "abusive public-records requests" and "improper litigation tactics."[53] To help resolve these problems, the Commission recommended two different approaches – either decentralize the CCR into regional offices or move post-conviction representation to the Public Defender.[54] The former approach would facilitate representation in the event of a conflict of interest caused by multiple defendants, "promote professionalism," and reduce delay caused by travel and scheduling conflicts.[55] The latter approach would put representation in the hands of "experts in criminal law."[56] The legislature opted for the former approach and in 1997 created the Capital Collateral Regional Counsel (CCRC) with three regional offices – northern, middle, and southern.[57] It also created the Commission on Capital Cases to oversee the CCRCs.[58]

A few years later, to save money and improve efficiency, the legislature considered eliminating the CCRCs and moving to a system comprised entirely of private attorneys.[59] Perhaps heeding warnings that moving to such a system would actually increase both costs and delays,[60] in 2003 the legislature instituted a "pilot

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50. The McDonald Commission was named after the Chair of the Commission, Justice Parker Lee McDonald. *See* MCDONALD COMMISSION REPORT, *supra* note 49, at 11.

51. *Id.* at 1.

52. *Id.* at 2.

53. *Id.* at 3.

54. *Id.* at 6-7.

55. *Id.* at 6.

56. *Id.* at 7.

57. FLA. STAT. ANN. § 27.701(1) (West 2011). Each regional office is headed by a "regional counsel" appointed by the Governor and confirmed by the Senate. *Id.*

58. FLA. STAT. ANN. § 27.709(2)(a) (West 2011). The state legislature eliminated the Commission on Capital Cases in 2011. 2011 Fla. Laws 2011-131 § 1. Before its elimination, the Commission had many functions, including "review[ing] the operation of the [CCRC] and private counsel," and receiving complaints about CCRC and registry attorneys. FLA. STAT. ANN. § 27.709(2)(a), (c) (2006), *repealed by* 2011 Fla. Laws 2011-131 § 1. The Executive Director of the Commission on Capital Cases recruited attorneys for the registry and maintained the registry. FLA. STAT. ANN. § 27.710(1) (2006), *repealed by* 2011 Fla. Laws 2011-131 §1.

The Justice Administrative Commission, which handles budgetary and accounting matters for the CCRCs and public defender offices, FLA. STAT. ANN. § 43.16 (West 2011), is now charged with maintaining the post-conviction registry of private counsel. 2011 Fla. Laws 2011-131 §§ 2, 4, 5; *see also* COMMISSION ON CAPITAL CASES, http://www.floridacapitalcases.state.fl.us/#index (last visited March 28, 2012) (noting that the Commission ceased operations effective June 30, 2011); *Capital Collateral Registry*, THE JUSTICE ADMINISTRATIVE COMMISSION, http://www.justiceadmin.org (last visited March 26, 2012).

59. *See generally* Pudlow, *supra* note 49; Olive, *supra* note 45, at 288.

60. *See generally* Pudlow, *supra* note 49 (discussing problems with relying on "network of private attorneys" to handle capital collateral proceeds); Pudlow, *supra* note 39, at 1 (discussing February 16, 2005 meeting of Senate Committee on Justice Appropriations, in which Senator Crist said: "In the astute wisdom of the Senate, we decided to slow it down and do a test and that's how [the pilot program] . . . came about.").

program" that eliminated only one CCRC – the northern region – and replaced it with representation by private attorneys listed on a special registry.[61] The legislature ordered the State Auditor General to review the program for "effectiveness and efficiency," with a particular focus on a comparison between the CCRCs and the registry attorneys in terms of "timeliness and costs."[62] The Auditor General's 2007 Report covered the period from July 1, 2003 through June 30, 2006.[63] The Report found that "the [CCRC] system [was] significantly more costly than the use of the registry attorneys," but that the difference in costs resulted partly from "the administrative costs of the CCRC," as well as from the significant amount of time and resources spent by the CCRC attorneys while working the cases.[64] For two of the fiscal years studied, "the CCRCs provided an average of 355 hours of legal counsel per case and the registry attorneys provided an average of 196 hours per case."[65] In terms of timeliness, the Report noted that "[u]seful comparisons as to timeliness" were hard to make given the "varying circumstances that can impact the length of time required to complete the case."[66] Nevertheless, the study showed that the amount of collateral appeal time spent "under the direct control of the CCRC and registry attorneys" was about the same.[67] In terms of quality and effectiveness, the Report found that the CCRCs experienced "a higher incidence of success" than registry attorneys.[68] Tellingly, the Report also noted that, despite the statutory requirement for judicial monitoring of counsel's performance, a "system for monitoring . . . has not been established,"[69] and "[t]he court's monitoring . . . has not occurred."[70]

Without monitoring, it is not surprising that problems with registry attorneys eventually began to surface. Sub-par performance did not go unnoticed by the Florida Supreme Court, which, as Mark Olive[71] aptly observed, is "in the best position to review the work product submitted by Registry attorneys on a daily

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61. FLA. STAT. ANN. § 27.701(2) (West 2011). Only attorneys listed on the special state registry could participate in the pilot program. *Id.* To get on the registry, which is now compiled by the executive director of the Justice Administrative Commission, *Id.* § 27.710 (West 2011), attorneys must "certif[y] that they meet the minimum requirements" set forth in section 27.704(2), that they "are available . . . to represent" capital post-conviction petitioners, and that they "have attended within the last year a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of capital cases . . . ." *Id.* § 27.710(1).

62.*Id.* § 27.701(2). In 2004, the legislature decided to continue the program beyond the initial year. *Id.*

63. AUDITOR GENERAL'S REPORT, *supra* note 20, at 1. It also covered "selected actions through November 30, 2006." *Id.*

64. *Id.* at 9.

65. *Id.*

66. *Id.* at 14.

67. *Id.* at 11 (stating that the length of time is "2.0 years for CCRC cases and 2.1 years for registry cases.").

68. *Id.* at 15. The CCRCs won 14 favorable judicial decisions, compared to 5 won by registry attorneys. *Id.* The Report warned, however, that these numbers could change from year to year, particularly given "the length of time that each case spends in the various appellate processes and the limited number of cases." *Id.*

69. *Id.* at 16.

70. *Id.* at 1.

71. Mr. Olive "is an attorney in private practice [who] . . . has represented death-sentenced inmates nation-wide for almost thirty years." Olive, *supra* note 45, at 277 n.1.

basis . . . ."[72] Justice Raoul Cantero told the Commission on Capital Cases that

> some of the worst lawyering I've seen is from some of registry counsel, unfortunately. . . . It seems to me some registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . . Sometimes, they raise too many issues and still they haven't raised the right ones. In arguments, they are unable to respond to questions or don't know what the record shows. They don't have a real good understanding of death penalty cases, I don't think.[73]

Then-Chief Justice Barbara Pariente echoed the thought, stating that "we have observed deficiencies" with registry counsel.[74] The ABA has weighed in as well. In 2006 the American Bar Association Death Penalty Moratorium Implementation Project[75] published a report on Florida's death penalty system noting that "registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline."[76] Mistakes like these have devastating consequences, as they literally can end the petitioner's opportunity for habeas review.[77]

Observers agree that lack of experience plays a role in the underwhelming performance of some registry attorneys.[78] While many registry lawyers have more years of criminal experience than CCRC lawyers, the experience tends to be with trials, not post-conviction appeals.[79] As the ABA noted in its 2006 report, one

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72. *Id.* at 288.

73. Pudlow, *supra* note 39, at 2.

74. *Id.* at 3.

75. The American Bar Association Death Penalty Moratorium Implementation Project (hereinafter the Project) was established in 2001. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at i. In 2003, the Project decided to investigate the death penalty systems in several major death penalty states, including Alabama, Arizona, Georgia, Florida, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. *Id.* The purpose of the investigations was to assess "the extent to which they achieve fairness and provide due process," and "highlight individual state systems' successes and inadequacies." *Id.*

76. *Id.* at 236.

77. *See* Coleman v. Thompson, 501 U.S. 722, 731-33 (1991) (claims not presented properly in state court will be procedurally defaulted on federal habeas); 28 U.S.C. § 2244(b)(2) (2012) (successive federal petitions will be dismissed unless they fall within an exception); 28 U.S.C. § 2254(b)(1) (2012) (federal petitioners must exhaust state remedies).

78. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 236 ("This lack of appellate experience may account for the questionable performance by some registry attorneys."); Pudlow, *supra* note 39, at 2 ("Part of the problem is the low threshold of experience, [Justice] Cantero said."); Gary Blankenship, *Registry Lawyers Defended at Committee Meeting*, FLA. BAR NEWS, Apr. 1, 2005, at 2 (comments by Executive Director of Commission on Capital Cases stating that registry lawyers "might be extremely competent at trial, but not on appeal."). This issue surfaced as a potential problem as early as 1997 during the McDonald Commission's review of Florida's post-conviction representation system. MCDONALD COMMISSION REPORT, *supra* note 49, at 4 ("Private attorneys, who testified, questioned whether a privatization model could provide qualified attorneys. Specifically, it was the consensus that private attorneys would not have the special training in the narrow field of death cases . . . .").

79. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 183 ("The Executive Director of the Commission on Capital Cases has noted that while on average, registry attorneys have more experience than capital collateral regional counsel, most of their work has been in trials, not appeals.") (citation omitted); Pudlow, *supra* note 39 (discussing problems with registry counsel performance and lack of experience).

registry lawyer with capital trial experience stated that "'[i]t was a terrible mistake for me to get involved, and a lot of other lawyers I know who are messing with this are having a rough time of it.'"[80]

The lack of relevant experience comes as no surprise to observers given that Florida law requires only basic criminal law experience.[81] To be eligible for the registry, attorneys must have at least three "years' experience in the practice of criminal law," which must include five of the following, in any combination: felony jury trials, felony appeals, or capital post-conviction evidentiary hearings.[82] These qualifications are insufficient for post-conviction counsel, for as Justice Cantero observed, "[a] felony can be a burglary . . . . Just because you've had five burglary trials by no means indicates you can handle a post-conviction death penalty case."[83]

Ironically, the Florida Supreme Court declined to apply more stringent qualifications to capital post-conviction counsel, in part because state law "provid[ed] for judicial oversight and monitoring of assigned counsel's performance in postconviction proceedings."[84] This might seem logical if the courts were actually engaged in monitoring, but as the Auditor General's Report confirms, they were not. Had the Florida courts engaged in monitoring, many problems with attorney performance – including the missed filing deadline in *Holland* – could have been eliminated.[85]

B. Holland's Odyssey

Albert Holland's 1997 murder conviction and death sentence became final on direct review on October 1, 2001, when the Supreme Court of the United States

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80. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 183 (quoting Jo Becker, *System May Be Slowing,* ST. PETERSBURG TIMES, July 17, 2000).

81. AMERICAN FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 235 (discussing qualifications and performance of registry counsel).

82. FLA. STAT. ANN. § 27.704(1) (West 2011) (attorneys with CCRC); *id.* § 27.704(2) (registry attorneys); *id.* §27.710(1), (2) (West 2011) (registry attorneys).

83. Pudlow, *supra* note 39, at 2.

84. *In re* Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 189 (Fla. 2002); *id.* at 186 (adopting proposed minimum standards for capital trial and direct appeal counsel (public defender and privately retained), but declining to adopt same proposed standards for capital post-conviction counsel). The other reasons for declining to impose more stringent standards included: (1) the potential disqualification of less experienced attorneys who join the CCRCs "from law school and gain expertise in handling these highly specialized postconviction proceedings by working with more experienced attorneys in those offices;" (2) the statutory nature of the right to counsel; (3) the "explicit standards for assistant collateral capital counsel and for conflict counsel" imposed by the legislature; and (4) the primary concern for competency at trial and appeal. *Id*. at 188-89.

85. Florida's failure to use an independent monitoring entity, as recommended in the *ABA Guidelines*, did not go unnoticed by the ABA during its 2006 assessment of Florida's capital punishment system. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 192. But what seemed to bother the ABA more than that was the lack of action by state actors in the face of known problems: "We note that regardless of whether the current reliance on the judicial appointment and monitoring of counsel is responsible, the quality of defense representation remains very uneven, as recognized by the Florida Supreme Court, *and yet little appears to have been done about it.*" *Id.* (emphasis added).

denied Holland's *certiorari* petition.[86] Soon thereafter, the State of Florida appointed a registry attorney to serve as Holland's state and federal post-conviction counsel.[87] In September 2002, counsel filed the state post-conviction motion, which tolled the federal statute of limitations with twelve days remaining.[88]

At some point during state post-conviction review, "relations between [counsel] and Holland began to break down,"[89] and Holland freely expressed his dissatisfaction.[90] In February 2004, while the case was pending before the Florida Supreme Court, he filed a motion requesting removal of counsel, leveling allegations about counsel's failure to include certain claims in the state habeas petition[91] and counsel's failure "to establish any relationship of trust or confidence"[92] with Holland. The State of Florida opposed the motion, arguing that since he had counsel, Holland should not be permitted to file *pro se* motions.[93] The

86. Holland v. Florida, 130 S. Ct. 2549, 2555 (2010).

87. *Id.* Florida law requires appointed counsel to continue representing the petitioner through federal habeas review, unless "released by order of the trial court." FLA. STAT. ANN. § 27.711(2) (West 2011).

88. *Holland*, 130 S. Ct. at 2555.

89. *Id.*

90. *See id.* at 2555-59. Holland complained to the Florida Supreme Court, the Florida Bar Association, and the Clerk of the Florida Supreme Court. *Id.*; Joint Appendix, *supra* note 2, at 207 (July 18, 2003 letter to Florida Bar Association); *id.* at 122, 123-24, 146-48 (letters to the Clerk of the Florida Supreme Court dated September 8, 2003; November 20, 2003; and April 26, 2004); *see* Holland v. Florida, 539 F.3d 1334, 1337 (11th Cir. 2008) (noting that "[i]n October 2005, [Holland] also contacted the Florida Supreme Court about the use of its website 'so that he could secure the assistance of outside supporters to keep him updated about the appeal.'"). In his letter to the Florida Bar Association, Holland complained that his post-conviction counsel refused to raise "at least (20) twenty to (25) twenty-five legal issues that have merit . . . ." Joint Appendix, *supra* note 2, at 207. The Florida Bar Association denied the complaint. *Holland*, 130 S. Ct. at 2556. Holland sent numerous letters to the Clerk of the Florida Supreme Court asking for documents and information about his case. In his first letter, Holland asked whether counsel had filed the state post-conviction petition, noting that he had written counsel "a letter a couple of months ago but he has not responded to my letter yet." Joint Appendix, *supra* note 2, at 122 (letter dated September 8, 2003). The Clerk responded, indicating that the petition had not yet been filed. *Id.* at 22 (letter dated September 11, 2003). In his second letter, Holland asked for a copy of a motion filed by the State of Florida, *id.* at 123 (letter from Holland to Clerk dated November 20, 2003), which the Clerk sent to Holland, *id.* at 25 (letter from Clerk to Holland dated December 3, 2003). In his third letter, Holland asked for copies of four separate filings, but this time the Clerk sent a letter stating that Holland would have to pay a total of $77.00 in order to obtain copies of the documents. *Id.* at 146-47 (letter from Holland to Clerk dated April 26, 2004); *id.* at 36 (letter from Clerk to Holland dated May 5, 2004).

91. Joint Appendix, *supra* note 2, at 134-47 (February 18, 2004 letter to Florida Supreme Court). After Holland sent the trial court a letter discussing documents in his case, counsel sent a letter to Holland correctly and thoroughly explaining that some claims simply are not cognizable in a post-conviction motion, and that even if a claim is cognizable, it can be counter-productive to raise the claim it if lacks merit. *Id.* at 54-56 (undated letter from counsel to Holland). Holland later filed a motion to supplement the record in the trial court, which counsel sought to adopt in an effort to preserve the claims and the record. *Id.* at 11-14. The trial court rejected the effort, ruling Holland's motion a nullity. *Id.* at 14.

92. *Id.* at 137 (February 18, 2004 letter to Florida Supreme Court).

93. *Id.* at 31; *Holland,* 130 S. Ct. at 2556.

Florida Supreme Court struck Holland's filing, agreeing with the State of Florida.[94]

Undeterred, in June 2004 Holland filed a second removal motion with the Florida Supreme Court, complaining of his lack of trust and confidence in counsel[95] and alleging several problems with counsel's performance, including counsel's failure to raise claims,[96] his failure to communicate with Holland,[97] his failure to send requested documents (including "statements and depositions," and various court filings),[98] and his "abandon[ment]" of Holland.[99] After the second removal motion, the Florida Supreme Court ordered responses from Florida and Holland's counsel.[100] Ultimately, however, the court denied the motion, again agreeing with Florida that Holland had no right to file *pro se* motions while he was represented by counsel.[101] Ordering and reviewing the responses to Holland's second removal motion appears to be the only monitoring performed by the Florida Supreme Court.[102]

From the beginning of state post-conviction review, Holland reminded counsel to preserve his claims for federal review.[103] Early on, counsel responded to Holland, indicating that he was on top of the matter.[104] In the months before the Florida Supreme Court issued its decision, Holland sent two letters to counsel inquiring about his case and reminding counsel of his desire to file a timely federal petition,[105] both of which went unanswered.[106] Unbeknownst to Holland, the Supreme Court issued its decision in November 2005 and its mandate on December 1, 2005, which meant the deadline for filing his federal habeas petition would expire twelve days later, on December 13, 2005.[107] That date came and went without a habeas filing.[108]

Uninformed about the Florida Supreme Court's decision in his case (and his missed filing deadline), Holland sent a letter to counsel in January 2006 reiterating

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94. *Holland*, 130 S. Ct. at 2556 ("The State responded that Holland could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel. The Florida Supreme Court agreed and denied Holland's requests.") (internal citations omitted).

95. Joint Appendix, *supra* note 2, at 135, 152.

96. *Id.* at 152-53.

97. *Id.* at 152; *Holland*, 130 S. Ct. at 2555.

98. Joint Appendix*, supra* note 2, at 152.

99. *Id.*

100. *Id.* at 44 (referencing Florida Supreme Court's July 7, 2004 Order).

101. *Id.* at 44-46; *Holland,* 130 S. Ct. at 2556.

102. *See supra* note 20 and accompanying text. While the court did not address the merits of Holland's complaints about counsel, had it done so, it likely would have rejected them. *See infra* note 180. The monitoring problem in Holland did not involve the Florida Supreme Court's rejection of the removal motions; it involved its failure to engage in proactive monitoring regarding counsel's duty to file a timely federal habeas petition. The removal motions, however, should have prodded the court to monitor counsel's performance going forward.

103. *Holland*, 130 S. Ct. at 2555.

104. Joint Appendix, *supra* note 2, at 55, 61; *Holland*, 130 S. Ct. at 2555.

105. Joint Appendix, *supra* note 2, at 210 (letter dated March 3, 2005); *id.* at 212 (letter dated June 15, 2005); *Holland*, 130 S. Ct. at 2556.

106. *Holland*, 130 S. Ct. at 2556.

107. *Id.*

108. *Id.* at 2556-57.

his request for information and his desire for a timely federal petition.[109] Shortly thereafter, during a shift in the prison library, Holland discovered that the Florida Supreme Court had rendered a decision in his case.[110] The very next day, he filed a *pro se* federal habeas corpus petition with the federal district court,[111] which the district court ultimately denied as untimely.[112]

Almost two months after the Florida Supreme Court's decision, counsel sent Holland a letter informing Holland that he would file a *certiorari* petition with the Supreme Court of the United States.[113] Holland hurriedly wrote back, correctly informing counsel that the *certiorari* petition would not toll the federal statute of limitations.[114] Holland followed up with a collect call to counsel, but the office did not accept the charges.[115] Counsel responded to Holland by letter, explaining his belief that the statute of limitations expired years earlier, before he was appointed to the case.[116] Holland wrote back, correctly explaining when the one-year limitations period actually began to run and that it was tolled when counsel filed the state post-conviction petition in 2002.[117] He also vented:

> [Y]ou never told me that my time ran out (expired). I told you to timely file my *28 U.S.C. [§] 2254* Habeas Corpus Petition before the deadline, so that I would not be time-barred.
> You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005 decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the courts [sic] decision as soon as you heard anything. . . . .
> Your letter is the first time that you have ever mentioned anything to me about my time had [sic] run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.[118]

The Supreme Court of the United States, reviewing Holland's case on *certiorari* to determine whether to apply the doctrine of equitable tolling, described counsel's conduct in this way:

> To be sure, [counsel] failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired . . . . [Counsel] failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his

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109. Joint Appendix, *supra* note 2, at 214 ("Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences."); *Holland*, 130 S. Ct. at 2557.

110. *Holland*, 130 S. Ct. at 2557.

111. Joint Appendix, *supra* note 2, at 84, 181-91; *Holland*, 130 S. Ct. at 2557.

112. Joint Appendix, *supra* note 2, at 81-94; *Holland*, 130 S. Ct. at 2559.

113. Joint Appendix, *supra* note 2, at 216 (Holland's letter to counsel referencing an earlier letter sent to him from counsel).

114. *Id.* at 216; *Holland*, 130 S. Ct. at 2557 ("Holland was right about the law.").

115. Joint Appendix, *supra* note 2, at 218; *Holland*, 130 S. Ct. at 2257.

116. Joint Appendix, *supra* note 2, at 78; *Holland*, 130 S. Ct. at 2557-58.

117. Joint Appendix, *supra* note 2, at 222.

118. *Id.* at 222-23. Following Holland's motion to remove counsel, the federal district court allowed counsel to withdraw and appointed new counsel to represent Holland during federal habeas review. *Holland*, 130 S. Ct. at 2559.

> doing so. [He] apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. [He] failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information.[119]

This conduct occurred while the Florida Supreme Court was supposed to be monitoring counsel's performance.

III. LESSONS FROM *HOLLAND*: THE EFFICACY OF MONITORING

A. The Duty to Monitor

Despite the importance and complexity of post-conviction proceedings, the Supreme Court long ago held that the Constitution provides no right to post-conviction counsel – not even for capital petitioners.[120] Adding insult to injury, the Court has also held that even if a state decides to provide counsel as a matter of statutory grace, the post-conviction petitioner does not have a right to effective assistance of that counsel,[121] which means that post-conviction petitioners must suffer the consequences of counsel's mistakes.[122] I believe (and have argued) that the Court got that second holding wrong. Specifically, I have argued that a state's decision to provide capital post-conviction counsel as a matter of statutory grace triggers a due-process based obligation to ensure that the right is meaningful.[123] And in the context of capital post-conviction counsel, meaningfulness requires two things: adherence to rigorous competency standards and supervision of counsel by monitoring her performance to prevent, to the extent possible, obvious errors.[124]

Because monitoring is necessary to protect the statutory right to capital post-conviction counsel, the system of monitoring established by the state must *also* be constitutionally meaningful – which means it must be designed in a manner that

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119. *Holland*, 130 S. Ct. at 2564.

120. Pennsylvania v. Finley, 481 U.S. 551 (1987) (no right to post-conviction counsel); Murray v. Giarratano, 492 U.S. 1 (1989) (no right to capital post-conviction counsel). For a discussion explaining the narrowness of *Giarratano*, see Eric Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006) ("To read *Giarratano* as holding that states have no obligation to provide postconviction counsel to death row inmates is to misread it.").

121. Wainwright v. Torna, 455 U.S. 586 (1982) (effectiveness guarantee attaches only to constitutional rights to counsel). In a recent decision, the Supreme Court of the United States declined to decide whether the Constitution provides "a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012). Instead, the Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.*

122. Coleman v. Thompson, 501 U.S. 722, 757 (1991).

123. McConville, *Constitutional Implications of Statutory Grants of Capital Counsel*, *supra* note 34, at 104-110 (arguing that decision to provide capital post-conviction counsel triggers constitutional obligation to monitor performance of counsel).

124. *Id.* at 105. *See also* McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 521-30 (explaining scope of constitutional monitoring obligation).

facilitates *quality monitoring*.[125] Accordingly, the monitoring standard must be "*preventive*, not corrective, in nature."[126] Instead of simply "targeting instances of actual ineffective assistance," the monitoring entity "must also target conduct that *threatens the delivery of effective assistance*."[127] Constitutionally meaningful monitoring does not involve looking over counsel's shoulder, second-guessing every decision. Rather, it involves general inquiry regarding "counsel's compliance with the basic duties required of all postconviction counsel"[128] – the duty to thoroughly investigate the entire case, the duty to raise all meritorious claims, and the duty to file a timely petition.[129] In Holland's case, the duty to monitor thus included a duty to inquire into counsel's understanding of how to calculate the federal deadline, as a misunderstanding on that score would undoubtedly threaten the delivery of effective assistance.

While monitoring will not catch or prevent all attorney errors, it should catch and prevent obvious errors, thereby decreasing the likelihood of ineffective assistance.[130] Indeed, the extreme deference to state criminal judgments demanded by the Antiterrorism and Effective Death Penalty Act on federal habeas review "increase[s] the importance of state postconviction proceedings"[131] and, hence, the need for effective post-conviction counsel.[132]

What happened to Albert Holland might suggest that monitoring is an inadequate means of protecting the right to post-conviction counsel. After all, unlike other death penalty states, Florida not only *required* the state post-conviction courts to monitor counsel's performance,[133] but also relied on monitoring as "the *sole method* of assuring adequacy of representation . . . ."[134] Moreover, the Florida Supreme Court on several occasions *recognized* its general obligation in this regard.[135] If errors like the one in *Holland* could not be prevented in Florida, then perhaps monitoring is not all that I cracked it up to be. But as explained below, the monitoring failure in *Holland* actually had nothing to do with monitoring as a concept; instead, it had everything to do with Florida's failure to meet the first two

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125. McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 543-44 ("[T]he system created to monitor capital postconviction counsel must be adequate and effective – it must protect the right to monitoring and, in turn, the right to effective capital postconviction counsel.").

126. *Id.* at 564 (discussing preventive standard and citing sources promoting preventive standard).

127. *Id.*

128. *Id.* at 571 (internal citation omitted).

129. *Id.* at 571-89 (discussing basic duties of post-conviction counsel and how to monitor for compliance).

130. *Id.* at 569.

131. Freedman, *supra* note 120, at 1098; *id.* ("By limiting federal habeas corpus review of the factual and legal determinations of state courts, AEDPA sought to give state courts the last word on questions of both guilt and sentence – and the last word on the state level is spoken during the postconviction process."). *See also* Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 415 (2010) ("States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become.").

132. *See, e.g.*, Freedman, *supra* note 120, at 1098-1101.

133. FLA. STAT. ANN. § 27.711(12) (West 2011).

134. FLA. STAT. ANN. § 27.7002(2) (West 2011) (emphasis added).

135. *See generally supra* note 11.

(of three) basic elements necessary to make any monitoring system constitutionally meaningful: a trained monitoring entity committed to the monitoring enterprise and a properly designed system for exercising the monitoring obligation. Florida's failure to meet these two elements virtually guaranteed failure of the third element – actual use of the monitoring system – for without the proper entity and an established monitoring system, monitoring (of any sort) is unlikely to occur.[136]

B. Cause of the Monitoring Failure in Holland

1. Lack of a Trained Monitoring Entity Committed to the Enterprise

Because "the monitoring process is really one of detection, intervention, and prevention,"[137] the members of the monitoring entity must be experts in capital post-conviction litigation.[138] Specifically, they must have training and experience sufficient to identify the signs of actual or potential failure to comply with the basic duties of capital post-conviction counsel – the duty to investigate, the duty to raise all non-frivolous claims, and the duty to file a timely petition.[139] Equally important, members of the monitoring entity must understand the role monitoring plays in protecting the right to effective post-conviction counsel and *be committed to that goal*.[140] Lack of such a commitment undermines the monitoring entity's ability to successfully exercise the monitoring function.[141]

The ABA recommends that the entity be "independent of the judiciary"[142] to "ensure that the capital defense function remains free from political influence."[143] Other observers have agreed, arguing against using courts as monitoring entities because of concerns about, *inter alia*, interference with the court's neutrality, lack of time and, perhaps worst of all, lack of ability or motivation to properly execute the monitoring function.[144] After evaluating these criticisms in detail, I nevertheless concluded that "lack of confidence in all judges across the country is unwarranted at this point."[145] Of course, the question *now* is whether Florida's experience with judicial monitoring proves otherwise. And the answer, I think, is

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136. The ABA has long-recommended these elements. *2003 ABA Guidelines*, *supra* note 37,at 944-951 (Guideline 3.1, discussing characteristics of monitoring entity); *id* at 974 (Guideline 7.1, discussing monitoring requirement and need for "systematic review based upon publicized standards and procedures").

137. McConville*, Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 570.

138. *See 2003 ABA Guidelines*, *supra* note 37, at 945 (Guideline 3.1).

139. *See id.* at 945-46; McConville*, Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 571-583 (describing basic duties of capital post-conviction counsel and how to monitor for failure to comply with those duties).

140. *See 2003 ABA Guidelines*, *supra* note 37, at 974 (monitoring entity's "paramount objective [is to] protect[] the rights and interests of the defendant.").

141. *Id.* at 948 (emphasizing need for entity charged with appointment, training and monitoring to be "wholly devoted to fostering high quality legal defense representation").

142. *Id.* at 944 (Guideline 3.1).

143. *Id.* at 948. *See also* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 254-55 (1990).

144. McConville*, Scope of Constitutional Obligation to Monitor, supra* note 34, at 549-54 (describing and discussing criticism of using courts as monitoring entities).

145. *Id.* at 554.

that it does. I was wrong.

To be fair to the Florida judiciary, members of the Florida Supreme Court have decried the poor performance rendered by some registry attorneys[146] and, speaking on behalf of the Florida Supreme Court, then-Chief Justice Barbara Pariente specifically recognized the importance of monitoring as a possible solution to the problem.[147] Moreover, there is absolutely no evidence of systemic bias in Florida, such as refusal to consider petitions fairly.[148] But the cold, hard reality is that despite the very clear obligation to monitor and the Florida Supreme Court's recognition of that obligation (and its importance), the Florida post-conviction courts are *simply failing to do it*. The Auditor General noted the systemic lack of monitoring in its 2007 Report,[149] and Albert Holland's case provides but one sad example. Even a registry lawyer (who was the head of the CCRC North before it was dissolved) acknowledged the judiciary's lack of oversight.[150] Thus, while the Florida judiciary is well-intentioned and sufficiently expert in capital post-conviction litigation, it appears to lack the commitment to the monitoring enterprise that is necessary for a constitutionally meaningful monitoring system.[151]

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146. *See supra* notes 73-74 and accompanying text.

147. Pudlow, *supra* note 39, at 2-3 (explaining by letter to the Executive Director of the Commission on Capital Cases that "the court has observed a marked improvement in the representation provided by the regional CCRC offices. As for registry counsel, we have observed deficiencies and we would definitely endorse . . . a continuing system of screening and monitoring to ensure minimum levels of competence.").

148. During its assessment of Florida's death penalty system, the ABA Assessment Project found no evidence that the Florida Supreme Court failed to adequately consider the merits of state post-conviction petitions:

> [A] review of Florida Supreme Court opinions reviewing the denial of a rule 3.851 motion indicates that the Court generally renders opinions addressing the issues of fact and law and explaining the basis for the disposition of the asserted claims. Additionally, we were unable to locate any instances of the Florida Supreme Court issuing an affirmance without an opinion, and there does not appear to be any rule, statute or case law permitting such practice in the Florida Supreme Court.

ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 231.

149. AUDITOR GENERAL'S REPORT, s*upra* note 20, at 1 ("The court's monitoring of the performance of counsel assigned to capital cases, required by Section 27.711(12) . . . *has not occurred."*) (emphasis added); *cf.* ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 192 ("[R]egardless of whether the current reliance on the judicial appointment and monitoring of counsel is responsible, the quality of defense representation remains very uneven, as recognized by the Florida Supreme Court, and *yet little appears to have been done about it.*") (emphasis added).

150. Pudlow, *supra* note 39, at 3 (Mike Reiter, a registry lawyer and former head of CCRC North, answered affirmatively when asked by a state legislator if registry lawyers lacked oversight). In its 2006 Report, the ABA noted criticism regarding "the judiciary's ability to successfully monitor attorneys on the statewide registry." ABA FLORIDA DEATH PENALTY REPORT*, supra* note 13, at 189.

151. A comment by a then-Florida Supreme Court Justice suggests that while judges might recognize the monitoring obligation, they remain unclear about the meaning and scope of that obligation. *See* Pudlow, *supra* note 39, at 1. Discussing the poor performance of some registry counsel, this Justice stated that it is "some of the worst lawyering [he had] ever seen." *Id.* at 2. Yet that same Justice, when asked by a state legislator if he "thought of removing [an incompetent lawyer] from [a] case," replied: "I've thought about it. I'm not sure we can. We have thought about whether this person should be a registry counsel at all. I think we are reluctant to go to that drastic a step." *Id.* at 3. Such reluctance is puzzling, for while removal is strong medicine, it is unclear why the judiciary would lack that authority altogether. Indeed, Florida post-conviction law appears to contemplate a judicial removal power. *See* FLA. STAT. ANN. § 27.711(8) (West 2011) (addressing how to handle fee payment in the event "an

Although the lack of an established monitoring system (discussed in the next section) surely contributed to the problem, the objections raised by opponents of judicial monitoring – the incongruity between monitoring and the judge's role as a neutral, a simple lack of time, and/or a lack of motivation[152] – provide other possible explanations for the lack of commitment to monitoring. Monitoring counsel's performance, even for basic signs of incompetence, might cause some judges to believe they must step out of their neutral role and act more like an advocate.[153] So rather than risk acting (or appearing to act) as an advocate, a judge might avoid monitoring. Although I have argued that monitoring can be accomplished without engaging in advocacy,[154] it appears this argument is more theoretical than real. Instead, it stands to reason that a commitment to monitoring is more likely to be present when the monitoring entity views itself as an advocate for capital inmates.

Lack of time also is a plausible explanation for the monitoring failure, given the time-consuming nature of monitoring[155] and the fact that Florida has the second largest death row in the nation.[156] And asking another judge to handle the monitoring function (proposed by me as a solution to lack of time)[157] likely would not work given the perception that monitoring requires advocacy.

But what explains the lack of motivation – particularly in a state that relies on monitoring as "the sole method of assuring adequacy of representation?"[158] A possible explanation is fear of losing an election by appearing "soft on crime," a problem about which Professor Stephen Bright has written extensively.[159] Indeed, in its 2006 Florida Death Penalty Report the ABA concluded that "politicization of both contested and retention judicial elections also greatly affects the judiciary."[160]

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attorney is permitted to withdraw *or is otherwise removed from representation prior to full performance of the duties specified in this section*") (emphasis added); *see also id.* ("An attorney who withdraws or is removed from representation shall deliver all files, notes, documents and research to the successor attorney within 15 days after notice from the successor attorney.").

152. *See* McConville*, Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 549-55 (discussing criticisms of judicial monitoring).

153. *See, e.g.*, Barbara R. Levine, *Preventing Defense Counsel Error – An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1433 (1984) (trial judges involved in monitoring "would have to avoid the temptation of getting overly involved in giving advice lest they compromise their own roles and counsel's.").

154. *See* McConville*, Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 550 ("effective postconviction monitoring need not involve advocacy").

155. *See 2003 ABA Guidelines*, *supra* note 37, at 973 (noting that monitoring "is not an easy task"); McConville*, Scope of Constitutional Obligation to Monitor, supra* note 34, at 570-98 (discussing monitoring entity's obligation).

156. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY, *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Mar. 17, 2012).

157. McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 553.

158. FLA. STAT. ANN. § 27.7002(2) (West 2011).

159. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808, 1826-32 (2000); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760-66 (1995).

160. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 325. Florida Supreme Court justices are governed by the merit selection process – initial appointment by the Governor followed by retention

If in the course of monitoring a judge discovers and remedies a problem with counsel's performance, the judge could be perceived as soft on crime, which could in turn be used against her in an upcoming election.[161] What judge facing re-election in a death penalty state wants to be viewed as the obstacle standing between the state and the enforcement of its criminal laws?[162]

The bottom line is that Florida's monitoring failure confirms the predictions of those who doubted the efficacy of judicial monitoring. Whatever the reason for the failure,[163] a change in the monitoring entity is necessary. The risk of insufficient monitoring by the judiciary is simply too high. Thus, as has been long-recommended by the ABA, the monitoring entity must be an independent entity.

Florida has independent defender organizations – the two remaining CCRCs – but under the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*),[164] the two CCRCs are prohibited from monitoring the attorneys in their respective offices, as it would constitute a conflict of interest.[165] Instead, to comply with the *ABA Guidelines*, Florida must establish an "[i]ndependent [a]uthority . . . run by defense attorneys with demonstrated knowledge and expertise in capital representation"[166] to conduct the monitoring function, and it must be the same entity that appoints, recruits and trains counsel.[167] Currently no such entity exists in the State of Florida.[168]

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elections. FLA. CONST. art. V, §10(a), (b). Trial and appellate court judges are elected unless voters in their jurisdiction choose to use the merit selection process. *Id.* *See also* ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 312-15 (explaining in detail election and merit selection process in Florida). The ABA acknowledged that while "the merit selection system . . . generally mutes the influence of political dollars on these judicial seats[,] . . . the merit selection process is not immune from politicization . . . ." *Id.* at 328.

161. Judicial decisions in death penalty cases have been fodder for political attack during retention elections in Florida. ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 329-30.

162. *See* Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot,* 5 J. App. Prac. & Process 347, 388 (2003) (challenging wisdom of this author's proposed monitoring requirement, arguing that in states where "courts have shown no hesitancy to affirm clearly incompetent representation . . . it is certainly questionable whether a high court or appointed commission would recognize a truly exacting standard of competent performance—and even *whether it would risk delaying an execution to remedy a violation of a proper standard.*") (emphasis added).

163. Without further detailed study, we will not know for certain why "the court's monitoring of the performance of counsel . . . has not occurred." AUDITOR GENERAL'S REPORT, *supra* note 20, at 1. The potential explanations discussed above represent some reasonable possibilities.

164. *2003 ABA Guidelines*, *supra* note 37.

165. *Id.* at 949.

166. *Id.* at 945 (Guideline 3.1(C)(2)).

167. *Id.* at 944-46 (Guideline 3.1).

168. The appointment and recruiting functions currently are performed by separate entities in Florida, neither of which is "run by defense attorneys." *Id.* at 945. The Florida Supreme Court appoints the CCRC to serve as post-conviction counsel in the geographic areas governed by the two remaining CCRCs, and the trial court appoints registry counsel in the geographic area governed by the pilot project. FLA. R. CRIM. P. 3.851(b). The Executive Director of the Commission on Capital Cases, which was defunded in 2011, used to be responsible for recruiting counsel for the registry. *See supra* note 58. As of July 1, 2011, the Justice Administrative Commission, which consists of two State Attorneys and two Public Defenders, is responsible for recruiting attorneys for the registry and maintaining the registry. *See generally*, JUSTICE ADMINISTRATIVE COMMISSION, *supra* note 58.

2. Lack of a Properly Designed Monitoring System

In order to effectively exercise the monitoring function, the monitoring entity needs a detailed monitoring system – a blueprint explaining precisely how to uncover signs of both inability to perform and actual or threatened poor performance.[169] This blueprint encourages not only thorough monitoring in an individual case, but also consistent monitoring across all cases. Unfortunately, no such blueprint existed in Florida, as the Auditor General discovered during his review of the pilot program.[170] And without any system in place to guide the monitoring entity (and remind it of the duty to monitor), it is no wonder the statutorily required monitoring did not occur in Florida.

Going forward, Florida (preferably through the monitoring entity) must establish a monitoring system designed to help the monitoring entity execute its function.[171] The system must include a protocol for both reactive and proactive monitoring; it must establish a plan not only for responding to complaints or observations regarding an inability to perform or questionable performance (reactive), but also for spotting signs of potential and actual problems with counsel's performance (proactive).[172] The plan for reactive monitoring should

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In its review of Florida's system, the ABA found no specific "training requirement[] for" CCRC attorneys "[a]part from the general CLE requirements for all attorneys." ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 166 (internal citation omitted). With respect to registry attorneys, the ABA found only the requirement that they must "'have attended within the last year a continuing legal education program of at least 10 hours duration devoted specifically to the defense of capital cases, if available." *Id.* (quoting FLA. STAT. § 27.710(1)). It is unclear whether the 10-hour program must be completed within the year before joining the registry, or every year. There appears to be no single entity charged with offering training programs for capital post-conviction counsel. *Id.* at 166 (listing various providers of relevant CLE programs, including the Florida Bar Association, the Florida Public Defenders Association, and the Commission on Capital Cases).

169. *See 2003 ABA Guidelines*, *supra* note 37, at 970 (explaining that the monitoring entity "should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation."); *id.* at 973 (noting that "[t]he performance of each assigned lawyer should be subject to systematic review based upon publicized standards and procedures."). ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at x (recommending that "Florida should adopt . . . attorney monitoring procedures that are consistent with the *ABA Guidelines*"); *cf* The Spangenberg Group, *State Indigent Defense Commissions*, THE SPANGENBERG REPORT 20 (Dec. 2006) (arguing that "effective oversight of an indigent defense system [requires] meaningful standards and guidelines with which to judge the adequacy of the indigent defense providers and individual attorneys").

170. AUDITOR GENERAL'S REPORT, *supra* note 20, at 16 ("Our discussions with the Department of Legal Affairs, the Executive Director, and registry attorneys disclosed that a system for monitoring the performance of attorneys assigned to capital defendants has not been established . . . .").

171. *See 2003 ABA Guidelines*, *supra* note 37, at 970, 973.

172. The *2003 ABA Guidelines* explicitly call for an established system for reactive monitoring, requiring the monitoring entity to "establish and publicize a regular procedure for investigating and resolving any complaints made by judges, client, attorneys, or others that defense counsel failed to provide high quality legal representation." *Id.* at 970 (Guideline 7.1(B)). In the Commentary to Guideline 7.1, the ABA recognizes that monitoring must also be proactive:

> While the [monitoring entity] should investigate and maintain records regarding any complaints . . . , an effective attorney-monitoring program in death penalty matters should go considerably beyond these activities. The performance of each assigned lawyer should be *subject to systematic review based upon publicized standards and procedures.*

require thorough investigation of the complaint, with mandatory follow-up on any information that might suggest incompetence. By its nature, reactive monitoring would be limited to the topic(s) raised in the complaint or noticed by the monitoring entity during its investigation.

Proactive monitoring requires a broader scope, as it involves a review of all three basic duties of post-conviction counsel. As a result, the protocol will by necessity be detailed.[173] It should, for example, establish a schedule for monitoring, specifying not only when the monitoring should occur, but also which aspect of counsel's performance must be examined at each stage of post-conviction review. The protocol should list the relevant performance issues and should identify the signs of both competent and incompetent performance with respect to those issues.[174] It should also designate methods for gathering the relevant information, such as holding conferences or sending checklists to counsel.[175] If it recommends the latter, the protocol should include formulated checklists applicable for each stage of the litigation. Finally, the protocol should outline the actions the monitoring entity ought to take once it spots a problem, including seeking remedies from the court. For example, if the monitoring entity discovers a problem with counsel's understanding of a filing deadline, the protocol should direct the monitoring entity to correct the misunderstanding before counsel misses the deadline. And, in the case of an actual untimely filing, the protocol might instruct the monitoring entity to seek an extension of time and, depending on the circumstances, removal of counsel.[176]

Most of the monitoring will be done at the trial court level because the investigation, discovery of claims, and raising them in a timely state petition all occur at the beginning of post-conviction review. But monitoring must continue throughout post-conviction review, as any claims not properly preserved (raised and considered on the merits) at the state post-conviction level will be lost at the federal habeas level.[177] As a result, the plan must require the monitoring entity to follow counsel's efforts to timely appeal any adverse rulings on the state petition.[178]

Id. at 973 (emphasis added). While the *2003 ABA Guidelines* recommend specific performance standards, they do not recommend specific procedures for the monitoring entity to follow. The recommendations in this article represent just a beginning sketch of the blueprint that is necessary for meaningful monitoring.

173. The *2003 ABA Guidelines* recommend the creation of "standards of performance" to which the monitoring entity should refer when "assessing the . . . performance of counsel." *Id.* at 989 (Guideline 10.1). *See also id.* at 992 (performance standards "should . . . be utilized . . . when monitoring the performance of counsel"). The *2003 ABA Guidelines* set forth detailed minimum performance standards, but encourage the monitoring entity to add to them. *Id.* at 989.

174. For a list of performance standards to guide the monitoring entity, see *id.* at 1079-87 (Guideline 10.15.1). *See also* McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 570-83 (discussing how monitoring entity can spot signs of competent and incompetent performance).

175. For a discussion of how the monitoring entity should gather the relevant information, see McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 583-89.

176. *See id.* at 597-98 (explaining possible remedies).

177. *See* 28 U.S.C. § 2254(b)(1) (2012); *Coleman v. Thompson*, 501 U.S. 722, 731, 752-53 (1991).

178. *See* FLA. R. CRIM. P. 3.851(d)(3) (state habeas petition filed in Florida Supreme Court with appeal from trial court's decision on post-conviction motion); FLA. R. APP. P. 9.110(b), 9.140(b)(1)(D), (b)(3) (rules for appealing capital post-conviction motions). In Florida, state post-conviction motions are separate from state habeas petitions, with the former originating in the trial court and the latter

And since Florida law requires registry attorneys to continue representing "the capital defendant throughout all post-conviction capital collateral proceedings, including federal habeas corpus proceedings,"[179] the monitoring plan absolutely must include instructions to monitor counsel's compliance with the duty to file a timely federal habeas petition.

C. Implications of Florida's Monitoring Failure

Had Florida complied with the first two essential elements of a constitutionally meaningful monitoring system, the general monitoring failure noticed by the Auditor General very likely would not have occurred. Using Albert Holland's case as an example, a committed monitoring entity following a detailed proactive monitoring strategy very likely would have intervened in time to prevent the missed federal deadline.[180] While the Florida Supreme Court engaged in some limited reactive monitoring in connection with Holland's second removal motion, it failed to proactively monitor for signs of other potential problems. A trained monitoring entity would have inquired whether counsel was aware of the one-year statute of limitations and whether counsel understood how to calculate its running (and tolling).[181] It also would have gathered information about counsel's plan for filing a timely petition and corrected counsel's course if it appeared the plan would lead to a late filing.

In the absence of such monitoring and through no fault of his own, Albert Holland missed his federal filing deadline. Fortunately for Holland, after years of litigation things finally worked out (for now at least). On remand[182] the district court found "extraordinary circumstances" warranting equitable tolling, allowed

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originating in the Florida Supreme Court. Thus, the monitoring entity must also track counsel's efforts to file a timely state habeas petition. *See* FLA. R. CRIM. P. 3.851(d)(3).

179. FLA. STAT. ANN. § 27.711(2) (West 2011); *see also* FLA. STAT. ANN. § 27.710(3) (West 2011) ("[I]f appointed to represent a person in postconviction capital collateral proceedings, [the attorney] shall continue such representation under the terms and conditions set forth in § 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court.").

180. Using the documents contained in the Joint Appendix as a guide, reactive monitoring in response to Holland's removal motions would not have revealed any problems with counsel's ability to perform or compliance with his duties to investigate the case and raise all meritorious claims. In fact, Holland presented similar allegations to the Florida Bar Association, but it denied the complaint as meritless. Joint Appendix, *supra* note 2, at 65-66. In his removal motions, Holland complained of a lack of communication and failure to raise claims, but in his response to Holland's second removal motion, counsel explained that he "communicated with Mr. Holland before, during and after the 3.851 motion was filed; before, during and after evidentiary hearings; and prior to filing appellate briefs and habeas corpus pleadings on the claims which, in [his] professional judgment, may be advanced in good faith." *Id.* at 38. Counsel also sent letters to Holland explaining not only that some claims are not cognizable on collateral review, but also precisely why his claims either could not, or should not, be raised. *See supra* note 13. And counsel made every effort to preserve the claims Holland sought to raise, first by seeking to adopt Holland's supplemental pleading (which the trial court rejected), and then by successfully supplementing the record with documents prepared by Holland. *See supra* note 13.

181. Such inquiry should take place at the beginning of state post-conviction review and periodically throughout the process.

182. After the Supreme Court's remand, the Eleventh Circuit "remand[ed] th[e] case to the district court for fact finding and further proceedings—including, if it is necessary, an evidentiary hearing—consistent with the Supreme Court's instructions." Holland v. Florida, 613 F.3d 1053 (11th Cir. 2010).

Holland to file an amended petition,[183] and then granted the petition in part and denied it in part.[184] But it is worth emphasizing that Holland is one of the lucky few, for the Supreme Court has held that "'a garden variety claim of excusable neglect' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline does not warrant equitable tolling."[185] There likely remains a number of unlucky capital inmates who pursued state post-conviction remedies during the period of Florida's monitoring failure and who missed their federal filing deadlines because of attorney negligence, all of whom would be ineligible for equitable tolling.[186]

Monitoring failures can also have a significant impact on the government. While proper monitoring keeps the case moving towards the finish line,[187] failure to monitor can aggravate a state's interests in avoiding delay and achieving finality. Indeed, had Albert Holland's federal petition been filed on time (by December 13, 2005),[188] federal habeas review likely would be completed or would be near completion.[189] Instead, Holland and the State of Florida spent years fighting about equitable tolling. And even though the district court resolved the equitable tolling issue and ruled on the merits of Holland's claims, the State still faces delay occasioned by appellate review of the district court's decision.[190] Moreover,

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183. Holland v. Florida, No. 06-20182 (S.D. Fla. Nov. 22, 2010) (order granting equitable tolling and allowing amended petition).

184. Holland v. Tucker, 2012 WL 1103294 at *30, *56 (S.D. Fla. 2012) (granting relief for denial of right to self representation and ordering new trial).

185. *Holland*, 130 S. Ct. at 2564 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990); Lawrence v. Florida, 549 U.S. 327, 336 (2007)).

186. Such cases likely exist. During its review of Florida's death penalty system, the ABA noted that "registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline." ABA FLORIDA DEATH PENALTY REPORT, *supra* note 13, at 182 (internal citation omitted).

187. Except in circumstances where the monitoring entity prevents attorney conduct that would have triggered a delay (think equitable tolling), monitoring probably does not reduce delay. But it should not aggravate the state's interest in finality. McConville, *Scope of Constitutional Obligation to Monitor*, *supra* note 34, at 570 ("[d]uring-performance reviews . . . pose no greater risk to finality than that which exists by virtue of the postconviction process itself . . . . Monitoring does not *increase* th[e] opportunity [for relief], but rather *protects* it by ensuring, to the extent possible, that counsel acts with a certain level of competence throughout the postconviction proceeding.").

188. *Holland*, 130 S. Ct. at 2556.

189. A recent study revealed that in capital cases it took an average of 28.7 months – a little over two years – to resolve a federal habeas petition in federal district court. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STAT PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 38-39 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (measuring the time from "the date of the first docket entry [to] the date of termination in district court"). Using this average as a guide, Holland would have finished district court review in the early part of 2008. Review in the court of appeals and the Supreme Court reasonably could have been finished within four years, putting us in early 2012. Indeed, consideration of Holland's January 2006 petition – from the filing in district court to the Supreme Court's decision regarding equitable tolling – took four and one-half years. *See* Joint Appendix, *supra* note 2, at 83 (petition filed January 19, 2006); *Holland*, 130 S. Ct. at 2549 (decision dated June 14, 2010).

190. Both Holland and the State of Florida appealed the district court's decision. *See* Holland v. Tucker, 2012 WL 1193294 (S.D. Fla. 2012), *appeal docketed*, No. 12-12404-P (11th Cir. May 7, 2012);

additional delay will result from the retrial should the appellate courts affirm the district court's decision in favor of Holland. In short, capital petitioners are not the only ones losing out because of the monitoring failure in Florida.

IV. CONCLUSION

Albert Holland brought his complaints about his counsel to the right party – the party that had a statutory (and constitutional) obligation to monitor counsel's performance. Unfortunately, the Florida Supreme Court failed to meet that obligation. True, it reviewed Holland's two motions to remove counsel from his case – even ordering responses from the parties after the second motion. But it failed to proactively monitor counsel's performance for compliance with his duty to file a timely federal habeas petition. Despite its recognition of the obligation to monitor, the court failed to detect and prevent a major (but preventable) error – the failure to file a timely federal habeas petition.

To some, Albert Holland's case might call into question the efficacy of monitoring as a tool to improve the performance of capital post-conviction counsel – a tool that I have argued is constitutionally required to protect the statutory right to capital post-conviction counsel. That the case took place in Florida – a state that requires monitoring and relies on monitoring as "the sole method of assuring adequa[te] representation"[191] – arguably makes the question even more pronounced. If Albert Holland could not get quality monitoring in Florida, then maybe quality monitoring is an unattainable goal.

As explained in this Article, however, the monitoring failure in *Holland* (and in Florida in general) does not undermine reliance on monitoring as a way of promoting effective assistance of capital post-conviction counsel. Instead, the monitoring failure in *Holland* was the result of two things: Florida's utilization of the judiciary as the monitoring entity and its failure to establish a detailed monitoring system to guide the monitoring entity in performing its functions. While the Florida judiciary undoubtedly possesses the requisite expertise to perform the monitoring function, its literal failure to monitor – not just in *Holland* but in post-conviction cases generally – confirms the doubts about the wisdom of relying on the judiciary to perform the monitoring function. For whatever reason – lack of time, concern about abandoning a neutral role or concern about reelection prospects, etcetera – the judiciary is not the best option for a monitoring entity. Instead, as the ABA has long recommended, monitoring must be performed by an independent entity that is committed to the monitoring enterprise.

But even with such an entity, meaningful monitoring cannot occur without an established monitoring plan detailing precisely how the monitoring entity ought to exercise the monitoring function at each stage of the post-conviction process. Indeed, the complete absence of such a plan decreases the chances that monitoring will occur *in any form*, let alone a meaningful form.

So in the end *Holland* teaches us an important lesson: Florida unfortunately set itself up for failure.

Holland v. Tucker, 2012 WL 1193294 (S.D. Fla. 2012), *cross appeal docketed*, No. 12-404-P (11th Cir. May 11, 2012).

191. FLA. STAT. ANN. § 27.7002(2) (West 2011).