DIRECT COLLATERAL REVIEW

*Z. Payvand Ahdout**

Federal courts are vitally important fora in which to remedy constitutional violations that occur during state criminal proceedings. But critics have long lamented the difficulty of obtaining federal review of these violations. The Supreme Court rarely grants certiorari to review state criminal convictions, including allegations of constitutional defects, on direct appeal. Likewise, the Court has historically declined to grant certiorari to review habeas claims that originate in state courts. And Congress has circumscribed the ability of all federal courts to grant relief on habeas claims made by state prisoners. The dominant scholarly view, therefore, is that systemic constitutional violations are going unremedied and will continue to go unaddressed absent broadscale change.

This Essay argues that an unnoticed change in the Supreme Court's certiorari practice over the last five years has reopened a previously closed path to remedying these violations. The Supreme Court has a long-stated presumption against taking cases that originate in state collateral proceedings, i.e., state proceedings in which prisoners challenge their convictions or sentences after the convictions have become final. This Essay shows that, although the Court previously hewed to that presumption, things have changed. Beginning in October Term 2015 and continuing to the present, the Court has steadily granted certiorari in these cases, indicating a sub silentio abrogation of the presumption. This Essay documents this changed certiorari practice and explains its significance, both for vindication of constitutional criminal procedure rights and for our understanding of the Supreme Court's central role in shaping those rights.

INTRODUCTION 160
I. THE ECOSYSTEM OF COLLATERAL REVIEW 166
A. The Evolution of Collateral Review 168
B. The Emergence of Direct Collateral Review 176
1. The *Kyles* Presumption 178

* Columbia Law School, Academic Fellow & Columbia Fellow. I served as a law clerk to Justice Ginsburg during October Term 2015. The views expressed are my own and the discussion is based on only publicly available materials. For generous engagement with this project, I am grateful to Galen Bascom, Tommy Bennett, Niko Bowie, Bridget Fahey, Kellen Funk, Bernard Harcourt, Jeremy Kessler, Lee Kovarsky, Robert Leider, Josh Levy, James Liebman, Gillian Metzger, Henry Monaghan, Trevor Morrison, Andrea Nishi, Eve Brensike Primus, Daniel Richman, Peter Strauss, and participants in the 2019 Junior Federal Courts Workshop and Columbia Associates & Fellows Workshop. I am grateful to Casey Sumner and the diligent editors of the *Columbia Law Review*.

2. The Emergence of Direct Collateral Review and the Abrogation of *Kyles* ... 180
II. A SHIFT TO COLLATERAL DOCTRINE ... 184
A. Doctrinal Development ... 185
1. When Direct Review Is Inadequate ... 187
2. When Federal Habeas Under Section 2255 Is Inadequate to the Task of Developing Collateral-Review Doctrines ... 193
B. Correction or Aversion of Severe Miscarriages of Justice ... 199
III. DIRECT-COLLATERAL-REVIEW PUZZLES ... 202
A. State Summary Decisions ... 203
B. State Law, Federal Law, and Subject Matter Jurisdiction ... 206
C. State Law, Federal Law, and the Substance/Form Distinction ... 208
D. Standard of Review ... 209
CONCLUSION ... 210

INTRODUCTION

Scholars and criminal justice advocates have long lamented the difficulty of obtaining relief for federal constitutional violations that occur during state criminal proceedings.[1] The largescale and often systemic violations of federal constitutional rights that occur in the state system are well documented.[2] Yet, despite agreement by reformers that federal courts are better suited to the task of interpreting the United States Constitution and remedying violations of our founding document, it has become

1. See, e.g., Nancy J. King & Joseph L. Hoffmann, Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ 83–84 (2011) (demonstrating empirically the paltry levels of relief on federal habeas); Lee Kovarsky, Structural Change in State Postconviction Review, 93 Notre Dame L. Rev. 443, 444 (2017) (recognizing that a lack of relief on federal habeas has put state postconviction into the foreground); see also Eve Brensike Primus, Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions, 61 Ariz. L. Rev. 291, 292–93 (2019) [hereinafter Primus, Equitable Gateways] (recognizing low levels of relief in the federal system); Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 731–71 (2002) (describing some of the barriers to relief on federal habeas).

2. See, e.g., James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies & Alexander Kiss, A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It 11–14 (2002), http://www2.law.columbia.edu/brokensystem2/report.pdf [https://perma.cc/Y8WL-AL4V] [hereinafter Liebman et al., Broken System, Part II] (documenting the high level of errors in capital cases); Primus, Equitable Gateways, supra note 1, at 292–93 (discussing the substantial evidence of constitutional violations and the large number of wrongful state convictions that have come to light).

difficult for state criminal defendants to obtain review by a federal court.[3] Each of the three paths for doing so—the Supreme Court's certiorari review on direct appeal, the Supreme Court's certiorari review on a state collateral challenge, and federal district court review on federal habeas—has substantial procedural challenges.[4] Historically, the Supreme Court has rarely granted certiorari to review direct appeals of state criminal convictions or of state collateral challenges (that is, challenges to a conviction that is already "final").[5] And for a variety of technical, but important reasons that this Essay explores, it is difficult for lower federal courts to address constitutional violations that occur in state proceedings through federal habeas review.[6] Indeed, one prominent scholarly work has described federal habeas relief as a "pipe dream."[7]

Although many scholars and jurists assume that it has become ever harder to vindicate federal constitutional rights, this Essay shows that, in a series of cases that have escaped public notice, the Supreme Court has opened up a previously limited pathway through which individuals can obtain review. This Essay documents this phenomenon and explores its significance, both for vindicating individual rights and for understanding the Supreme Court's role in shaping those rights.

Most constitutional criminal procedure violations that occur in state court are not remedied because of complex procedural requirements and legal standards that imprisoned individuals often navigate without counsel.[8] Some criminal procedure issues—including ineffective assistance of

---

3. This was the ethos that motivated the Warren Court's habeas revolution, the expansion of the availability of relief under 42 U.S.C. § 1983, and the concomitant narrowing of abstention doctrines. See Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 234 (1988). The merits of the debate concerning parity span a wide spectrum of substantive domains that lie beyond the scope of this Essay. For key perspectives on this debate, compare Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1105 (1977) (suggesting that parity between state and federal courts is "at best, a dangerous myth"), with Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 637 (1981) (defending that "state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles"). This Essay concerns criminal procedure rights in particular.

4. See 28 U.S.C. § 1257(a) (2018) (granting Supreme Court jurisdiction over direct appeals from state court judgments); Id. § 2254(a) (providing habeas review over state criminal convictions in federal district courts).

5. See Jeffrey S. Sutton & Brittany Jones, The Certiorari Process and State Court Decisions, 131 Harv. L. Rev. Forum 167, 170, 176–78 (2018) (presenting statistics that show the Supreme Court disfavors certiorari petitions from state courts overall and arguing this disproportionally affects state criminal defendants).

6. See infra section I.A.

7. King & Hoffmann, supra note 1, at 75.

8. See Primus, Equitable Gateways, supra note 1, at 299 (describing how procedural barriers like the statute of limitations and exhaustion requirement "ensure that most state prisoners' claims are never considered on the merits in federal court").

counsel, the prosecution's failure to turn over material evidence in violation of *Brady v. Maryland*,[9] or the retroactive applicability of new law—are far more likely to be (or *must* be) brought after a conviction is final.[10] What is more, it is challenging for imprisoned people to successfully navigate the unique procedural infrastructure that exists when they bring their claim into federal court. When a federal court—whether the U.S. Supreme Court or a lower federal court—sits in review of a state court judgment, it aims to balance the systemic federalism interests of comity to the states, the presumption of regularity within the state system, and the state's interest in finality, against the individual's liberty interest.[11] Due to a confluence of factors, including federal legislation and Supreme Court precedents, the available avenues for relief have narrowed over time.

Procedurally, there are three avenues through which a federal court can review a state criminal conviction.[12] First, the Supreme Court can review the case on direct appeal. Second, the Court can review a state collateral challenge in a posture that this Essay terms "direct collateral review": After the case is final, a prisoner can challenge the conviction collaterally in state court and can appeal those decisions to the Supreme Court. Third, a federal district court can review a state conviction in the federal habeas posture.

Practically, relief is elusive. It is well documented that the Supreme Court rarely grants direct appeals from state criminal cases.[13] Moreover, in 1990, the Court articulated its presumption against granting direct collateral review,[14] observing that "[i]nstead, the Court usually deems

9. 373 U.S. 83, 87 (1963).

10. This Essay refers to these issues as "collateral-review issues." See Massaro v. United States, 538 U.S. 500, 504–05 (2003) (holding ineffective assistance of counsel cases are more appropriately brought on collateral, rather than direct, review); Tiffany R. Murphy, Futility of Exhaustion: Why *Brady* Claims Should Trump Federal Exhaustion Requirements, 47 U. Mich. J.L. Reform 697, 698 (2014) (noting that *Brady* claims usually are brought on collateral review); infra notes 174–184 and accompanying text (describing why retroactivity issues must be brought in postconviction proceedings).

11. See, e.g., Williams v. Taylor, 529 U.S. 420, 436 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications . . . .").

12. See infra Figure 1 (depicting the stages of a criminal case).

13. See Sutton & Jones, supra note 5, at 169–70 (collecting data on certiorari grants of state cases).

14. See Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of petition for certiorari) ("[T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims."). The Supreme Court elevated these words to a fixture of the Court's doctrine in *Lawrence v. Florida*, where the majority relied on the fact that the Court rarely grants review in this posture to reason that the time to file a habeas petition would not be tolled while a petition for certiorari was pending on direct collateral review. 549 U.S.

federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims."[15] Frustratingly, however, because of the "restraints imposed by the Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA)—the federal habeas statute—robust review is no longer viable in federal habeas proceedings.[16]

This Essay documents that, over the last five years, the Supreme Court has changed course with respect to one of the vehicles for vindicating constitutional criminal procedure rights: direct collateral review. To do that, this Essay carefully parses the Court's "shadow docket"—the hundreds of orders, summary reversals, calls for responses, certiorari grants, and orders granting, vacating, and remanding cases, which the Court issues in addition to the ninety or so merits decisions that get most of the attention. Though rarely studied, this docket can reflect changes in Court behavior and viewpoint much more rapidly than the merits docket.[17] And in some areas of the law, the shadow docket is even more influential than the merits docket.[18] An analysis of the shadow docket over the last five years demonstrates that the Court is no longer constrained by its stated practice against review of state collateral proceedings. This Essay thus also makes a methodological contribution, demonstrating that analysis of the Court's shadow docket is critically important to understanding the Supreme Court's discretionary interventions and can provide earlier and more accurate pictures of the Court's work.

Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed

---

327, 335 (2007). This Essay uses the term "presumption" cognizant of the fact that the Court has never referred to its stated practice as such. Perhaps a more neutral term would be "stated practice." In the context of granting certiorari and the cert pool, however, a stated practice printed in the U.S. Reports may, in effect, turn into a presumption effectively precluding review without a sufficient rebuttal.

15. *Kyles*, 498 U.S. at 932 (citing Huffman v. Florida, 435 U.S. 1014, 1017–18 (1978) (Stevens, J., respecting denial of petition for certiorari)); see also 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 6.4(b) & n.4 (7th ed. 2019) (collecting cases).

16. Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring).

17. See generally William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015) (identifying the import of the shadow docket and its lack of transparency); Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123 (2019) [hereinafter Vladeck, Shadow Docket] (documenting the Solicitor General's recent practice on the Court's shadow docket).

18. See, e.g., Stephen I. Vladeck, The Supreme Court's Most Partisan Decisions Are Flying Under the Radar, Slate (Aug. 11, 2020), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html [https://perma.cc/8DZP-AGE7] (explaining that developments of the shadow docket during the summer of 2020 include "an unusually large . . . number of significant rulings . . . [that] are quietly shaping the rules of the upcoming elections, how governments . . . respond to COVID, the resumption of the federal death penalty, and more").

course and exhibited the exact opposite preference: a propensity *for* granting cases from state collateral review as against federal habeas review. In its 2015 Term, the Supreme Court decided five cases originating on state collateral review[19]—matching the prior five Terms combined[20]—and in its 2016 Term, the Court continued this practice, deciding four cases in this posture.[21] In the 2018 Term, the Court decided three cases in this posture, and its shadow docket reflects this change.[22] In 2019, the Court heard two direct-collateral-review cases on its plenary docket,[23] resolved another in summary fashion,[24] and granted one for its 2020 term.[25] To Court watchers, even consistently granting one or two cases of a single type is interesting, but granting so many cases of a variety the Court has stated a preference against is unheard of.

Nestled between direct review and federal habeas review at the Supreme Court is direct collateral review. Although it may sound like a contradiction in terms, it precisely explains what the Court does in this posture: It directly reviews a state collateral proceeding.[26] Like direct review, the Court's basis for jurisdiction on direct collateral review is 28 U.S.C. § 1257.[27] But unlike direct review, direct collateral review introduces many of the complexities commonly associated with the federal

19. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016); Foster v. Chatman, 136 S. Ct. 1737, 1742 (2016); Wearry v. Cain, 136 S. Ct. 1002, 1002 (2016) (per curiam); Montgomery v. Louisiana, 136 S. Ct. 718, 726–27 (2016); Maryland v. Kulbicki, 577 U.S. 1, 3–4 (2015) (per curiam). Five cases are staggering when compared with prior terms, where the Court would generally hear one or zero direct-collateral-review cases. See infra section II.B (tracing direct collateral review before and after AEDPA).

20. See infra Figure 2.

21. Weaver v. Massachusetts, 137 S. Ct. 1899, 1906–07 (2017); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017); Rippo v. Baker, 137 S. Ct. 905, 906 (2017) (per curiam). The final case, Turner v. United States, originated on collateral review from a criminal proceeding in the District of Columbia. 137 S. Ct. 1885, 1891 (2017). Although the District of Columbia is not a state, this Essay categorizes *Turner* as a direct-collateral-review case because even the Supreme Court does, on occasion, cite the D.C. Court of Appeals as a state supreme court for these purposes. See, e.g., Garza v. Idaho, 139 S. Ct. 738, 744 n.3 (2019) (citing a D.C. Court of Appeals case for the proposition that "[a]t least two state courts have declined to apply *Flores-Ortega* in the face of appeal waivers").

22. *Garza*, 139 S. Ct. at 743; Madison v. Alabama, 139 S. Ct. 718, 726 (2019); Moore v. Texas, 139 S. Ct. 666, 667 (2019).

23. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); McKinney v. Arizona, 140 S. Ct. 702, 706 (2020).

24. Andrus v. Texas, 140 S. Ct. 1875, 1878 (2020).

25. Jones v. Mississippi, 140 S. Ct. 1293, 1293 (2020) (mem.) (granting certiorari).

26. It is a particularly apt time to begin the discussion of direct collateral review. In one of its most recent direct-collateral-review cases, *McKinney*, 140 S. Ct. 702, the Court was presented with the peculiarity of this posture head on. As Justice Ginsburg wrote in her dissent, the Court was faced with "the pivotal question: Is McKinney's case currently on direct review . . . or on collateral review . . . ?" Id. at 710 (Ginsburg, J., dissenting).

27. See 28 U.S.C. § 1257(a) (2018) (granting jurisdiction over "[f]inal judgments . . . rendered by the highest court of a State").

habeas posture. It is a posture in which federal supremacy, state sovereign authority, and individual liberties converge.[28] It is a posture in which the Supreme Court has to choose between the state interest in finality and the individual's liberty interest. It is a posture free from the procedural strictures of AEDPA, but that still navigates the difficult terrain between the state interest in finality and the federal interest in supremacy. It is this duality that creates real opportunities for criminal justice reform and real challenges to the Court's jurisdiction. Procedure—and procedural posture—affects the development of substantive rights. By revealing this path, this Essay calls for scholars to think more critically about how the peculiarities of this procedural posture will affect the substantive development of criminal procedure rights.[29] This Essay thus sets out an analytical research agenda and starts the dialogue of critical issues that the Supreme Court must mediate to further develop criminal procedure doctrines.

Part I situates direct collateral review in the current dialogue and chronicles its emergence as a fixture of the Court's docket. Part II, the heart of this Essay, offers a legal theory and normative defense for direct

---

28. For a sampling of the debate over these values, compare Sanders v. United States, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."), Fay v. Noia, 372 U.S. 391, 401–02 (1963) ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."), and Barry Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 Calif. L. Rev. 485, 488 (1995) ("[H]abeas clearly has something to do with [fairness] matters such as vindicating constitutional rights . . . ."), with Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 524 (1963) (resisting "the notion that sound remedial institutions can be built on the premise that state judges are not in sympathy with federal law"), Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970) ("My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."), John J. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 171 (1948) (finding "abuse[s]" in federal habeas proceedings after they "opened wide the door to review . . . of every criminal proceeding, state or federal, in which a person convicted of crime was willing to make oath that he had been denied a fair trial"), and Frank W. Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741, 741–42 (1966) (noting that "[e]ven before the era of *Brown v. Board of Education*, *Mapp v. Ohio*, *Gideon v. Wainwright*, and *Escobedo v. Illinois*, federal habeas corpus for state court prisoners was greatly agitating the more emotional critics of federal authority" (footnotes omitted)). For one additional perspective, see Rose v. Mitchell, 443 U.S. 545, 585 (1979) (Powell, J., concurring in the judgment) ("This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States' administration of that law." (citing Perez v. Ledesma, 401 U.S. 82 (1971); Younger v. Harris, 401 U.S. 37 (1971))).

29. For analysis of how the presumption against retroactivity articulated in Teague v. Lane, 489 U.S. 288, 292 (1988), changed the substantive development of the law, see Linda Meyer, "Nothing We Say Matters": *Teague* and New Rules, 61 U. Chi. L. Rev. 423, 455–59 (1994).

collateral review's emergence. The current ecosystem of collateral review—primarily Congress's passage of AEDPA and the Executive's centralized control over federal criminal cases—has created the need for the Court to engage in direct collateral review in order to continue doctrinal development of issues likely to come up on collateral review. Accordingly, Part II shows that direct collateral review is *the* legal channel for developing constitutional law pertaining to criminal defendants' rights, including retroactivity and mixed questions of law and fact such as ineffective assistance of counsel and failure to turn over material evidence under *Brady*. Part III then predicts and explores some of the challenges that direct collateral review will have to evolve to meet in the future.

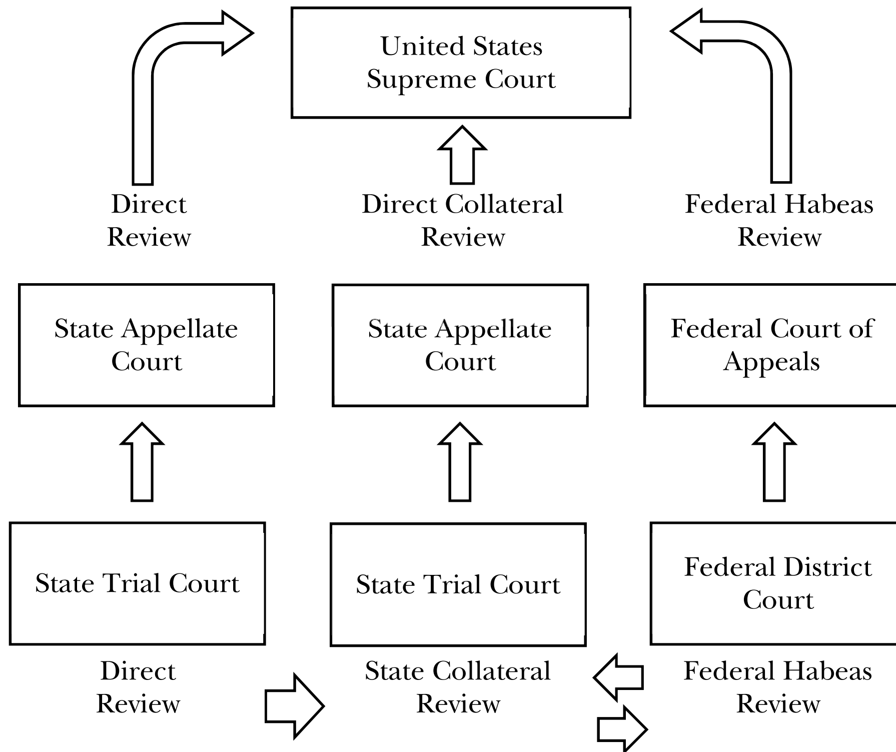
I. THE ECOSYSTEM OF COLLATERAL REVIEW

The modern criminal case is more than a single proceeding in a single court before a single sovereign. Although it begins with an initial conviction and direct review, it then moves on to a complex system of collateral review: first in the states and then before the federal judiciary. In order to set a terminological baseline, Figure 1 visually depicts how a state criminal case proceeds through both state and federal courts.

A state criminal case begins in state trial court. After conviction, a state criminal defendant has multiple opportunities to challenge federal constitutional defects that occurred during his or her trail and subsequent confinement. The defendant may pursue a direct appeal through the state system and, if unsuccessful, petition the United States Supreme Court to review. If the defendant's direct appeal is denied, the conviction is said to be "final." After this, the imprisoned person can challenge his or her confinement in a collateral challenge, defined by the Supreme Court as "judicial review that occurs in a proceeding outside of the direct review process."[30] First, the imprisoned person must pursue any relief available under state law, which, for consistency, this Essay refers to as "state collateral review." This may include state administrative or state habeas proceedings. After pursuing state collateral review (and any state appeals), the imprisoned person can again petition the United States Supreme Court to review. This is what this Essay terms "direct collateral review." Finally, if state collateral relief is denied, the imprisoned person can file a federal habeas review petition in a federal district court under AEDPA. As with direct review and state collateral review, an imprisoned person may pursue his or her federal habeas case all the way to the Supreme Court. In some circumstances, it may be possible for an imprisoned person to petition for state collateral relief again following this step.

30. Wall v. Kholi, 562 U.S. 545, 560 (2011).

Figure 1. The Stages of a Criminal Case[31]



Although the current state of affairs for state criminal cases includes both state and federal courts, as well as multiple venues for a collateral challenge to a conviction, this was not always the case. This Part lays the groundwork to understand the ever-evolving ecosystem of collateral review and the recent emergence of direct collateral review. This Part begins with the most well-known aspect of collateral review: federal habeas review. Far from exhaustive, this Part aims to tell a very brief tale of two federal habeas regimes. At its most robust, federal habeas was a plenary near-duplication of state criminal proceedings and review.[32] But the Burger and Rehnquist Courts' jurisprudence, the passage of AEDPA, and the interpretation of AEDPA have so altered the role that federal habeas review occupies today that federal habeas relief is, for most prisoners, elusive.[33] In light of this transformation, much of the modern scholarship has focused on reworking federal habeas review or else, working within it.[34] In focusing on how to fix this broken part of collateral review, the Supreme Court's pushback

31. Figure 1 is adapted and modified from Kovarsky, supra note 1, at 447 fig.1.
32. See infra notes 41–45 and accompanying text.
33. See infra notes 46–74 and accompanying text.
34. See infra notes 84–86 and accompanying text.

in reopening direct collateral review has escaped public notice. Very recent scholarship has recognized that the federal habeas transformation has caused hydraulic pressure on other parts of the collateral-review apparatus, and this scholarship has begun to explore another central component of the ecosystem of collateral review: state collateral review.[35] Direct collateral review—appeals from those state collateral decisions—holds an important, unexplored role in this system.

This Part explores this structural and scholarly evolution, and concludes, in section I.B, by documenting the emergence of a central component of the ecosystem of collateral review: direct collateral review. By undertaking an original review of the Court's plenary and shadow dockets over the last thirty years, section I.B shows that direct collateral review is now a fixture of the ecosystem of collateral review.

A. *The Evolution of Collateral Review*

The writ of habeas corpus[36] originated in English common law and was integrated into early American law.[37] Although habeas review was originally limited to challenges of federal detention, Congress broadened the writ's scope to include prisoners held in state custody during Reconstruction.[38] In doing so, Congress responded to a new dynamic between the states and federal government, in which some states actively subverted federal constitutional rights and even sought criminal retribution against federal Reconstruction officials.[39] Still, in 1867 it was far from clear that federal courts sitting in habeas had the power to entertain petitions from state prisoners previously decided in state court.[40]

In the 1950s, the Warren Court fashioned a new role for federal habeas review.[41] Many of the Warren Court's landmark decisions were

---

35. See infra notes 94–96 and accompanying text.

36. The literature on federal habeas review is vast. See generally Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1272–75 (7th ed. 2015) [hereinafter Hart & Wechsler] (canvassing foundational literature); Hertz & Liebman, supra note 15 (describing habeas corpus as the preferred method of assuring federal appellate review of all constitutional challenges to incarceration). This overview is not meant to be exhaustive but rather intends to provide a working understanding of the evolution of the federal courts' role in administering habeas review of state convictions.

37. McNally v. Hill, 293 U.S. 131, 136 (1934).

38. See Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385 ("[T]he several courts of the United States . . . shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution . . . .").

39. See King & Hoffmann, supra note 1, at 50–52.

40. See Hart & Wechsler, supra note 36, at 1265.

41. For other perspectives concerning the history of federal review of state convictions, see, e.g., James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2055–94 (1992) [hereinafter Liebman, Apocalypse] (arguing that direct review at the Supreme Court provided federal

animated by the notion that the availability of a federal forum is critical to vindicating constitutional rights.[42] So as states met the Warren Court's landmark criminal procedure cases with resistance, the Court armed federal district courts with powerful habeas review to provide relief to state prisoners confined unconstitutionally.[43] Much like the Reconstruction Congress that authorized federal review of state convictions, the Warren Court was responding to, at times, active state subversion of federal rights.[44] In expanding the scope of federal habeas review and articulating new rules of criminal procedure, the Warren Court made collateral review an integral part of the criminal justice project. In essence, the Warren Court made habeas review a real robust mechanism to correct constitutional defects that occurred during state criminal trials. During this era, federal habeas review was a near duplication of an original trial: Federal habeas courts were authorized to hold evidentiary hearings and to review de novo legal conclusions that states had previously decided.[45] It was a powerful remedial tool.

But this came at a cost: The number of federal habeas petitions surged, the federal courts were inundated, the states' interest in finality was largely disregarded, and lower federal courts were the ones vacating state convictions.[46] So the Burger and Rehnquist Courts pared back.[47] Focusing principally on the goals of comity, finality, and federalism,[48] the

---

review before the passage of the statute authorizing certiorari jurisdiction); Carlos M. Vázquez, Habeas as Forum Allocation: A New Synthesis, 71 U. Miami L. Rev. 645, 650–55 (2017) (arguing that until the passage of AEDPA, state prisoners were entitled to federal review of the legal and mixed law/fact questions decided against them in state courts, originally on direct review by the Supreme Court and later via federal habeas).

42. See Chemerinsky, supra note 3, at 244 (citing Owen M. Fiss, *Dombrowski*, 86 Yale L.J. 1103, 1103 (1977)).

43. See King & Hoffmann, supra note 1, at 55–56 (noting that states met cases like Miranda v. Arizona, 384 U.S. 436 (1966), Gideon v. Wainwright, 372 U.S. 335 (1963), and Mapp v. Ohio, 367 U.S. 643 (1961), with hostility).

44. See id.

45. See id. at 56–57; Liebman, Apocalypse, supra note 41, at 2004–05.

46. From 1960 to 1965, the number of federal habeas petitions filed by state prisoners jumped from 871 to 4,845. Hart & Wechsler, supra note 36, at 1270. And by 1970 that number doubled to 9,063. Id.

47. See John H. Blume, AEDPA: The "Hype" and the "Bite", 91 Cornell L. Rev. 259, 265 (2006) (detailing the Burger and Rehnquist Courts' reaction to the "highwater-mark era" of federal habeas review with a "regime of systematic judicial limitations"). The Court made clear on at least one occasion that it was "reluctant to draw inferences from Congress' failure" to enact habeas reform. Brecht v. Abrahamson, 507 U.S. 619, 632–33 (1993) (internal quotation marks omitted) (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988)).

48. These goals—while at times diffuse within the Court's jurisprudence—were later incorporated into AEDPA. See Williams v. Taylor, 529 U.S. 420, 436 (2000) (recognizing "AEDPA's purpose to further the principles of comity, finality, and federalism").

Burger and Rehnquist Courts decided a number of cases that circumscribed the availability of habeas relief to state prisoners. The Court developed the procedural default doctrine in *Wainwright v. Sykes*, holding that questions not properly preserved in state court could not be raised on federal habeas review.[49] It also adopted a total exhaustion rule in *Rose v. Lundy*, requiring habeas petitioners to first avail themselves of any available state relief.[50] The Court fashioned a default nonretroactivity rule in *Teague v. Lane*, holding that new rules would not ordinarily be applied to provide relief to convictions that were final.[51] Together, these cases restored a preference for finality of state convictions and recognized the state sovereign interest in deciding questions of law in the first instance. These cases reflect a departure from the principle that a federal court is necessary to vindicate federal rights. Instead, they are founded on the presumption of parity between state and federal courts: that state courts are capable of fully actualizing constitutional rights.[52]

Even with these changes, however, federal habeas review of state convictions was robust. In other words, not all was lost of the Warren Court era. Writing in 1992, Professor James Liebman argued that the standards that federal habeas courts applied mapped onto the standards that the Supreme Court applied on direct review.[53] Courts reviewed legal questions and mixed questions of law and fact de novo,[54] and they would apply legal precedent, develop doctrine, and consult persuasive authority.[55] Compared to the Warren Court era, habeas review was not as powerful, but it

49. See 433 U.S. 72, 86–91 (1977) (requiring, with limited exception, denial of federal habeas where the petitioner previously forfeited state relief because of failure to follow adequate and independent state procedures).

50. See 455 U.S. 509, 518–19 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.").

51. See 489 U.S. 288, 310 (1989) (plurality opinion) (O'Connor, J.).

52. See Chemerinsky, supra note 3, at 244 (observing that the Burger Court frequently "rejected attempts to expand federal court jurisdiction and often narrowed it, concluding that state courts could be trusted to adequately protect federal interests").

53. See Liebman, Apocalypse, supra note 41, at 2005 (describing the standards applied in federal habeas and direct appellate review by the Supreme Court as in "near parity").

54. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 373–83 (1986) (applying the de novo standard to an ineffective assistance of counsel claim); Miller v. Fenton, 474 U.S. 104, 112–13, 115 (1985) (holding that review of the "voluntariness" of a confession in a federal habeas proceeding is a "legal inquiry requiring plenary federal review"); Townsend v. Sain, 372 U.S. 293, 318 (1963) ("Although the district judge may . . . defer to the state court's findings of fact, he may not defer to its findings of law."). In *Wright v. West*, three Justices questioned independent review of mixed questions. See 505 U.S. 277, 288–97 (1992) (plurality opinion).

55. See Liebman, Apocalypse, supra note 41, at 2003–04. Indeed, commentators maintained that federal courts would "pay such attention to the state courts' opinions . . . as those opinions inspire on their merits and on the strength of their authors' and joiners' reputations." Id. at 2004.

still provided a vehicle to challenge one's conviction and to correct state court errors on matters of constitutional law.

That, no doubt, changed in 1996 when Congress undertook a major redesign of federal habeas review in AEDPA.[56] AEDPA codified many of the Supreme Court's limitations on review, including *Wainwright v. Sykes*'s procedural default rule[57] and *Teague*'s nonretroactivity rule.[58] AEDPA constrained habeas relief to those who are "in custody," created a one-year statute of limitations for habeas cases,[59] required exhaustion of state proceedings,[60] limited a habeas petitioner's ability to file a second or successive habeas petition,[61] and fashioned new standards for an evidentiary hearing.[62] One of the most significant changes, however, was Congress's adoption of Section 2254(d), which makes explicit federal deference to prior state proceedings in the form of a relitigation bar.[63] That provision directs:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[64]

Critically, this provision did away with de novo review in federal habeas and precluded federal review of state-court decisions—even erroneous

56. Because AEDPA's effects are widely discussed in the literature, this Essay provides only a brief overview for context. For more detailed discussion, see Blume, supra note 47, at 261 (arguing that ten years after its passage, "AEDPA has been less 'bite' than 'hype'"); James S. Liebman, An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases, 67 Brook. L. Rev. 411, 425 (2001) (finding "no systematic trial-level improvements" in capital cases that coincide with AEDPA's adoption); Bryan A. Stevenson, Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases, 41 Harv. C.R.-C.L. L. Rev. 339, 359–63 (2006) (recommending the repeal or suspension of several of AEDPA's procedural limitations).

57. See 28 U.S.C. § 2254(c) (2018).

58. See id. § 2254(e)(2)(A)(i).

59. See id. § 2244(d)(1).

60. See id. § 2254(b)(1)(A).

61. See id. § 2244(b)(1).

62. See id. § 2254(e)–(f).

63. See id. § 2254(d)(1)–(2).

64. Id.

ones[65]—so long as they are not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States."[66] This provision served "not only [to] narrow[] federal judicial power but also . . . to relieve the burden on the states in their administration of criminal justice and, ultimately," to make states the primary fora for assessing the constitutionality of confinement.[67]

Although Section 2254(d)'s language introduced a relitigation bar, which defers in significant measure to state courts, Supreme Court decisions interpreting Section 2254(d) have fortified it. In *Terry Williams v. Taylor*, the Court explained that a state decision is "contrary" to established federal law (1) if the state court's decision is "substantially different" from the Supreme Court's precedent, (2) if the state court "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (3) if the state court was presented with facts that are "materially indistinguishable" from a relevant Supreme Court precedent, but the state court reaches an opposite result.[68] Although *Williams* did not expressly limit habeas relief to the exact same facts of a prior case, it did severely circumscribe federal court authority to extrapolate from prior cases to new factual scenarios, a rule that is particularly potent in cases involving mixed questions of fact and law.[69]

In *Harrington v. Richter*, after describing Section 2254(d)'s standard, the Court clarified that "[i]f this standard is difficult to meet, that is because it was meant to be."[70] After all, Section 2254(d) was designed to "'guard against extreme malfunctions in the state criminal justice systems,'

---

65. See Harrington v. Richter, 562 U.S. 86, 101 (2011) (explaining that "[f]or purposes of § 2254(d)(1) 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law'" (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000))).

66. 28 U.S.C. § 2254(d)(1).

67. J. Richard Broughton, Habeas Corpus and the Safeguards of Federalism, 2 Geo. J.L. & Pub. Pol'y 109, 120 (2004).

68. 529 U.S. at 405–06.

69. The Supreme Court has on many occasions reversed, in summary fashion, grants of habeas, basing the reversal principally on the notion that the purported state-court error was not in violation of "clearly established" Supreme Court precedent. See, e.g., Dunn v. Madison, 138 S. Ct. 9, 11–12 (2017) (per curiam) (reversing the Eleventh Circuit and holding that the relevant cases had not "'clearly established' that a prisoner is incompetent . . . because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied" to him); Glebe v. Frost, 574 U.S. 21, 23 (2014) (per curiam) (reversing the Ninth Circuit's grant of habeas because the state court did not violate clearly established law); Lopez v. Smith, 574 U.S. 1, 6–7 (2014) (per curiam) (reversing the Ninth Circuit's grant of habeas relief because it was not clearly established by the Supreme Court that a defendant can be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial); Marshall v. Rodgers, 569 U.S. 58, 59 (2013) (per curiam) (reversing the Ninth Circuit's grant of habeas because the state court did not violate clearly established law).

70. 562 U.S. at 102.

not [to be] a substitute for ordinary error correction through appeal."[71] The Supreme Court has held that state summary decisions constitute decisions "on the merits" that should govern,[72] and has even held that state decisions addressing some, but not all, of the defendant's claims trigger the relitigation bar.[73] Before proceeding to the merits, courts must "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with a prior" Supreme Court decision.[74]

AEDPA's limit on the availability of habeas relief is surely no closely guarded secret.[75] Even the Supreme Court has, on at least one occasion, acknowledged its own role in making habeas relief more elusive.[76] Courts now focus much of their resources on whether the petitioner has cleared the statutory procedural hurdles, which are themselves complex doctrines that are often difficult to apply.[77] Noncapital petitioners, moreover, generally navigate their habeas petitions pro se.[78] This, coupled with heightened deference to state courts (in the form of a relitigation bar)

---

71. Id. at 102–03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)).

72. Id. at 99. The Court has directed that, where there is a summary affirmance or summary denial, federal habeas courts should ordinarily look to the last underlying reasoned decision and presume that the summary affirmance or denial was based on the reasons articulated therein. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2017); Ylst v. Nunnemaker, 501 U.S. 797, 806 (1991).

73. Johnson v. Williams, 568 U.S. 289, 292–93 (2013).

74. *Harrington*, 562 U.S. at 102.

75. See King & Hoffmann, supra note 1, at 75 (referring to relief on federal habeas as a "pipe dream"); see also Justin F. Marceau, Challenging the Habeas Process Rather than the Result, 69 Wash. & Lee L. Rev. 85, 89 (2012) [hereinafter Marceau, Habeas Process] ("[F]ederal habeas review of state convictions has become futile, illusory, and so improbable as to be 'microscopic.'" (quoting King & Hoffmann, supra note 1, at 81)).

76. See Calderon v. Thompson, 523 U.S. 538, 554–55 (1998) ("In light of 'the profound societal costs that attend the exercise of habeas jurisdiction,' we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." (citation omitted) (quoting Smith v. Murray, 477 U.S. 527, 539 (1986))); see also Blume, supra note 47, at 262 ("While the Court maintains that the scope of the writ is primarily for Congress to determine, it does not, in my view, really believe that to be true. . . . [It] has assumed a fair share of the responsibility for determining the scope of habeas review . . . .").

77. See King & Hoffmann, supra note 1, at 76–81 (chronicling Section 2254's procedural requirements and commenting that "[f]ar too much of the time and effort that federal courts and states' attorneys devote to habeas litigation has nothing to do with whether the petitioner is actually guilty or has been convicted or sentenced in violation of the Constitution"); Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 Calif. L. Rev. 1, 2 (2010) [hereinafter Primus, Structural Vision] (recognizing that habeas review "is spent finding ways to dismiss the petitions on procedural grounds without ever addressing their merits").

78. See Primus, Equitable Gateways, supra note 1, at 317 (noting that because most prisoners are indigent, they usually "either must proceed pro se or rely on pro bono assistance that typically comes from large law firms or legal institutions that do not focus on criminal cases").

once a petitioner has met the requisite procedural requirements to get to the merits, has yielded a "microscopically low rate of habeas relief" for noncapital petitioners held in state custody.[79]

Since AEDPA's passage—and the court decisions that have defined its breadth—scholars have lamented that federal habeas review is not adequately suited to the task of remedying unconstitutional confinement. According to one empirical study, since AEDPA's passage, federal habeas relief is afforded in only 0.29% of noncapital cases and 12.4% of capital cases.[80] Before AEDPA's passage, nearly forty percent of capital habeas petitions were granted relief.[81] So unlikely is federal habeas relief for state prisoners in this era that Professors Nancy King and Joseph Hoffmann labeled it a "pipe dream."[82] This rate of federal habeas relief should not be taken as a marker of a properly functioning state criminal justice system. As Professor Eve Primus put it: "[G]iven substantial evidence that states systematically violate criminal defendants' constitutional rights and the large numbers of wrongful state convictions that have come to light, the rate of relief cannot be explained on the grounds that everything is basically fine."[83] In other words, AEDPA bears significant human costs: Imprisoned persons whose conviction or confinement is unconstitutional have been deprived, not of some abstract remedy, but of a way to secure their liberty.

Scholarly attention to postconviction criminal justice reform has focused on efforts to redesign or work creatively within the federal habeas system. Professors King and Hoffmann, for example, have argued that federal habeas review should be reserved only for capital cases and a highly limited number of noncapital cases so that scant resources are reserved for those cases most likely to merit relief.[84] And even scholars who have written about the pervasive injustices in *state* criminal justice and *state* collateral review have advocated for *federal* habeas reform to address those issues. Professor Primus, for example, has advocated for using the federal habeas system not only to remedy individual claims of injustice but also to account

---

79. King & Hoffmann, supra note 1, at 83.

80. Nancy J. King, Fred L. Cheeseman II & Brian J. Ostram, Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, at 51–52 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/TAF7-3KSC].

81. James S. Liebman, Jeffrey Fagan & Valerie West, A Broken System: Error Rates in Capital Cases, 1973–1995, at 4 (Columbia L. Sch., Pub. L. Working Paper No. 15, 2000), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2220&context=faculty_scholarship [https://perma.cc/UX7T-J6HX].

82. King & Hoffmann, supra note 1, at 75.

83. Primus, Equitable Gateways, supra note 1, at 292–93 (internal citations omitted).

84. King & Hoffmann, supra note 1, at 91.

for systemic issues in state criminal justice systems.[85] Professor Justin Marceau has advocated for litigating systemic failures in state-collateral-review processes during federal habeas review.[86]

It is not just scholars who are focused on how federal habeas review can be used to remedy state miscarriages of justice. Courts too have sought to work within this system to provide relief in at least some of the cases that warrant it despite AEDPA's procedural strictures. Professor Aziz Huq argues that the Supreme Court has created a two-track habeas system that allows certain types of claims to leap past AEDPA's procedural hurdles in order to advance to the merits.[87] And lower federal courts have followed the Court's lead. Professor Primus has observed that courts have created "equitable gateways" within the federal habeas system in order to look beyond procedural barriers to a more robust merits review, particularly for claims of innocence or the lack of an opportunity for full and fair review.[88] By contrast, Professor Marceau has contended that recent court cases in lower federal courts have focused more on the fairness of procedures rather than on innocence.[89]

Federal habeas review is, to date, a main way that scholars have thought about collateral review. But state collateral review is the legal antecedent to that process, one that state prisoners must demonstrate they have availed themselves of in order to even bring a federal habeas claim.[90] Despite the legal requirement that state courts are the initial fora for collateral challenges, scholarship has not yet fully incorporated state collateral review into its prescriptions for criminal justice reform.[91] Recent scholarship, however, has begun to explore the scope of the state's constitutional obligation to afford collateral relief. Professors Carlos Manuel Vázquez and Stephen Vladeck argue that the Supreme Court's decision in *Montgomery v. Louisiana*[92] constitutionally requires the

---

85. Primus, Equitable Gateways, supra note 1, at 317–22.

86. Marceau, Habeas Process, supra note 75, at 146.

87. Aziz Z. Huq, Habeas and the Roberts Court, 81 U. Chi. L. Rev. 519, 528–29 (2014).

88. Primus, Equitable Gateways, supra note 1, at 293.

89. See Justin Marceau, Is Guilt Dispositive? Federal Habeas After *Martinez*, 55 Wm. & Mary L. Rev. 2071, 2143–45 (2014) (describing two recent cases whose outcomes suggest that "[g]uilt is increasingly *not* dispositive").

90. See 28 U.S.C. § 2254(b)(1)(A) (2018) (mandating that prisoners exhaust state remedies before bringing federal habeas petitions).

91. In a recent essay on the disparity between state and federal certiorari grants at the Supreme Court, Judge Jeffrey Sutton and Brittany Jones assert in passing that federal habeas review is the only—and very unlikely—way that a state criminal defendant can challenge a conviction after direct appeal. Sutton & Jones, supra note 5, at 177. Although Judge Sutton and Jones do not discuss the central role that states, and the Supreme Court reviewing states, play in collateral review, they do draw attention to state processes, state constitutions, and the Supreme Court's review of state cases. See id. at 176–78.

92. 136 S. Ct. 718 (2016).

availability of collateral relief in a certain subset of cases and that states are, in turn, constitutionally required to provide that relief.[93]

And in a recent article, Professor Lee Kovarsky puts state collateral review in the foreground. He argues that the modern federal habeas system's inability to check state convictions adequately has created a hydraulic pressure on the broader criminal justice system, rendering state collateral review an increasingly central aspect of criminal justice administration.[94] He maps federal intervention onto the state-collateral-review system, analyzing constitutional intervention and federal habeas intervention.[95] In his robust treatment, Professor Kovarsky expressly limits his analysis of direct collateral review to only those cases in which the Supreme Court directly seeks to regulate the state-collateral-review apparatus.[96] In doing so, Professor Kovarsky stops where this Essay centers its focus: Direct collateral review itself is an emergent and integral part of the criminal justice system and, through case-by-case determinations, may be the best mechanism to constrain and define the bounds of state collateral review.

B. *The Emergence of Direct Collateral Review*

On October 26, 1990, the Supreme Court denied Curtis Lee Kyles's petition for certiorari and for a stay of execution.[97] Kyles, whose capital murder conviction and death sentence had been affirmed on direct appeal in Louisiana, petitioned for state collateral relief, claiming the prosecution in his original trial had withheld material evidence that it had a constitutional obligation to turn over under *Brady*.[98] The state collateral court denied relief and the Louisiana Supreme Court denied discretionary review.[99] In a rare look into the Supreme Court's certiorari granting process, Justice Stevens, concurring in the denial of a stay of execution, explained that it was this posture—from state collateral review—and not the merits of Kyles's *Brady* claim animating the Court's denial. "Because the scope of the State's obligation to provide collateral review is shrouded in so much uncertainty," Justice Stevens explained, "this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal

93. Carlos M. Vázquez & Stephen I. Vladeck, The Constitutional Right to Collateral Post-Conviction Review, 103 Va. L. Rev. 905, 926–40 (2017).

94. Kovarsky, supra note 1, at 443–44. Others have written that when one point in the criminal justice system is not functioning properly, it puts pressure on other points to catch that error. See Liebman et al., Broken System, Part II, supra note 2, at 65 (noting that federal judges heighten review of death verdicts handed down in California state courts because California state judges are believed to be wary of overturning death verdicts).

95. Kovarsky, supra note 1, at 477–87.

96. Id. at 465–66.

97. Kyles v. Whitley, 498 U.S. 931, 931 (1990).

98. Kyles v. Whitley, 514 U.S. 419, 421–22 (1995).

99. Id.

constitutional claims."[100] "Instead," Justice Stevens continued, "the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims."[101] Kyles, still on death row, took the Court's direction, filed a federal habeas petition, and ultimately prevailed on his *Brady* claim five years later.[102]

On November 6, 2017, the Supreme Court summarily reversed the Eleventh Circuit's grant of federal habeas relief to Vernon Madison, who claimed that a medical condition left him with no memory of his offense, thus rendering his impending execution a violation of the Eighth Amendment's ban on cruel and unusual punishment.[103] Justice Ginsburg, concurring, observed that the issue presented "would warrant full airing" outside of the federal habeas context because of the "restraints imposed by [AEDPA]."[104] It was the posture of his appeal, from federal habeas, that prompted the Court to deny his petition and, accordingly, kept Madison on death row.[105] When the case returned to the Supreme Court the next year, this time on appeal from state collateral review—the Court's stated disfavored posture—the Court granted Madison's petition and ultimately vacated the decision below,[106] showing a preference for petitions originating on state collateral review over federal habeas.

These two cases—separated by over a quarter of a century—reflect a deep, yet so far unnoticed change in the Supreme Court's certiorari-granting process. The Supreme Court's agenda-setting process is one of the most consequential, yet elusive, aspects of the Court's authority. The Court, of course, has the power to decide the cases and even the issues that it will hear. And it does so behind closed doors, generally issuing only routine orders granting a case without reasoning or reporting votes. Although the Court's agenda-setting decisions are highly impactful, our collective understanding is a meager one. There is little theory concerning the Court's discretionary certiorari process and little formal Court guidance.[107] With Supreme Court Rule 10 as the only official guidepost for

100. *Kyles*, 498 U.S. at 932 (Stevens J., concurring) (citing Case v. Nebraska, 381 U.S. 336 (1965)).

101. Id. (citing Huffman v. Florida, 435 U.S. 1014 (1978) (Stevens, J., respecting denial of petition for certiorari)).

102. See *Kyles*, 514 U.S. at 453–54 (granting habeas relief and holding that the prosecutor improperly withheld *Brady* material).

103. Dunn v. Madison, 138 S. Ct. 9, 11–12 (2017) (per curiam).

104. Id. at 12 (Ginsburg, J., concurring).

105. See id. at 11–12.

106. Madison v. Alabama, 139 S. Ct. 718, 722, 726 (2019).

107. For one insightful work describing the measures the modern Court can use to control the cases and issues that come before it, see Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 685–707 (2012).

granting certiorari,[108] scholars, practitioners, and Court watchers glean lessons from historical practice and from the Supreme Court's public presence: a mosaic formed by the plenary and shadow dockets, orders, and arguments.[109] Although the Justices are collectively careful to maintain ultimate discretion and, of course, secrecy, individual Justices sometimes use the shadow docket—i.e., the hundreds of routine orders, including, inter alia, summary reversals; calls for responses; certiorari grants; and orders granting, vacating, and remanding cases—to signal to practitioners how to make their cases palatable.[110] Individual Justices—like Justice Stevens in *Kyles* or Justice Ginsburg in *Madison*—may dissent, concur, or issue a statement contemporaneously with an order that explains an otherwise routine order. Even in the absence of individual writings, routine orders help paint a more detailed picture of what goes on in chambers. Orders calling for response may indicate some intent to grant a particular case or interest in a particular issue. Likewise, petitions relisted for conference may indicate a looming grant or a shadow opinion in the works. While these aspects of the Court's business are opaque, collectively they form a more complete picture of what goes on at One First Street. By integrating both the plenary and shadow dockets into an analysis, this section documents a sustained change to the Court's shrouded agenda-setting process. In doing so, it makes a methodological contribution. The shadow docket is a rich source of information concerning the Court's practice. It gives a more complete picture of the Court's actions and can document changed attitudes on the Court before they reach the merits docket.

1. *The* Kyles *Presumption.* — Contrary to its usual secrecy, the Supreme Court has a *stated* practice against granting cases originating on state collateral review, reflected not only in Justice Stevens's concurrence in *Kyles* but also in *Lawrence v. Florida*,[111] where the Court elevated Stevens's words to a fixture of the Court's doctrine. The Court there held that the time to file a federal habeas petition would not be tolled while a petitioner sought direct collateral review, reasoning—on the basis of Justice Stevens's

108. Sup. Ct. R. 10 (listing three broad categories for granting certiorari with the caveat that the list "neither control[s] nor fully measur[es] the Court's discretion").

109. See Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 Geo. L.J. 1487, 1511 (2008) (describing the close attention court practitioners pay to determine the likelihood a petition will be granted, including the time of year it will be considered).

110. This Essay does not include simple denials of certiorari without any accompanying opinion in the analysis here. For recent scholarship concerning—and highlighting the importance of—the Supreme Court's shadow docket, see generally Baude, supra note 17 (identifying a lack of transparency in the Court's summary decisionmaking process); Vladeck, Shadow Docket, supra note 17 (investigating in reference to historical practices of the Solicitor General).

111. 549 U.S. 327, 335 (2007).

words—that the Court very rarely grants direct collateral review.[112] In the pre-AEDPA, robust-review world, the Supreme Court largely adhered to Justice Stevens's words in *Kyles*, preferring federal habeas review over direct collateral review.[113] Indeed, the Court resolved only six direct-collateral-review cases in the ten years before AEDPA was passed.[114] Nonetheless, in the twenty years that followed AEDPA's passage, the Court continued to hew to its stated presumption, generally granting zero or one case per Term originating in this posture.[115] And in 2007, over ten years

---

112. Id.

113. See supra notes 42–55 and accompanying text.

114. See Victor v. Nebraska, 511 U.S. 1, 22 (1994) (holding that jury instructions, taken as a whole, correctly conveyed the reasonable doubt standard); Schad v. Arizona, 501 U.S. 624, 627 (1991) (holding, in a capital case, that Beck v. Alabama, 447 U.S. 625 (1980), did not entitle petitioner to a jury instruction on a lesser included offense of robbery when the jury had the option of convicting on the noncapital charge of second-degree murder); Yates v. Evatt, 500 U.S. 391, 392–93 (1991) (holding, in a capital case, that a jury instruction of presumed malice did not constitute harmless error); Johnson v. Mississippi, 486 U.S. 578, 584–85, 590 (1988) (holding that the Mississippi Supreme Court's affirmance of petitioner's capital sentence despite the vacatur of the underlying conviction that served as a statutory aggravating factor violated the Eighth Amendment's ban on cruel and unusual punishment); Yates v. Aiken, 484 U.S. 211, 215–16 (1988) (holding that Francis v. Franklin, 471 U.S. 307 (1985), applied retroactively to petitioner's case, requiring vacatur of petitioner's capital sentence); Truesdale v. Aiken, 480 U.S. 527, 527 (1987) (per curiam) (reversing summarily the decision of the South Carolina Supreme Court, which had refused to apply as retroactive Skipper v. California, 476 U.S. 1 (1986)).

115. The cases granted review were Smith v. Cain, 565 U.S. 73, 75–76 (2012) (holding that the prosecutors' failure to turn over contradictory statements made by the state's sole witness violated petitioner's *Brady* rights); Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam) (holding that the state postconviction court applied the incorrect prejudice standard for a postconviction inquiry); Medellin v. Texas, 552 U.S. 491, 497–99 (2008) (holding that the International Court of Justice case, *Avena*, and the President's memorandum agreeing to apply it, were not binding federal law displacing Texas's ban on filing successive habeas petitions); Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (holding that *Teague* does not impose a constitutional ceiling for retroactivity); Smith v. Texas (*Smith II*), 550 U.S. 297, 300 (2007) (reversing the Texas Court of Criminal Appeals and holding that the *Penry* error in Smith v. Texas (*Smith I*), 543 U.S. 37 (2004), was not harmless); Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006) (holding that evidence obtained in violation of Article 36 of the Vienna Convention—which permits those detained in a foreign country to notify their home country of their detention—need not be excluded from trial); Deck v. Missouri, 544 U.S. 622, 624 (2005) (holding that the Constitution forbids visible shackling during the sentencing phase of a capital trial unless justified by an essential state interest); Roper v. Simmons, 543 U.S. 551, 559–60 (2005) (holding that juvenile death sentencing violates the Eighth Amendment's ban on cruel and unusual punishment); Florida v. Nixon, 543 U.S. 175, 178 (2004) (holding that counsel's failure to obtain express consent to conceding guilt in a capital case does not automatically render counsel's performance deficient); *Smith I*, 543 U.S. at 38 (holding that the "nullification instruction" given during a capital trial was constitutionally inadequate under Penry v. Johnson, 532 U.S. 782 (2001)); Bunkley v. Florida, 538 U.S. 835, 836 (2003) (per curiam) (holding that Fiore v. White, 531 U.S. 225 (2001), required the Florida Supreme Court to answer the previously declined question whether the knife in petitioner's possession was a "common pocketknife"); New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 155 (1998) (per curiam) (holding

after AEDPA's passage, a majority of the Court in *Lawrence* found that Justice Stevens's words still rang true and elevated them, in a precedential opinion, to a fixture of the Court's practice.[116] Justice Ginsburg, by contrast, in dissent, recognized that AEDPA changed a lot, perhaps warranting a change to the rules of the game. Expressly distinguishing *Kyles v. Whitely* as a "pre-AEDPA case," Justice Ginsburg wrote that "[s]ince AEDPA . . . our consideration of state habeas petitions has become more pressing."[117] "[A] petitioner who has suffered a violation of a constitutional right," she continued, "will nonetheless fail on federal habeas" if the petitioner is unable to meet Section 2254(d)'s heightened standard of review.[118] Justice Ginsburg thus concluded that "[e]ven if rare, the importance of our review of state habeas proceedings is evident."[119] In 2008, Professors Giovanna Shay and Christopher Lasch picked up on this debate, arguing that after AEDPA, practitioners ought to seek out direct collateral review.[120] But since then, the debate between the *Lawrence* majority and dissent has garnered little attention, likely because at the time the Court still generally adhered to *Kyles*'s stated practice against granting review in direct-collateral-review cases. But the Court's cases and shadow docket in recent Terms suggest that this debate and assumptions about direct collateral review are ripe for reexamination.

2. *The Emergence of Direct Collateral Review and the Abrogation of* Kyles. — During its 2015 Term, the Court resolved five direct-collateral-review cases—a previously "rare" posture—matching the prior five Terms combined.[121] This includes three cases from the Court's plenary docket,

---

that the Extradition Clause imposes a mandatory duty on asylum states, affording no discretion to its executive officers).

116. 549 U.S. at 335 (quoting Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of stay of execution)).

117. Id. at 343 n.7 (Ginsburg, J., dissenting).

118. Id.

119. Id. (citing *Deck*, 544 U.S. at 624; *Roper*, 543 U.S. at 578).

120. See Giovanna Shay & Christopher Lasch, Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts, 50 Wm. & Mary L. Rev. 211, 215–16 (2008).

121. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016) (holding that a Pennsylvania Supreme Court justice's failure to recuse himself violated the Due Process Clause where the justice, in his former role as district attorney, had approved seeking the death penalty in petitioner's case); Foster v. Chatman, 136 S. Ct. 1737, 1742–43 (2016) (ruling in favor of petitioner on his *Batson* claim); Wearry v. Cain, 136 S. Ct. 1002, 1002 (2016) (per curiam) (holding that the prosecution's failure to disclose material evidence violated petitioner's *Brady* rights); Montgomery v. Louisiana, 136 S. Ct. 718, 725, 729 (2016) (holding that the Constitution requires state collateral courts to give retroactive effect to new substantive rules of constitutional law); Maryland v. Kulbicki, 577 U.S. 1, 4–5 (2015) (per curiam) (holding that counsel's failure to question the legitimacy of ballistics evidence that was then considered legitimate did not constitute ineffective assistance of counsel).

Williams v. Pennsylvania,[122] *Foster v. Chatman*,[123] and *Montgomery v. Louisiana*,[124] and two cases from the Court's shadow docket, *Wearry v. Cain*[125] and *Maryland v. Kulbicki*.[126] This change in the Court's certiorari practice did not go unnoticed by its members. In two of these cases, Justice Alito expressly raised the *Kyles* statement and questioned the Court's fidelity to it. First, in his dissent in *Wearry v. Cain*, Justice Alito took issue with the Court's decision to reverse without full merits briefing.[127] He reasoned that because the Court had "previously told litigants that petitions like the one here"—from state collateral review—"are particularly *unlikely* to be granted," it was unfair to expect the state to press all its best arguments in a brief in opposition to certiorari.[128] Later that same Term, in his concurrence in *Foster v. Chatman*, Justice Alito raised this concern again: "Until recently, this Court rarely granted review of state-court decisions in collateral-review proceedings, preferring to allow the claims adjudicated in such proceedings to be decided first in federal habeas proceedings."[129] "Recently," Justice Alito observed, "this Court has evidenced a predilection for granting review of state-court decisions denying postconviction relief."[130]

The 2015 Term was no aberration. In its 2016 Term, the Court decided four direct-collateral-review cases. Three cases were on the plenary docket, *Moore v. Texas*,[131] *Weaver v. Massachusetts*,[132] and *Turner v. United States*,[133] and one was on the shadow docket, *Rippo v. Baker*.[134] Although the Court did not decide a direct-collateral-review case during the 2017 Term, Justice Ginsburg's concurrence in a summary reversal in *Dunn v. Madison* all but invited Madison's counsel to find another way—direct collateral review—to the Supreme Court.[135] And so during the 2018 Term, the Court resolved that case on direct collateral review, styled *Madison v. Alabama*,[136] along with two others on its plenary docket, *Garza*

122. 136 S. Ct. at 1903.
123. 136 S. Ct. at 1742–43.
124. 136 S. Ct. at 725, 729.
125. 136 S. Ct. at 1002.
126. 557 U.S. at 4–5.
127. 136 S. Ct. at 1008–09 (Alito, J., dissenting).
128. Id. at 1011.
129. 136 S. Ct. 1737, 1760 (2016) (Alito, J., concurring in the judgment).
130. Id. at 1761 (citing *Wearry*, 136 S. Ct. at 1002).
131. 137 S. Ct. 1039, 1044 (2017).
132. 137 S. Ct. 1899, 1905 (2017).
133. 137 S. Ct. 1885, 1888 (2017).
134. 137 S. Ct. 905, 906 (2017) (per curiam).
135. See supra notes 104–106 and accompanying text.
136. 139 S. Ct. 718, 726 (2019).

v. Idaho[137] and *Moore v. Texas*,[138] with *Moore* being a later iteration of a case decided in 2017.[139] What is more, the ethos—that direct collateral review is a preferred vehicle for deciding collateral-review issues—permeates the shadow docket, where the Court relisted direct-collateral-review petitions for conference and issued calls for responses in others.[140] This confirms that the Court no longer views the posture of these cases, standing alone, as disqualifying. During the 2019 Term, the Court resolved two direct-collateral-review cases on its plenary docket, *McKinney v. Arizona*[141] and *McGirt v. Oklahoma*,[142] and another on the shadow docket, *Andrus v. Texas*.[143] And, as of this writing, the Court is poised to hear one direct-collateral-review case during the 2020 Term.[144]

Figure 2 shows the Court's changed attitude towards direct collateral review graphically, plotting the number of cases resolved per Term. Terms in which the Court granted only a single direct-collateral-review case are represented with a black outline. Terms in which the Court granted more than one case are represented with black shading. The star represents Congress's passage of AEDPA. The graphic shows how much more frequently the Court has engaged in direct collateral review. Whereas there used to be no grants or perhaps one, the Court's recent certiorari practice shows much more engagement with this procedural posture.

137. 139 S. Ct. 738, 743 (2019).

138. 139 S. Ct. 666, 667 (2019).

139. See Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

140. See, e.g., Reed v. Texas, 140 S. Ct. 686, 689 (2020) (Sotomayor, J., respecting the denial of certiorari) (indicating that petitioner will not be prejudiced by the present denial in seeking review of a future petition for direct collateral review); Petition for a Writ of Certiorari at i–ii, Acklin v. Alabama, 139 S. Ct. 1374 (2019) (No. 18-640), 2018 WL 6040483 (presenting the question whether a criminal defendant is deprived of his right to conflict-free counsel when his lawyer is paid by a third party who threatens to withhold payment unless the lawyer conducts his defense in a manner promoting the third party's interest and counsel does so); Petition for a Writ of Certiorari at 2, Washington v. Alabama, 139 S. Ct. 1264 (2019) (No. 18-742), 2018 WL 6523959 (presenting the question whether under *Strickland*, a court assessing prejudice resulting from trial counsel's errors should consider each error in isolation or the cumulative effect of the errors); Petition for a Writ of Certiorari at i, Carruthers v. Mays, 139 S. Ct. 1173 (2019) (No. 18-697), 2018 WL 6192288 (presenting the question whether depriving a criminal defendant of trial counsel against his will, without the warnings and voluntary waiver required by *Faretta v. California*, violates the Sixth Amendment); Petition for a Writ of Certiorari at i, Newton v. Indiana, No. 17-1511 (U.S. filed May 3, 2018), 2018 WL 2113639 (presenting the questions whether *Miller v. Alabama* applies to discretionary sentences of life without parole imposed for juvenile offenders and whether an evidentiary hearing is required to assess whether juveniles sentenced before *Miller* are irreparably corrupt).

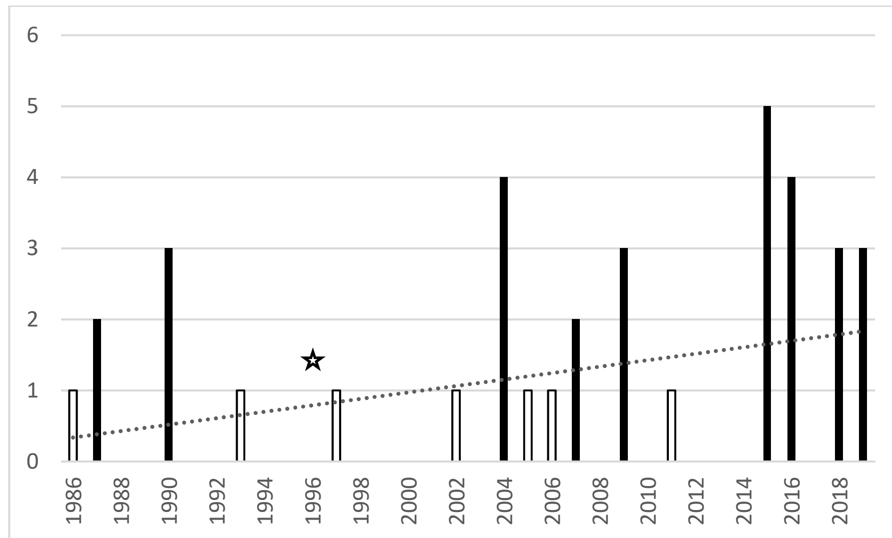
141. 140 S. Ct. 702, 706 (2020).

142. 140 S. Ct. 2452, 2459 (2020).

143. 140 S. Ct. 1875, 1878 (2020) (per curiam).

144. See Petition for a Writ of Certiorari at 3–7, Jones v. Mississippi, 140 S. Ct. 1293 (2020) (No. 18-1259), 2019 WL 1453516.

Figure 2. Direct-Collateral-Review Cases per Term



Given that the plenary and shadow dockets reveal a new openness towards direct collateral review, one might ask whether this vehicle preference is likely to persist as the composition of the Court changes. In broad terms, vehicle preference does not seem to track familiar ideological lines. Although one cannot know for certain which Justices join the summary opinions on the shadow docket,[145] the plenary docket suggests that, at least with respect to the specific Justices now comprising the Court, this issue has not become an ideological sticking point. Chief Justice Roberts, for his part, has authored and joined direct-collateral-review cases.[146] Likewise, Justice Kavanaugh joined *Garza v. Idaho*, a direct-collateral-review case decided during his first Term at the Court.[147] And Justice Gorsuch authored *McGirt v. Oklahoma*.[148] This suggests that direct collateral review is likely here to stay and is certainly ripe for examination. It is time to understand what direct collateral review is, why it has become a fixture of the Court's docket, how it can and should work, and what its potential opportunities and drawbacks are.

145. Unlike cases resolved on the plenary docket, when the Court issues a per curiam summary reversal, individual Justices who do not agree with the opinion do not have to register their dissent formally. They may choose not to vote to summarily reverse and never make that disagreement known to the public.

146. See, e.g., Foster v. Chatman, 136 S. Ct. 1737, 1742 (2016); Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016).

147. 139 S. Ct. 738, 742–43 (2019). Justice Kavanaugh began hearing cases on October 9, 2018. Adam Liptak & Noah Weiland, Justice Kavanaugh Takes the Bench on the Supreme Court, N.Y. Times (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/us/politics/justice-brett-kavanaugh-supreme-court.html (on file with the *Columbia Law Review*).

148. 140 S. Ct. 2452, 2459 (2020).

II. A SHIFT TO COLLATERAL DOCTRINE

The Supreme Court's recent dockets chronicle an unacknowledged abrogation of the stated presumption against direct collateral review in favor of federal habeas. This Part argues that this is no mere aberration, but rather a harbinger of the Court's future certiorari practice. Faced with the decisions of Congress in passing AEDPA and the Executive in administering federal criminal justice, the Court has seized on the only means available to it for the robust development of doctrine pertaining to collateral review: direct collateral review.[149]

The ecosystem of collateral review has increased the demand on the Supreme Court to engage in direct collateral review both to ensure continued doctrinal development and to vindicate the ends of individual justice. This section takes each of these in turn. Congress, in passing AEDPA's relitigation bar, ensured that the Supreme Court could no longer develop doctrine when a case originates on habeas under 28 U.S.C § 2254. And the Solicitor General's coordinated control over government appeals—coupled with statutory procedural hurdles under 28 U.S.C. § 2255[150]—means that even defendant-friendly positions taken by the federal government can perversely limit the ability of individuals in state incarceration to access their constitutional rights. This leaves the Supreme Court with one robust avenue in which to develop collateral-review doctrine: direct collateral review. On direct collateral review the Court can resolve collateral-review issues that either legally cannot come up on direct review or, as a practical matter, are not developed in the factual record until direct collateral review. What is more, the Court is not bound by AEDPA's relitigation bar. These factors not only explain the rise of direct collateral review; they also demand its continued use.

Section II.A argues that only through direct collateral review can the Court continue to develop constitutional protections. Direct collateral review is, in many cases, the only vehicle for development of constitutional criminal procedure doctrines.[151] This means that without it, constitutional criminal procedure will remain frozen in time, incapable of evolving to

149. A precise understanding of the Court's hydraulic behavior in an institutional sense—whether it is pushing back against actions taken by other branches or merely looking to resolve particular issues in ways that are available to it—lies beyond the scope of this Essay, but is something I intend to take on in future work in a broader substantive context.

150. 28 U.S.C. § 2255 (2018) is the mechanism for *federally* imprisoned individuals to challenge their *federal* convictions and sentences.

151. This Essay focuses on courts and, in particular, on the Supreme Court's ability to resolve particularly doctrinal questions. There is another part of this development that lies beyond the scope of this Essay: the role of the lawyer—and the capital defense bar specifically—in potentially driving some of this change. It is my intention to focus on the incentives and practices of courts, not to limit the significance of lawyers and parties, the in-depth analysis of which lies beyond the scope of this Essay.

meet the needs of criminal defendants in the era of mass incarceration.[152] Section II.B focuses on the stakes in individual cases: Direct collateral review is often the rare available mechanism to remedy grave injustice.

A. *Doctrinal Development*

Section 2254(d)(1)'s limitation of relief to cases involving "an unreasonable application of[] clearly established Federal law, *as determined by the Supreme Court of the United States*," serves two functions.[153] First, the relitigation bar results in extreme deference to state courts. This point has been written about extensively, but it is nonetheless extraordinary: When a state court has rendered a decision "on the merits" and that decision is collaterally challenged through Section 2254, federal courts are obliged to defer to that decision—even if it is wrong—so long as the state decision is not in direct contravention of on-point Supreme Court precedent.[154] This constraint has grave implications for doctrinal development. In practical terms, federal courts, including the Supreme Court, can no longer develop doctrine when a case originates in federal court on a habeas petition. Federal courts are limited to the universe of law that existed at the time of the state court's decision. Taking federal habeas off the table as a vehicle for doctrinal development is a significant shift from the pre-AEDPA state of affairs.

Section 2254(d)(1) has a second, more nuanced effect that has not been the subject of much writing. By limiting habeas relief to cases in which a state court adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by *the Supreme Court of the United States*,"[155] Section 2254(d)(1) creates an expanded role for the Supreme Court to develop collateral-review doctrines. AEDPA erases all precedent and doctrine settled in the lower federal courts,[156] forcing the Supreme

152. It bears mention at the outset that there are structures that often act as a barrier to seeking out direct collateral review. The case that made clear the Court's practice against granting these cases, *Lawrence v. Florida*, held that AEDPA's one-year statute of limitations is not tolled during the time an individual petitions for certiorari on direct collateral review. 549 U.S. 327, 329 (2007). Although, in theory, an individual could bring a habeas petition in federal court and request a stay while the Supreme Court considers that individual's certiorari petition, the mere fact that the statute of limitations is not tolled may have already done its work, disincentivizing the direct-collateral-review petition in the first place. This is a disincentive distinct from the path dependency of incomplete information regarding certiorari practices that this Essay aims to correct.

153. 28 U.S.C. § 2254(d)(1) (emphasis added).

154. See Harrington v. Richter, 562 U.S. 86, 100–01 (2011) (explaining that incorrect applications of law may not be statutorily unreasonable).

155. 28 U.S.C. § 2254(d)(1) (emphasis added).

156. In the Supreme Court's own words, "We have emphasized, time and again, that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" Lopez v. Smith,

Court to issue opinions recognizing the full panoply of federal rights likely to come up on collateral review.[157] In other words, AEDPA's language contemplates that the *Supreme Court* will speak clearly and decisively on the types of issues that come up in federal habeas challenges including, for example, retroactivity, ineffective assistance of counsel, *Brady*, and certain Eighth Amendment claims (collectively, what this Essay refers to as "collateral-review issues"). AEDPA thus increases "demand" for the Supreme Court to opine on collateral-review issues, perhaps warranting Supreme Court intervention before a real robust split of authority develops.[158] At this time, AEDPA's constraint means that a circuit court's interpretation of the federal constitution is not binding on states within that circuit. Only when the Supreme Court develops doctrine will that doctrine finally be applicable to the states.

The confluence of the increased need for the Supreme Court to decide collateral-review issues and the fact that AEDPA takes off the table habeas review as a vehicle for deciding those questions puts pressure on the Court to decide questions that arrive in vehicles other than federal habeas.[159] Direct review, however, is not always a viable option: Some issues can be raised only in a collateral posture, and others are far more likely to be, either for practical reasons or because the factual record is not sufficiently developed until collateral review. And many of these issues are unlikely to arrive at the Supreme Court from collateral review of final federal convictions under 28 U.S.C § 2255. This section outlines the types of questions on which AEDPA demands the Supreme Court to have the

---

574 U.S. 1, 2 (2014) (per curiam) (citing Marshall v. Rodgers, 569 U.S. 58, 62–65 (2013) (per curiam)); see also Shay & Lasch, supra note 120, at 228 (observing that "[i]t is no longer permissible . . . for 'a significant shift in doctrine [to occur] in the federal and state courts with no more than dicta from the Supreme Court to guide it'" (second alteration in original) (quoting Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1065 (1977))).

157. This task, which contemplates Supreme Court intervention to *confirm* the opinion of the unanimous lower courts for the sake of creating precedent, stands in contrast to the role the Supreme Court envisions for itself. See Sup. Ct. R. 10(a) (listing a split of authority as the first consideration in determining whether to grant certiorari); see also Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009, 70 Ohio L.J. 805, 821–22 (2009) ("We are needed when there is a split, when other courts—federal courts of appeals, state high courts—disagree on what the law of the United States is . . . . We sit in the main to resolve splits.").

158. The Supreme Court's own interpretation of "clearly established Federal law" as referring only "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions," has amplified the Court's task. Williams v. Taylor, 529 U.S. 362, 412 (2000).

159. Professor Kovarsky has recently recognized the "hydraulic pressure" that AEDPA (and decisions interpreting it) have put on the state postconviction process itself. Kovarsky, supra note 1, at 460. That pressure has direct implications for the subject of this Essay as well: If state postconviction proceedings are becoming an increasingly important part of securing federal constitutional rights for state prisoners, the Court is likely to have even more cases at the certiorari stage originating in this posture.

final word and explains why vehicles other than direct collateral review are inadequate. Because of the lack of available alternatives for doctrinal development, this section predicts that the Supreme Court will continue to grant direct-collateral-review cases to develop doctrine on collateral-review issues. If it does not, these doctrines will remain frozen in time, perhaps failing to address even novel technologies related to innocence.

1. *When Direct Review Is Inadequate.* — Many issues must come up in a collateral posture and others are far more likely to come up on collateral review than on direct review. For these issues, direct review is not a substitute for a robust form of federal habeas. These issues will arise only in collateral cases—that is, on state collateral review, federal habeas review of state convictions under AEDPA, and federal habeas review of federal convictions under 28 U.S.C. § 2255. And although the Supreme Court may continue to develop these doctrines on direct collateral review and on federal habeas of federal convictions under Section 2255, it cannot, as previously explored, develop doctrine on these issues under AEDPA.

a. *Rights More Likely to Arise on Collateral Review.* — Some issues are more likely to arise on direct collateral review than on direct review. These issues typically involve mixed questions of law and fact, where the facts come to light after a conviction is final. Ineffective assistance of counsel claims, for instance, are far more likely to be, or are even more appropriately brought, on collateral review.[160] Some states even require these claims to be brought collaterally.[161] When an individual has the same appellate and trial counsel, one can hardly expect counsel to argue his or her own ineffectiveness on appeal. But even when an individual has separate appellate and trial counsels, the record before the court of appeals is more often about the substantive merits of the criminal defendant's case than trial counsel's ineffectiveness.[162] An inquiry into the facts underlying an individual's ineffectiveness claim—including whether counsel had a strategic reason for making the challenged decision and whether there was

---

160. See Massaro v. United States, 538 U.S. 500, 504 (2003) ("In light of the way our system has developed, in most cases a motion brought under [habeas review] is preferable to direct appeal for deciding claims of ineffective assistance.").

161. See 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.7(e) (4th ed. 2019). Although some states do permit a defendant to raise an ineffective assistance of counsel claim on direct appeal, there may be structural issues, such as developing a record of ineffectiveness, that do not provide the Court with a sufficient vehicle for developing sufficient doctrine even in the available cases on direct review. For a discussion of the structural issues in mounting successful ineffective assistance of counsel claims and one proposed solution, see Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 Cornell L. Rev. 679, 680–82 (2007).

162. See *Massaro*, 538 U.S. at 505 (noting that "[t]he evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong" of the constitutional standard for ineffective assistance of counsel).

any resulting prejudice—must occur before a court can rule on the merits. And that will, more often than not, be on a collateral inquiry. Counsel-related claims have, according to one report, been part of more than half of all Section 2254 petitions: A staggering eighty-one percent of petitions in capital cases raised counsel-related claims, while 50.4% of noncapital petitions with available claims information raised such claims.[163] For the Supreme Court to "clearly establish" new law in this substantive area, it must grant cases that originate in a collateral posture. And because Section 2254 prohibits the application of nonpreexisting law, the only vehicles the Court has to recognize new law in this area are federal habeas cases brought under 28 U.S.C. § 2255 or direct-collateral-review cases.

This is borne out by the Court's recent direct-collateral-review cases, many of which address the development of ineffective assistance of counsel doctrine. In the 2018 Term, the Court decided *Garza v. Idaho*, which held that the "presumption of prejudice" applies when a criminal defendant has instructed counsel to file a notice of appeal even when the defendant's plea has partially waived that right.[164] In other recent cases, the Court has held that counsel's failure to inform a client of a potential plea agreement or immigration consequences renders performance deficient.[165] Highlighting the Court's commitment to its doctrinal-development role, the Court has reversed state court holdings of ineffective assistance in order to clarify federal law. In *Maryland v. Kulbicki*, for example, the Court addressed the State's mistaken application of federal ineffective assistance principles.[166] Although states can provide protections greater than the federal constitutional floor, when they apply federal law as federal law, the Court has an interest in ensuring its correct application and development. As the collateral dialogue moves to states in postconviction proceedings, we can expect that those states employing the floor will invite direct review.[167]

Likewise, *Brady* claims—which require discovery of illegally and purposefully withheld information that is material, relevant to the defendant's guilt or punishment, and favorable to the accused[168]—are far more likely

---

163. King et al., supra note 80, at 28. Only sixty-four percent of noncapital petitions had claims information available. Id. at 26.

164. 139 S. Ct. 738, 742 (2019).

165. Missouri v. Frye, 566 U.S. 134, 145 (2012) (plea agreements); Padilla v. Kentucky, 559 U.S. 356, 359–60 (2010) (immigration consequences).

166. 577 U.S. 1, 4–6 (2015) (per curiam) (holding that the Maryland Court of Appeals should have assessed the reasonableness of counsel's conduct as of the time of the conduct rather than speculating whether a different trial strategy would have been more successful).

167. See, e.g., Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017) (holding that prejudice is not presumed on collateral review when the underlying error is the attorney's failure to raise a structural error).

168. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where

to be made on collateral review. Even if counsel suspects that *Brady* information has been withheld, counsel must first locate that material—typically "during the page-by-page review of police reports, [by] reading a district attorney's files disclosed through postconviction discovery, or through an open records request."[169] And that generally occurs after a guilty verdict has been rendered and a sentence imposed.[170]

Brady claims also make up a significant part of the postconviction docket. According to one report, 43.1% of Section 2254 petitions in capital cases raised lost-, undisclosed-, or false-evidence claims, while thirteen percent of petitions in noncapital cases with available claims information raised such claims.[171] What is more, *Brady* claims make up a significant portion of meritorious cases: One report has found that forty-two percent of exonerations in the United States are based on the discovery of official misconduct, with one of the most common kinds of misconduct being withheld *Brady* material.[172] As with ineffective assistance claims, the Supreme Court is far more likely to recognize and further define the contours of *Brady* rights on collateral, rather than on direct, review and has done so in recent Terms.[173]

b. *Rights that Do Not Accrue Until After a Conviction Has Become Final.* — Doctrine concerning substantive rights that do not accrue until after a conviction has become final can be developed only in a collateral-review posture. All issues of retroactivity under *Teague v. Lane* must, by their nature, arise on collateral review.[174] *Teague* sets the standard for newly

---

the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

169. Murphy, supra note 10, at 716.

170. See id. at 698 ("[B]ecause of state court rules governing the criminal appellate process, uncovering exculpatory or impeachment evidence usually does not occur until the prisoner has started state postconviction proceedings. Moreover . . . many *Brady* violations are not uncovered until the state prisoner pursues federal habeas relief in federal court." (footnote omitted)); see also, e.g., Ira Mickenberg, New Felony Defender Program: A Practical Guide to *Brady* Motions 10 (2008), http://www.ncids.org/Defender%20Training/2008%20New%20Felony%20Defender%20Training/BradyHandout.pdf [https://perma.cc/Q7JU-MTQ5] (explaining that a state postconviction or federal habeas petition is usually the appropriate way to raise a *Brady* issue when the material arises after conviction and sentencing).

171. King et al., supra note 80, at 30.

172. Samuel R. Gross & Michael Shafer, Exonerations in the United States, 1989–2012: Report by the National Registry of Exonerations 66–67 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/5Y56-47SP].

173. See, e.g., Turner v. United States, 137 S. Ct. 1885, 1888 (2017) (holding that the withheld material was not relevant for petitioners' *Brady* claims); Wearry v. Cain, 136 S. Ct. 1002, 1002 (2016) (per curiam) (holding that withheld material violated *Brady*); Smith v. Cain, 565 U.S. 73, 75–76 (2012) (holding that failure to disclose material impeachment evidence violated *Brady*).

174. 489 U.S. 288 (1989).

articulated rights that are retroactively applicable to incarcerated individuals on collateral review.[175] *Teague* sets the presumption that newly articulated rights do not apply to convictions that are already final unless the articulated right is (1) substantive, in that it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[176] or (2) a "watershed rul[e] of criminal procedure," in that the procedure is "implicit in the concept of ordered liberty."[177] The Supreme Court generally does not both articulate a new rule and hold that it applies retroactively to cases on collateral review in the same case.[178] So the question whether a newly articulated rule is retroactive must arise and be resolved in a collateral case.[179] From *Truesdale*

---

175. For instance, under *Teague*, individuals incarcerated for sodomy in the Bowers v. Hardwick, 478 U.S. 186 (1986), era would be permitted to challenge their continued confinement after the Supreme Court articulated a new right in *Lawrence v. Texas*, which struck down a criminal prohibition on sodomy as unconstitutional, 539 U.S. 558, 578 (2003). The right not to be penalized for these acts was not articulated until *after Lawrence*, and so *Teague* directs that continued confinement after this decision *becomes* unlawful.

176. *Teague*, 489 U.S. at 307 (internal quotation marks omitted) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

177. Id. at 311. To date, the Supreme Court has never held that a case guaranteeing procedural rights is retroactive on collateral review, although it is widely thought that Gideon v. Wainwright, 372 U.S. 335 (1963), would be such a case. See *Teague*, 489 U.S. at 311–12 (quoting *Mackey*, 401 U.S. at 693–94).

178. The Supreme Court may articulate a new rule in a collateral case, thus determining at once whether the right exists and whether it applies retroactively to final convictions. While this is plausible in theory, it does not prove true in practice. Setting aside that AEDPA removes the Supreme Court's authority to articulate new rules in collateral cases brought under Section 2254, the Supreme Court is clear that it is not bound by unreasoned conclusions that may arise from its cases. For example, in *Miller v. Alabama*, the Supreme Court articulated a new rule: Automatic sentences of life without parole for juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. 567 U.S. 460, 465 (2012). When the Court decided this question, it simultaneously granted relief to another defendant, Kuntrell Jackson, in a companion case to *Miller* that arose on collateral review. See id. at 465–67, 478–79. Nonetheless, the Court did not decide *Miller*'s retroactive effect until 2016 in Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

179. There is good reason to believe that retroactivity—a previously narrow subset of cases—will become a larger part of the Supreme Court's docket. For a long time, jurists and commentators had assumed that retroactivity was a matter of federal statutory law. See, e.g., Danforth v. Minnesota, 552 U.S. 264, 266 (2008) ("New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe . . . must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings."); Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction at 23–24, *Montgomery*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 3799566 (arguing that "[t]he federal habeas statute supplied the exclusive source of the *Teague* exceptions to finality" and "*Danforth*'s rationale explains that *Teague*'s exceptions to finality are based on the federal habeas statute"). But in *Montgomery*, the Court recognized *Teague* as a constitutional floor that all states must apply in state collateral review. See 136 S. Ct. at 729 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state-collateral-review courts to give retroactive effect to that rule."); Vázquez & Vladeck, supra note 93, at 910 (maintaining that *Montgomery* "cemented

v. Aiken[180] and *Yates v. Aiken*[181] to *Montgomery v. Louisiana*,[182] the Supreme Court has used direct collateral review—both before and after AEDPA—to recognize the retroactive applicability of "new law."

Similarly, doctrine concerning continuing execution competency under the Eighth Amendment can be developed only on collateral review.[183] An individual who was lawfully sentenced to death may, while on death row, suffer new conditions that later make the punishment of death unlawful, such as a medical condition that impairs his or her ability to comprehend his or her conviction and sentence.[184] By its nature, the punishment becomes unlawful *after* the conviction is final.

c. *Rights Pertaining to the Administration of Collateral Review.* — Issues relating to the administration of collateral review must also, by their nature, be decided in a collateral posture. The Court can set the constitutional bounds of collateral review only on collateral review: What are the constitutional guarantees that attend collateral process? This includes, for instance, whether claims of structural error—which trigger automatic reversal on direct review—require a showing of prejudice on collateral review. *Weaver v. Massachusetts*, a direct-collateral-review case, decided a question relevant to the administration of collateral review: whether a petitioner must make a showing of prejudice when alleging an ineffective assistance of counsel claim arising from counsel's failure to object to the violation of the guarantee of public trial.[185] Likewise, questions addressing whether particular statutes, treaties, or cases set minimum standards for collateral review applicable to state processes must arise on collateral review. For example, in *Montgomery v. Louisiana*, the Court held that *Teague* sets minimum standards for states to apply on collateral review.[186] Similarly, in *Medellin v. Texas*, the Court held that a presidential memorandum agreeing to be bound by international law does not require states to eliminate bans on filing successive state collateral

---

the existence of a reviewable federal question whenever a state court fails to apply what, in the Supreme Court's view, is a new rule of substantive constitutional law applicable to the case at hand"). With more jurisdictions opining on this constitutional question, the likelihood of disagreement, and consequently the need for the Supreme Court's resolution, increases.

180. 480 U.S. 527, 527 (1987) (per curiam) (reversing a state collateral case that failed to hold retroactive Skipper v. South Carolina, 476 U.S. 1 (1986)).

181. 484 U.S. 211, 215–16 (1988) (holding that Francis v. Franklin, 471 U. S. 307 (1985), was not a "new" rule and therefore applied retroactively to petitioner's case).

182. 136 S. Ct. at 734 (holding that *Miller v. Alabama*'s ban on mandatory sentences of life without parole for juvenile offenders applies retroactively).

183. See Kovarsky, supra note 1, at 453–54.

184. See id. at 454; see also Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.").

185. 137 S. Ct. 1899, 1906–07 (2017).

186. 136 S. Ct. at 729.

petitions.[187] *Montgomery* placed limits on the states' abilities to form their own processes, and *Medellin* showed the discretion that states have even in the face of executive action. And in *McKinney v. Arizona*, the Court considered whether a state collateral court must apply current law during a collateral resentencing challenge, or whether it should apply the law at the time the conviction became final.[188] Holding that states play a central role in determining whether a challenge is direct or collateral, *McKinney* further empowered states as the primary architects of state collateral review.[189]

Claims concerning collateral-review issues either must be, or are far more likely to be, presented in a collateral proceeding. In light of Section 2254's relitigation bar, the Supreme Court can no longer develop doctrine in cases originating under that statute.[190] The Justices are aware, no doubt, of the limitations that AEDPA places on them and, at times, put calls out for vehicles that will bring them issues that they can actually resolve. For instance, in *Dunn v. Madison*, the Court reversed a federal grant of habeas relief under AEDPA.[191] Justice Ginsburg, concurring, observed that the issue presented "would warrant full airing" outside of the federal habeas context because of the "restraints imposed by [AEDPA]."[192]

With federal habeas off the table for doctrinal development, the Court is left only with cases originating in state collateral review and federal collateral cases originating under Section 2255.[193] The next section explores when Section 2255 is not an adequate vehicle in which to develop certain of these doctrines, leaving only direct collateral review available to the Court as a vehicle for robust doctrinal development.

---

187. 552 U.S. 491, 498–99 (2008).

188. See 140 S. Ct. 702, 708–09 (2020).

189. See id.

190. See supra section I.A.

191. 138 S. Ct. 9, 12 (2017) (per curiam).

192. Id. (Ginsburg, J., concurring).

193. Professor Kovarsky astutely predicts that state postconviction review itself will become increasingly important because certain questions are incapable of resolution in the direct-review chain. Kovarsky, supra note 1, at 453. Although states are sure to play a critical role in the future development of collateral-review issues, development on these fronts can at most be a joint project between state and federal actors. After all, the impetus for modern habeas was systemic subversion of constitutional rights by certain states. And while near-plenary review of state convictions by federal habeas courts provoked AEDPA's reimagined state–federal dynamic in the postconviction process, see supra notes 56–67 and accompanying text, there is still a need for federal development of constitutional law or, at the very least, a final federal arbiter of constitutional disputes or uncertainty, see Cover & Aleinikoff, supra note 156, at 1048–49 (observing that *Brown v. Allen* and other Warren Court habeas cases initiated a dialogue between state and federal courts over the scope of federal constitutional rights). Because of AEDPA's relitigation bar, that arbiter can be only the Supreme Court, and the method it has available for doctrinal development is direct collateral review.

2. *When Federal Habeas Under Section 2255 Is Inadequate to the Task of Developing Collateral-Review Doctrines.* — Habeas review of federal criminal convictions under 28 U.S.C. § 2255 is an imperfect substitute for truly robust federal habeas of state convictions to develop criminal procedure doctrine at the Supreme Court. Section 2255 is the statutory mechanism for *federal* prisoners to collaterally challenge their confinement.[194] Although one might expect the Supreme Court to reach for these cases to develop collateral doctrine because they do not raise the same federalism and comity concerns as cases in which courts vacate state convictions, as a practical matter, procedural and structural limitations severely circumscribe Section 2255's utility as a tool for doctrinal development. Section II.A.2.a explores procedural limitations. Section II.A.2.b recognizes unique dynamics of federal litigation—of particular importance, the coordinating effect of a unified Department of Justice—that further weaken Section 2255 as a vehicle for robust doctrinal development. These procedural and structural limitations help explain why the Court has had to reach for direct collateral review to expand the habeas doctrines section I.A explores.

a. *Procedural Limitations.* — In contrast to Section 2254, Section 2255 does not impose a relitigation bar. But it imposes many statutory procedural requirements—in particular, the requirement to obtain a certificate of appealability in order to press a claim on appeal[195]—that limit the scope of review and impede robust development of new law. If a habeas petitioner under Section 2255 loses a claim in district court, the petitioner must obtain permission—called a "certificate of appealability"—from the court of appeals to appeal the lost issue.[196] The formal standard that applies is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner."[197] In practice, the certificates are granted somewhat rarely.[198] If

194. See 28 U.S.C. § 2255(a) (2018) (permitting a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence").

195. Id. § 2253(c)(1).

196. Id.

197. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

198. The decisions concerning whether to grant or deny a certificate of appealability are not always reasoned, and it is hard to understand how the formal *Slack* standard applies on the ground. See Julia Udell, Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study 7 (Dec. 24, 2019) (B.A. study, Columbia College), https://ssrn.com/abstract=3506320 (on file with the *Columbia Law Review*) (finding that the Eleventh Circuit grants review in approximately eight percent of cases, which is lower than the fourteen percent grant rate for the First Circuit); Luis Angel Valle, Certificates of Appealability as Rubber Stamps 27 (Apr. 14, 2020) (unpublished note), https://ssrn.com/abstract=3576026 (on file with the *Columbia Law Review*) (finding that courts of appeals are deferential when conducting a certificate-of-appealability analysis).

a certificate of appealability is denied, a persistent habeas applicant who petitions the Supreme Court puts forth a certiorari petition that presents the question whether the court of appeals's denial of a certificate of appealability was in error, not whether the petitioner is correct on the underlying substantive issue.[199] As a practical matter, the Supreme Court often receives petitions for certiorari that do not present a substantive issue, but instead present the first-order question whether the court of appeals's denial of the certificate of appealability on that substantive issue is proper.[200] Although this does not preclude the Supreme Court's review, it is, as Chief Justice Roberts described, "a somewhat unusual procedural posture,"[201] on which the Court nearly always denies review. This procedural limitation on Section 2255 means that incarcerated individuals who lose usually cannot present the Supreme Court with a "clean" vehicle. Thus, as a practical matter, the Supreme Court is severely limited from robustly developing collateral doctrine that originates on a Section 2255 petition.

b. *Structural Limitations.* — Structural issues further limit Section 2255's utility as a tool for doctrinal development. Certain issues will either never come up or will never get to the Supreme Court because of mechanisms in each of the three federal branches that serve to unify and coordinate federal criminal enforcement. Together, these forces often work to prevent a federal vehicle from making its way to the Court. This means that the Court must, in practical terms, engage in direct collateral review to develop law in particular substantive areas. As a threshold matter, Section 2255 deals only with federal law. So certain state-law issues, including, for example, an idiosyncratic state-waiver law, will never arise on Section 2255 review. But even where the issues of federal and state law overlap, structural limits in the execution of federal law may prevent the issue from arising on Section 2255 review.

i. *First.* — One set of constraints relates to the executive branch and its control over federal enforcement policy and federal criminal cases. Because the United States is always a party in these cases, the Justice Department has an outsized role in their disposition.[202] Through enforcement memoranda and internal memoranda interpreting the scope of significant judicial opinions, the Justice Department can insulate from review whole issues or types of cases, whether intended or not, by taking a defendant-favoring position.[203] Although the Department's positions are

---

199. See Welch v. United States, 136 S. Ct. 1257, 1263–64 (2016).

200. See id.

201. Id. at 1263.

202. See Neal Devins & Michael Herz, The Uneasy Case for Department of Justice Control of Federal Litigation, 5 U. Pa. J. Const. L. 558, 561–62 (2003) (explaining the Justice Department's more centralized role in criminal prosecutions).

203. How this operates in other criminal and civil contexts, including within the administrative state, is something I intend to undertake in future work.

not always made public, scholars and practitioners can glean lessons from the instances that have been made public.

One recent and germane example involves the retroactive scope of *Miller v. Alabama*, which held that mandatory sentences of life without parole for juvenile offenders are unconstitutional.[204] In *Montgomery v. Louisiana*, the United States as amicus curiae made public and comprehensive its position that *Miller* indeed applied retroactively to cases on collateral review.[205] In an appendix to its brief, the United States listed the instances in which federal juvenile offenders who had previously been sentenced to life without parole under a mandatory sentencing regime had already been resentenced.[206] Because of the United States' centralized decision not to contest *Miller*'s retroactive application, neither party was likely to appeal the propriety of a resentencing, and therefore a federal collateral vehicle for this question was unlikely to arrive at the Supreme Court.[207] In a judicial system driven by cases and controversies, the only disputes that would arrive at the Supreme Court would originate in a state collateral posture, explaining the Court's decision to grant *Montgomery v. Louisiana* on direct collateral review.

Another powerful example involves the federal death penalty docket, which can vary greatly from one administration to the next. The Justice Department employs coordinating mechanisms in an effort toward consistent prosecution of capital punishment.[208] Prosecutions for crimes that are eligible for the death penalty are presented to the Justice Department before capital charges are filed.[209] This coordinating moment gives each administration the opportunity to set a consistent policy and a

---

204. 567 U.S. 460, 465 (2012).

205. Brief for the United States as Amicus Curiae Supporting Petitioner at 10–15, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 4607689.

206. Id. at app. A.

207. When the interests of prosecutors align with those of defendants or incarcerated individuals, courts may choose to inquire independently into the other side of the dispute. Although rare, it presents the theoretical opportunity for these disputes to still proceed and percolate through the federal courts.

208. During the Clinton Administration, local U.S. Attorneys' offices needed authorization from the Justice Department before affirmatively seeking capital punishment. During the George W. Bush Administration, by contrast, Attorney General John Ashcroft implemented new procedures, requiring prosecutors to seek Justice Department authorization to pursue *or not to pursue* capital punishment when the charged conduct was death-penalty eligible. See DOJ, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review pt. 4, § B (2001), https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm [https://perma.cc/5BYX-PAVJ] [hereinafter DOJ, Federal Death Penalty System]. And Attorney General Ashcroft was known to direct U.S. Attorneys' offices that had recommended lesser sentences to pursue the death penalty. See, e.g., Opinion, John Ashcroft's Death-Penalty Edicts, N.Y. Times (Feb. 7, 2003), https://www.nytimes.com/2003/02/07/opinion/john-ashcroft-s-death-penalty-edicts.html (on file with the *Columbia Law Review*).

209. DOJ, Federal Death Penalty System, supra note 208, pt. 1, § A.

unified position. This moment thus limits the percolation of capital punishment issues—a substantial portion of the collateral-review agenda—in the federal system.[210]

Although federal criminal enforcement often originates under the control of local U.S. Attorneys in diffuse offices, the DOJ exercises centralized control over appeals. Local U.S. Attorneys' offices must obtain permission from the Solicitor General to pursue any appeal (though not to defend an appeal).[211] And the Solicitor General is the central federal actor at the certiorari stage and before the Supreme Court.[212] Centralization at the appellate stage can decisively affect whether issues get to the Supreme Court's doorstep and, consequently, whether the Supreme Court will have the opportunity to develop doctrine from that vehicle. And, of course, the Solicitor General has nearly exclusive control over whether to petition the Supreme Court for certiorari when the United States loses in a court of appeals.

Garza v. Idaho, a direct-collateral-review case from the 2018 Term, demonstrates just how powerful this moment in the Solicitor General's office is.[213] There, the Court noted that eight of the ten federal courts of appeals to decide the question presented—whether a presumption of prejudice applies when counsel fails to file an appeal that defendant requested where defendant has signed an appeal waiver—had decided that the presumption of prejudice does indeed apply.[214] So why didn't the Supreme Court grant one of those ten *federal* cases originating on Section 2255? The Solicitor General's role as the (near) exclusive certiorari petitioner for the federal government may provide some answers. In the eight cases where the United States had lost in a federal court of appeals, the Solicitor General's office did not petition for certiorari. In both cases where the United States had won, *United States v. Mabry*[215] and *Nunez v. United States*,[216] the imprisoned individual chose to petition. In its response brief in *Nunez*, the United States urged the Court to issue a "GVR"—an

---

210. See Deborah Fins, NAACP Legal Def. & Educ. Fund, Inc., Death Row U.S.A.: Winter 2020, at 36–37 (2020), https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2020.pdf [https://perma.cc/R8LE-PGEH] (finding that only sixty-two out of 2,624 individuals on death row face capital sentences arising from a federal prosecution).

211. 28 C.F.R. § 0.20(b) (2019) (charging the Solicitor General with "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts").

212. See 28 U.S.C. § 518(a) (2018) ("Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested."). The Attorney General has, in turn, delegated authority to the Solicitor General. See 28 C.F.R. § 0.20.

213. 139 S. Ct. 738, 743 (2019).

214. Id. at 743 & n.3.

215. 536 F.3d 231, 233 (3d Cir. 2008).

216. 546 F.3d 450, 451 (7th Cir. 2008).

order to grant the petition, vacate the decision, and remand the case—so that the court of appeals could consider a different argument pressed by the government instead of the one on which the Court had rested its opinion.[217] This middle ground approach meant that the parties were not truly adverse. And in *Mabry*, the United States did file an adverse brief, but recognized that the petitioner had also effectuated a waiver to bring a habeas case (in addition to an appeal waiver), which independently barred his case.[218] Thus, of the ten federal cases, the United States chose to be truly adverse in only one, where the case was independently a poor vehicle for review. Why didn't the Solicitor General choose to petition in the cases it had lost? Perhaps the Solicitor General's Office was sympathetic to the incarcerated individual's arguments. Or perhaps it rightly believed it could not win at the Supreme Court, and wanted to mitigate further losses in jurisdictions that had not yet decided the issue or where it had already won. Whatever the motive, the Solicitor General, as a repeat, monopolistic player, could decide unilaterally that it would not provide the Court with a vehicle in which to decide the issue.

ii. *Second.* — Federal and state criminal systems—and the resources devoted to each—differ in significant respects that may bear on whether interactions with a criminal defendant are constitutional in the first instance.[219] In absolute terms, the federal criminal system generates far fewer cases than the state systems taken together, and this applies to the capital docket as well.[220] This provides a smaller pool of federal cases in which issues can percolate. Moreover, state defenders' caseloads are often significantly higher than their federal counterparts,[221] which may mean that in the federal system, there is less ineffective assistance of counsel.[222] Federal prosecutors' offices generally have higher salaries and different

217. Brief for the United States at 9–10, Nunez v. United States, 554 U.S. 911 (2008) (No. 07-818), 2008 WL 2050805.

218. Brief for the United States in Opposition at 7–8, Mabry v. United States, 557 U.S. 903 (2009) (No. 08-763), 2009 WL 1317891.

219. See Primus, Structural Vision, supra note 77, at 16–23 (describing structural issues in state criminal justice systems including underfunded public defender offices, high numbers of cases, prosecutorial misconduct, and poor record keeping).

220. See Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/J68L-P9CU] (finding that, including immigration offenses, only about 268,000 out of 2.3 million imprisoned individuals, or roughly twelve percent, are housed in federal facilities). For statistics cataloguing the low number of federal capital inmates relative to the states, see Fins, supra note 210, at 36–37.

221. Inga L. Parsons, "Making It a Federal Case": A Model for Indigent Representation, 1997 Ann. Surv. Am. L. 837, 857–66 (comparing the caseloads and institutional resources available to state versus federal public defenders).

222. Primus, Structural Vision, supra note 77, at 18–20 (documenting the close relationship between heavy public defender caseloads and quality of representation).

norms, which may, on the whole, decrease the incidence of *Brady* violations.[223] The U.S. Attorneys' Office also employs prophylactic measures that counsel turning over materials beyond what is strictly required by *Brady*.[224] For individuals, it is better that their counsel is likely to be effective and that prosecutors will not improperly withhold evidence. But it also means that these issues percolate less in the federal system than in the state system.

iii. *Third*. — Congress too plays a role in constraining Section 2255's utility. Congress sets one body of federal criminal law. In some circumstances a single source of law can limit percolation of collateral-review issues in federal courts. For instance, Congress banned the execution of juvenile offenders[225] before the Supreme Court decided the punishment's unconstitutionality in *Roper v. Simmons*.[226] Indeed, the fact that Congress acted to proscribe execution of juvenile offenders was incorporated into the Supreme Court's assessment of whether the "standards of decency" had yet evolved.[227] Congress's forward-thinking legislation thus played an unintended, but paramount, role in the vehicle that would ultimately arrive at the Supreme Court to decide the execution-of-juveniles issue: *Roper*, which was a direct-collateral-review case.[228]

iv. *Fourth*. — Federal courts should not express hostility towards the application of federal law, as compared with their state counterparts. The modern habeas system was developed in response to some state-court subversion of newly articulated rights by the Warren Court.[229] Because these are federal rights, one should expect federal courts to be less hostile in effectuating them than state courts. Although the difference between the two systems should not be stark in light of the special solicitude the

---

223. Compare Administratively Determined Pay Plan Charts, Offs. of the U.S. Att'ys, https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts [https://perma.cc/WH7J-7H6P] (last updated Oct. 29, 2020) (noting that the minimum starting salary for a U.S. Attorney is just over $55,000 per year), with Andrew Pantazi, Paying for Justice: Public Defenders and Prosecutors Flee for Better Salaries, Fla. Times-Union (Feb. 23, 2018), https://www.jacksonville.com/news/20180223/paying-for-justice-public-defenders-and-prosecutors-flee-for-better-salaries [https://perma.cc/5U46-UXML] (last updated Feb. 25, 2018) (noting that the starting salary for state prosecutors in Jacksonville, Florida, is just $44,000 per year).

224. DOJ, Just. Manual § 9-5.001 (2020) (requiring pretrial disclosure "beyond that which is 'material' to guilt" under the constitutional floor); DOJ, SDNY Discovery and Disclosure Policy 12 (2010), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/nys_discovery_policy.pdf [https://perma.cc/3BP2-LY8L] ("This Office complies with the broad disclosure of exculpatory evidence set forth in USAM 9-5.001 . . . .").

225. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, § 60002(a), 108 Stat. 1796, 1959 (codified at 18 U.S.C. § 3591 (2018)).

226. 543 U.S. 551, 578–79 (2005).

227. See id. at 563–67.

228. See id. at 559–60.

229. See supra section I.A.

Constitution places on state adjudicatory neutrality towards enforcement of federal law,[230] the margins were the impetus for robust collateral review in the first instance.[231] The development of constitutional rights in collateral proceedings should be an exercise in the limits of previously articulated rights, not in their wholesale rejection. And state courts, prosecutors, and legislatures may be more interested in testing those limits than their federal counterparts.

The confluence of these procedural limitations and structural aspects of Section 2255 demonstrate why the Supreme Court has chosen direct collateral review in order to further develop law on collateral-review issues such as *Brady*, ineffective assistance of counsel, and Eighth Amendment issues. It is a posture over which the Court still retains a great deal of discretion and one in which it is not yet encumbered by federal legislation or executive policy.

B. *Correction or Aversion of Severe Miscarriages of Justice*

AEDPA's relitigation bar has self-evident implications for individual habeas applicants, rendering the likelihood of relief in any individual case extremely low.[232] Of course, even petitioners who have identified a bona fide error in their state proceeding may not be entitled to a habeas remedy. Where the Supreme Court identifies a potentially severe miscarriage of justice,[233] AEDPA creates an incentive for the Court to grant certiorari and cure that injustice, even if in a messy vehicle such as direct collateral review. Indeed, the cases that the Supreme Court has taken on direct collateral review often show the urgency of the Court's intervention. Of the twenty-nine state collateral cases resolved since AEDPA's passage, seventeen of those cases have involved a capital conviction, a set with

---

230. See Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system . . . we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

231. See Kovarsky, supra note 1, at 451–52 (providing an account of state hostility to federal rules of decision in the Eighth Amendment context); Primus, Structural Vision, supra note 77, at 17 ("The mainstream view today is that federal judges are more expert than their state counterparts, more solicitous of constitutional rights, more insulated from political pressure, and more able to apply uniform interpretations of federal law.").

232. According to one study, 0.29% of noncapital habeas petitions were granted relief, while 12.4% of capital petitions were successful. See King et al., supra note 80, at 51–52. This paltry likelihood of success is not because the convictions are error free. See Primus, Equitable Gateways, supra note 1, at 292–93.

233. Some are skeptical of the power of the category of the severe miscarriage of justice. See, e.g., Huq, supra note 87, at 525, 533 ("[I]t cannot be assumed that the fundamental-miscarriage-of-justice rule will play a significant role in practice beyond a marginal set of outlier cases.").

irreversible consequences.[234] And Supreme Court Justices who identify a miscarriage of justice have powerful incentive to push for a grant or summary reversal at the stage of plenary review, before the federal habeas posture presents an insurmountable standard of review vehicle issue.[235]

One category of collateral-review cases that merits particular attention is the category of cases that the Court decides in summary fashion. Nine of the Court's collateral-review cases since AEDPA's passage have been decided without full merits briefing and argument.[236] The summary decision process is generally used for narrow reversals based on clear, on-point precedent. But that is exactly the type of error that should, in theory, succeed on a habeas petition.[237] In other words, the law that applies in those cases is already "clearly established." Indeed, the Court's language in these summary opinions emphasizes just how straightforward the error below was.[238]

Nonetheless, in each of these cases, the Court found a need to address the underlying decision and conviction. Six of the summary cases involved a capital defendant,[239] and one included an offender who was sentenced to life imprisonment.[240] The decision to address these cases shows that at least a majority of the Court sees itself as addressing a potentially severe and irreversible miscarriage of justice—one that is not likely to be corrected in a later proceeding. Consider the origin of the stated

234. Andrus v. Texas, 140 S. Ct. 1875, 1877 (2020) (per curiam); Madison v. Alabama, 139 S. Ct. 718, 722 (2019); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017); Rippo v. Baker, 137 S. Ct. 905, 906 (2017) (per curiam); Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016); Foster v. Chatman, 136 S. Ct. 1737, 1742 (2016); Wearry v. Cain, 136 S. Ct. 1002, 1002 (2016) (per curiam); Hall v. Florida, 572 U.S. 701, 704 (2014); Hinton v. Alabama, 571 U.S. 263, 264 (2014) (per curiam); Garcia v. Texas, 564 U.S. 940, 940 (2011); Sears v. Upton, 561 U.S. 945, 947 (2010) (per curiam); Medellin v. Texas, 552 U.S. 491, 501 (2008); *Smith II*, 550 U.S. 297, 299 (2007); Deck v. Missouri, 544 U.S. 622, 624 (2005); Roper v. Simmons, 543 U.S. 551, 556 (2005); Florida v. Nixon, 543 U.S. 175, 178 (2004); *Smith I*, 543 U.S. 37, 37 (2004) (per curiam).

235. Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring) (recognizing the "restraints imposed" by AEDPA as a reason to deny certiorari).

236. *Andrus*, 140 S. Ct. at 1877; *Rippo*, 137 S. Ct. at 906; *Wearry*, 136 S. Ct. at 1002; Maryland v. Kulbicki, 577 U.S. 1, 2 (2015) (per curiam); *Hinton*, 571 U.S. at 263–64; *Sears*, 561 U.S. at 944–46; *Smith I*, 543 U.S. at 37; Bunkley v. Florida, 538 U.S. 835, 836 (2003) (per curiam); New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 151 (1998) (per curiam).

237. In his dissent in *Wearry v. Cain*, Justice Alito takes issue with the majority's decision to summarily reverse on, what the majority claims, is an open-and-shut issue, arguing that the appropriate vehicle for such claims is habeas. 136 S. Ct. at 1012 (Alito, J., dissenting) ("[I]f the *Brady* claim is as open-and-shut as the Court maintains, AEDPA would not present an obstacle to the granting of habeas relief.").

238. See, e.g., *Hinton*, 571 U.S. at 272 ("This case calls for a straightforward application of our ineffective-assistance-of-counsel precedents . . . .").

239. For a complete list of capital cases decided on direct collateral review in this period, including those resolved in summary fashion, see supra note 234.

240. *Bunkley*, 538 U.S. at 837.

presumption against granting collateral-review cases in *Kyles*—Justice Stevens's concurrence in the *denial of a stay of execution*—as the prime counterpoint.[241] The stakes for Kyles could not have been higher, yet Justice Stevens made clear that Kyles had another, better, avenue for relief: federal habeas.[242] AEDPA injected a new countervailing and superseding uncertainty to direct-collateral-review cases: the high likelihood that errors, even in capital cases, could not be corrected on federal habeas.[243]

The Court's merits cases arising from collateral review also demonstrate the Court's intervention to remedy grave miscarriages of justice. In *Foster v. Chatman*, a capital case, the Court addressed a highly factbound *Batson* challenge (that is, a challenge made to a party's use of peremptory strikes during jury selection on the basis of a classification such as race or sex).[244] *Foster*'s facts speak for themselves: (1) copies of the jury venire list in which the names of Black prospective jurors were highlighted in bright green; (2) an evaluation of the jurors that stated, "If it comes down to having to pick one of the black jurors, [this one] might be okay . . . ."; and (3) handwritten notes in which three prospective jurors were labeled "B # 1," "B # 2," and "B # 3."[245] Although the Court generally grants certiorari to resolve splits of authority,[246] this highly factbound case addresses an unusual breakdown of society's norms and protections. Similarly, in *Williams v. Pennsylvania*, another capital case, the Court decided the question whether a judge should have recused himself when he previously served as the District Attorney who authorized the prosecutor to seek the death penalty in the case.[247] Although *Foster* and *Williams* each forged new ground, they did so in highly factbound, idiosyncratic cases—in other words, in the types of cases that the Court generally does not grant. What accounts for these grants, particularly when the Court has not only a practice against granting factbound cases but a

---

241. Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

242. Id.

243. Justice Sotomayor's recent dissent from the denial of certiorari in a capital case is a powerful example of just how challenging it is to remedy a possible injustice once it is in habeas review. See Lance v. Sellers, 139 S. Ct. 511, 517 (2019) (Sotomayor, J., dissenting from the denial of certiorari) ("Absent this Court's intervention, Lance may well be executed without any adequately informed jury having decided his fate. Because the Court's refusal to intervene permits an egregious breakdown of basic procedural safeguards to go unremedied, I respectfully dissent.").

244. See 136 S. Ct. 1737, 1742–45 (2016). Although this Essay refers to this as a "factbound" case, it is somewhat circular to do so. Most *Batson* cases that the Supreme Court adjudicates will be factbound because the most egregious cases (1) ought not to occur or (2) will be remedied below. So even if the Court wants to send a message, it will have to grant certiorari in a factbound case.

245. Id. at 1744.

246. See supra note 157 (discussing the Court's primary considerations in granting certiorari).

247. 136 S. Ct. 1899, 1903 (2016).

stated presumption against granting cases that arrive at the Court on state collateral review? It must be that at least some Justices recognize a potentially grave miscarriage of justice that they may be able to persuade the full Court to remedy with the parallel knowledge that the injustice is likely to remain even on federal habeas review.

III. DIRECT-COLLATERAL-REVIEW PUZZLES

There is broadscale agreement that procedure—and procedural posture—affects substance.[248] Procedural posture frames legal questions in ways that dramatically impact how rights are ultimately articulated.[249] In the habeas space it is often dispositive that AEDPA's inquiry into *clearly established* law precludes federal habeas courts from articulating new substantive rights in this posture.[250] As the Court reaches for direct collateral review to develop and articulate constitutional criminal procedure rights, the procedural peculiarities of the posture will affect how broadly the Court is able to articulate those rights. This Part draws out some of the fraught threshold issues that arise in direct-collateral-review cases to provide an initial postural account.

Direct collateral review is something of a hybrid, uncomfortably shoehorned between direct review and federal habeas review. So too is the administration of direct collateral review, at times demanding default rules governing the administration of direct review and at other times eschewing them. After all, direct review and direct collateral review share a statutory basis for jurisdiction, 28 U.S.C. § 1257, which governs appeals from final state-court judgments. But direct collateral review is an appeal of a collateral challenge—a posture that comes with many procedural restrictions at the state level. So direct collateral review is much more likely to present threshold issues similar to those in federal habeas review: how to treat summary orders, whether state procedural law negates subject matter jurisdiction, the import of the words on the face of a state opinion, and what the appropriate standard of review ought to be on factual and legal challenges.

There is a well-developed body of law for deciding these collateral-review idiosyncrasies on federal habeas under AEDPA. Although far from

---

248. Although the broad premise is largely agreed upon, the normative framework for assessing the relationship between substance and procedure is not. For an interesting discussion of the academic debate concerning the relationship between process and substance, see Jenny S. Martinez, Process and Substance in the "War on Terror", 108 Colum. L. Rev. 1013, 1018–27 (2008). See generally Henry P. Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970) (examining how obscenity cases illustrate the relationship between substance and procedure in the First Amendment context).

249. This Essay also demonstrates the opposite: Substance affects procedure. In order to resolve collateral-review issues (substance), the Court must engage in direct collateral review (procedure).

250. See supra section II.A.

perfect, AEDPA jurisprudence has rules governing the treatment of state summary opinions, the development of the factual record, and the standard of review.[251] And the puzzle is that AEDPA's rules are too restrictive to allow the Court to continue to develop doctrine and to remedy grave miscarriages of injustice.[252] Indeed, their restrictiveness is a primary justification for direct collateral review's emergence.

This Part illustrates the inherent tension in the direct-collateral-review posture using four examples: (1) how to treat state summary decisions, (2) whether state procedural law governs, (3) whether the state's words or its actions are dispositive, and (4) the appropriate standard of review. This Part aspires to initiate a dialogue and does not endeavor to offer the final word.

A. *State Summary Decisions*

State courts issue summary decisions—unreasoned or scantly reasoned opinions, generally denying relief or affirming the decision below—with regularity on state collateral review. In the AEDPA context, the Court has accounted for the reality and ubiquity of state-court summary decisions with a line of cases providing guidance for evaluating summary decisions on habeas review. These cases—*Ylst v. Nunnemaker*,[253] *Harrington v. Richter*,[254] and *Wilson v. Sellers*[255]—navigate AEDPA's federalism aspirations and state constraints on giving collateral cases full consideration and exposition at every level. The Court's jurisprudence expressly recognizes and seeks to account for the resource constraints that state courts face in issuing collateral-review decisions.[256] These cases decide whether AEDPA's relitigation bar will be triggered by one-line summary decisions. In order to defer to stated reasoning, the Court's default rule is to "look through" the summary decision to the last reasoned state opinion and to assume that a summary affirmance (or denial of discretionary review) was based on the reasoning in the written opinion.[257] But the process of summary decisionmaking is so ubiquitous in the state collateral process that sometimes there is no reasoned written opinion; there are only summary denials.[258] And the Court's doctrine accounts for that as well, providing

251. See supra section I.A.

252. See supra Part II.

253. 501 U.S. 797 (1991).

254. 562 U.S. 86 (2011).

255. 138 S. Ct. 1188 (2018).

256. See, e.g., *Harrington*, 562 U.S. at 99 ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed.").

257. *Wilson*, 138 S. Ct. at 1193–94; *Ylst*, 501 U.S. at 806.

258. Cf. *Harrington*, 562 U.S. at 99 (recognizing the myriad factors that inform a state court's decision to issue summary orders, including resource constraints). This is not meant to single out states for using summary orders; the practice is shared by federal courts as well.

that unreasoned denials are decisions "on the merits" and directing state collateral courts, perhaps somewhat oxymoronically, to defer to reasonable reasons that *could have been given* even though they were not given.[259]

The Court has no analogous rules for direct collateral review. Instead, the Court has the *Michigan v. Long* presumption, which applies when the Court reviews a state-court decision on direct review: Unless the state-court decision is clear on its face that it rests on an adequate and independent state-law ground, the Supreme Court can validly exercise jurisdiction.[260] How should the Court factor in summary decisions—particularly when they are so prevalent on state collateral review—and should the Court consider what state law has to say about summary decisions? Although the Supreme Court has had to grapple with state summary decisions in direct-collateral-review cases, it has not developed a reasoned doctrinal framework to apply in these cases.

The jurisdictional issue lurking beneath the merits in *Foster v. Chatman* is instructive.[261] The state collateral court wrote that Foster's *Batson* challenge was not reviewable under Georgia's preclusion law because it was reviewed on direct appeal before the Georgia Supreme Court.[262] New evidence, however, is one means of circumventing the state's procedural bar.[263] So the state collateral court reviewed Foster's "new" evidence and concluded that his *Batson* claim was "without merit."[264] The Georgia Supreme Court summarily denied Foster's Application for a Certificate of Probable Cause.[265] The effect of the Georgia Supreme Court's denial on the Court's jurisdiction was a point of disagreement among the various opinions.

The majority starts with the jurisdictional question. Under Georgia law, the Georgia Supreme Court will issue a certificate of probable cause in a collateral case involving a criminal conviction "where there is arguable merit."[266] Recognizing that Foster appealed from the summary denial of the Georgia Supreme Court—a one-line order—the Court holds, in a footnote, "[a] decision by the Georgia Supreme Court that Foster's appeal had no 'arguable merit' would seem to be a decision on the merits of his claim."[267] Applying *Long*'s principle, the Court holds that there is federal jurisdiction because it is not clear from the face of the summary opinion

See, e.g., 2d Cir. Internal Operating Proc. 32.1.1 (describing the Second Circuit's procedures for issuing summary orders).

259. *Harrington*, 562 U.S. at 99.

260. 463 U.S. 1032, 1040–41 (1983).

261. 136 S. Ct. 1737 (2016).

262. Id. at 1745.

263. Id. at 1746.

264. Id. at 1745.

265. Id. at 1745 n.1.

266. Ga. Sup. Ct. R. 36.

267. *Foster*, 136 S. Ct. at 1746 n.2.

that it rests on an adequate and independent state-law ground.[268] The Court then looks to the Georgia collateral court's ruling for further evidence that the decision under review rested on a federal question: Although that court ostensibly found a procedural bar to Foster's claim—preclusion—it was linked to an assessment of Foster's *Batson* claim.[269] So the collateral court's decision was not independent of federal law, and thus the Supreme Court had jurisdiction.[270]

Justice Thomas's dissent brings *Michigan v. Long* to the fore. He starts with the premise that the Court's statutory basis for jurisdiction—28 U.S.C. § 1257(a)—"authorizes [the Supreme Court] to review the 'judgments or decrees rendered by the highest court of a State in which a decision could be had.'"[271] Justice Thomas speculates that the "likely explanation for the [Georgia Supreme] [C]ourt's denial of habeas relief is that Foster's claim is procedurally barred."[272] He then critiques the majority's treatment of the summary denial, maintaining that the appropriate course of action is to vacate and remand so the Georgia Supreme Court could clarify its reasoning in the first instance.[273] In reaching that conclusion, Justice Thomas calls out *Michigan v. Long*'s presumption as inadequate to the task of dealing with summary orders because, he suggests, the *Long* presumption depends upon a reasoned opinion. He writes: "There is neither an 'opinion' nor any resolution of federal law that 'fairly appears' on the face of the unexplained order."[274]

The colloquy between the majority and dissent underscores the mismatch between applying direct review default rules to direct-collateral-review cases. The Chief Justice's treatment of the summary denial leaves a lot to be desired. Requiring that a state summary denial be "clear on its face" that it rests on an adequate and independent state law procedural ground is not only a high bar but will often be futile for a state.[275] Summary denials, by their nature, are summary. They will not be clear on their face. They often have no reasoning. The *Michigan v. Long* presumption does too much. But Justice Thomas's approach—assuming in the first instance that the denial rests on procedural grounds or remanding to clarify—is unworkable. Summary denials are ubiquitous in the state collateral process, and Justice Thomas's approach would preclude the Court's review where review and relief are most warranted: where the imprisoned person

---

268. Id. at 1746.

269. Id. at 1746–47.

270. Id.

271. Id. at 1761 (Thomas, J., dissenting) (quoting 28 U.S.C. § 1257(a) (2012)).

272. Id.

273. Id. at 1763.

274. Id. (quoting Michigan v. Long, 463 U.S. 1032, 1042 (1983)).

275. This may explain why the Chief Justice's opinion goes on to provide additional, confirmatory (but supposedly unnecessary) evidence for exercising jurisdiction by looking to the underlying state-court decision. See id. at 1746 n.2 (majority opinion).

raises a real constitutional infirmity and the state-court system is so dismissive that it does not even provide reasons for its denial.

One imperfect alternative is to apply the federal habeas review default articulated in *Ylst v. Nunnemaker*, particularly because it was fashioned specifically with the ubiquity of summary denials in mind.[276] The Court could "look through" to the last reasoned state-court opinion to discern whether that opinion rested on adequate and independent state-law procedural grounds and assume that the summary opinion was based on the same reasoning.[277] This default rule would obviate the need for a remand without applying a presumption that is futile in this context.

B. *State Law, Federal Law, and Subject Matter Jurisdiction*

Until recently, the Supreme Court had been clear that states are the primary architects of the laws and procedures governing state collateral review.[278] This had created a complex patchwork of procedures and rules within each state, which are, of course, a function of *state* law.[279] But sometimes, states borrow terms, procedures, and doctrines originally developed by and for federal court. When states apply federal law as federal law, there is no dispute that the Supreme Court has jurisdiction to review those decisions.[280] But when states choose to apply doctrine, standards, and tests in their collateral-review proceedings that *look like* federal law—but are not—that choice complicates the jurisdictional analysis.

This tension was at the fore in *Montgomery v. Louisiana*.[281] Although the petition for certiorari raised only the substantive question whether *Miller*'s ban on mandatory sentences of life without parole for juvenile offenders applies retroactively on collateral review,[282] the Court added the threshold question whether it had jurisdiction over the case.[283] Expressly applying *state* retroactivity law—which used federal retroactivity law as a

276. 501 U.S. 797, 806 (1991).

277. Id.

278. For instance, the Court has found that there is no right to an attorney during collateral review, see Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), and that states are free to provide collateral relief for newly articulated rights that are neither watershed procedural nor substantive, see Danforth v. Minnesota, 552 U.S. 264, 266 (2008).

279. Compare, e.g., Fla. R. Crim. P. 3.850(a) (permitting collateral review of judgments in five enumerated circumstances and when "[t]he judgment or sentence is otherwise subject to collateral attack"), with N.Y. Crim. Proc. Law § 440.30 (McKinney 2005) (providing no substantive claims that can be brought).

280. See, e.g., Maryland v. Kulbicki, 577 U.S. 1, 2–3 (2015) (per curiam) (reversing Maryland's incorrect overbroad application of the Sixth Amendment ineffective assistance of counsel standard). But see Jason Mazzone, When the Supreme Court Is Not Supreme, 104 Nw. U. L. Rev. 979, 1029–62 (2010) (arguing that the Supreme Court should not reverse and remand state determinations that incorrectly exceed the federal constitutional floor).

281. 136 S. Ct. 718 (2016).

282. Id. at 725.

283. Montgomery v. Louisiana, 575 U.S. 911, 911–12 (2015).

nonbinding guidepost—the Louisiana Supreme Court held that *Miller v. Alabama*'s prohibition on sentences of mandatory life without parole for juvenile offenders was not retroactive.[284] Louisiana was clear in its jurisprudence: Louisiana "adopt[s] the *Teague* standards for all cases on collateral review in our state courts. In doing so, we recognize that we are not bound to adopt the *Teague* standards."[285] The state borrowed, and misapplied, federal law. In this circumstance, is there a sufficient federal interest in the case for the Supreme Court to exercise jurisdiction? Pages upon pages were written by the parties, court-appointed amicus curiae, and other amici curiae on that very question.[286] Ultimately, in deciding that *Teague* is a constitutional floor, the Supreme Court did not have to address this as-yet unresolved jurisdictional question.[287] The jurisdictional stakes in the suit morphed by constitutionalizing *Teague* because the question became whether Louisiana's rules conformed to the federal constitutional minimum, not whether Louisiana's rule was state or federal law.

Although the Supreme Court must ensure that it has subject matter jurisdiction in every case, including both on direct review and on federal habeas review, the direct-collateral-review posture will present harder-than-average jurisdictional issues. The Court has generally avoided constitutional minima for collateral review because it is not yet clear whether there is a right to collateral review in the first instance.[288] States have, accordingly, taken the reins. But where there is a state process, there is a constitutional right to due process. Direct-collateral-review cases thus may raise procedural rights in a realm where it is not clear whether the guarantor is state or federal law. This is so particularly when the Supreme Court seeks to establish and clarify rules concerning the *administration* of collateral review because the Court has largely said that this is the states' domain and there is little in the way of articulated constitutional standards.[289] Because states are the primary architects of state collateral review, every procedure, in theory, is a state procedure. If tomorrow, a state decided to borrow AEDPA's relitigation bar, including related

284. This is a streamlined version of the facts. In the underlying opinion, the Louisiana Supreme Court applied its precedent to hold that Montgomery was not entitled to collateral relief. State v. Montgomery, 141 So. 3d 264, 264 (La. 2014). But in an earlier case, *State v. Tate*, the Louisiana Supreme Court had held that *Miller* was neither a substantive rule of decision nor a watershed rule of criminal procedure. 130 So. 3d 829, 831 (La. 2013).

285. State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992).

286. See, e.g., Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction at 9–37, *Montgomery*, 136 S. Ct. 718 (No. 14-280), 2015 WL 3799566; Brief for the United States as Amicus Curiae Supporting Petitioner at 25–33, *Montgomery*, 136 S. Ct. 718 (No. 14-280), 2015 WL 4607689.

287. *Montgomery*, 136 S. Ct. at 729.

288. See Vázquez & Vladeck, supra note 93, at 910 (arguing that *Montgomery* contemplates a constitutional right to postconviction review).

289. See supra section II.A.1.

doctrine, would the Supreme Court have jurisdiction to review the misapplication of those standards? The answer will be somewhere between the Constitution's minimum "federal ingredient" standard[290] and the statutory basis for jurisdiction. For the time being, it remains an open question, and of a type likely to come before the Court more often in direct-collateral-review cases.

C. *State Law, Federal Law, and the Substance/Form Distinction*

The Court encountered an adjacent question in *McKinney v. Arizona*—not the question of the State's role to design its own collateral-review procedures, but the State's role in determining whether a particular process is direct or collateral.[291] In 1992, James McKinney was convicted of two counts of first-degree murder.[292] Consistent with state procedures at the time, the judge then found the presence of aggravating factors that rendered McKinney's crimes death-eligible offenses.[293] The trial judge then weighed the aggravating and mitigating circumstances and sentenced McKinney to death.[294] The Court, in *Ring v. Arizona*, later determined that the structures allowing for the judge to play such a role in Arizona's scheme were unconstitutional.[295] But that decision does not apply to cases on collateral review. Almost two decades later, the Ninth Circuit on federal habeas held that the judge in McKinney's original trial had not appropriately considered certain mitigation evidence and accordingly ordered the Arizona courts to reconsider McKinney's case.[296] When the case returned to the Arizona Supreme Court it weighed the aggravating and mitigating evidence and determined that McKinney's capital sentence was appropriate.[297] One question for the United States Supreme Court was whether the Arizona Supreme Court had erred in doing the weighing itself instead of remanding for a new jury trial, consistent with *Ring v. Arizona*'s mandate.[298] To reach that question, the Court had to decide whether the proceeding before the Arizona Supreme

290. See Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823–28 (1824) (upholding a constitutional "federal question" jurisdiction in excess of what most federal jurisdictional statutes permit). For more on federal question jurisdiction and the different limits imposed by Article III and 28 U.S.C. § 1331, as well as a discussion of "protective jurisdiction," whose limits lay beyond the scope of this Essay, see Hart & Wechsler, supra note 36, at 784–806.

291. 140 S. Ct. 702, 708 (2020).

292. Id. at 705.

293. Id. at 706.

294. Id.

295. 536 U.S. 584, 589 (2002).

296. *McKinney*, 140 S. Ct. at 706.

297. Id.

298. Id.

Court constituted direct review or collateral review because *Ring* applies on direct, but not on collateral, review.[299]

The majority and dissenting opinions home in on the precise complexities of direct collateral review. Justice Kavanaugh, writing for the majority, looks to Arizona's language and reasons that because *Arizona* considers this collateral review, it is collateral review and *Ring* does not apply.[300] He writes:

> In conducting the reweighing, the Arizona Supreme Court explained that it was conducting an independent review in a collateral proceeding . . . . Under these circumstances, we may not second guess the Arizona Supreme Court's characterization of state law . . . . As a matter of *state* law, the reweighing proceedings in McKinney's case occurred on collateral review.[301]

In dissent, Justice Ginsburg looks at the issue as a federal question and interrogates the substance of the Arizona Supreme Court's process.[302] Relying on substance rather than on the presence of certain words in the Arizona Supreme Court's opinion, Justice Ginsburg reasons that "[r]enewal of direct review cannot sensibly be characterized as anything other than direct review."[303] She thus concludes that "[t]he Arizona Supreme Court's 2018 proceeding was essentially a replay of the initial direct review proceeding."[304]

The difference in approach between the majority and dissent—the form of a state's opinion and the substance of a state's opinion—can yield two very different results when forming the boundaries of state collateral review. Although the majority chose form, that approach is somewhat in tension with the approaches the Court took in *Montgomery*—in which it saw the question of retroactivity as a matter of federal law[305]—and with *Foster*, in which the Court did not wade into the state-law morass concerning summary orders to determine whether it had jurisdiction.[306] It is still an open question whether the state's words or the federal assessments of the state court's actions ultimately govern on direct collateral review, and it is a question the Court is likely to face with regularity going forward.

D. *Standard of Review*

Although the Supreme Court has not expressly so stated, it appears to have applied a plenary standard of review to address legal questions in

299. Id. at 708.
300. Id.
301. Id. (citations omitted).
302. Id. at 711 (Ginsburg, J., dissenting).
303. Id.
304. Id.
305. Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016).
306. Foster v. Chatman, 136 S. Ct. 1737, 1746–47 & n.2 (2016).

each of its direct-collateral-review cases. Unlike in AEDPA, Congress has not set a different standard (in the form of a relitigation bar) for the Supreme Court to apply to these cases and, in light of the doctrinal-development and access-to-justice motivations for granting these cases, using the same de novo standard as in direct review cases is normatively good. But as the underlying theme of this section has already gestured, the issue may not be cut-and-dried.

States have fashioned their collateral-review proceedings individually and have employed varying standards of review.[307] Even within the same state, differing standards of review may apply at different stages of a collateral challenge. There are, quite literally, thousands of state-court cases wrestling with the appropriate standard of review to apply in a state collateral case, but none at the Supreme Court. For choice of law purposes, standard of review is tricky: Although it is generally procedural law—requiring federal, not state, standards to apply—some federal courts sitting in diversity have applied state standards of review.[308] Should direct collateral review follow the general rule, or should it be treated specially? Should federal law account for the fact that states administering collateral review tend not to apply the de novo standard? And what if the state-law decision below was incorrectly decided because of the state's less searching standard of review? Is *that* an adequate and independent state ground barring the Court's jurisdiction? It is not likely, given the impetus for the emergence of direct collateral review, that the Court will choose such a path.

CONCLUSION

In outlining some of the procedural puzzles that direct collateral review brings with it, the prior section animates the likely reasons the

---

307. See, e.g., Price v. State, 278 So. 3d 1287, 1288 (Ala. Crim. App. 2018) (holding that where a circuit court summarily dismisses a state collateral petition, the abuse of discretion standard applies, and where a circuit court bases its determination on a cold trial record, the de novo standard of review applies); Collins v. State, 220 S.W.3d 684, 685 (Ark. 2005) (recognizing a heightened standard of review in capital cases); Pittman v. State, 90 So. 3d 794, 804 (Fla. 2011) (applying the substantial evidence standard for factual findings and the de novo standard for legal conclusions); People v. Faraone, 738 N.E.2d 571, 572–73 (Ill. App. Ct. 2000) (recognizing that the manifest-error standard of review applies to findings requiring testimony and that a pleading standard applies for dismissal); State v. Ojibway, No. A16-0326, 2017 WL 3469424, at *2 (Minn. Ct. App. Aug. 14, 2017) (holding that when a postconviction motion is filed within the two-year statute of limitations period, the preponderance of the evidence standard of review applies in trial court); State v. Gondor, 860 N.E.2d 77, 88 (Ohio 2006) (holding that the abuse of discretion standard applies to appeals of postconviction proceedings); State v. Smith, 878 N.W.2d 135, 148 (Wis. 2016) (holding that competency determinations are reviewed under the clearly erroneous standard of review).

308. See 19 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4508 nn.16, 74 (3d ed. 2020) (citing examples).

Court was so reluctant to engage in direct collateral review before AEDPA: It is a challenging posture to administer and it creates uncomfortable friction between the Court and states.[309] It raises jurisdictional questions that are hard to resolve and also calls into question state courts' sovereignty to adjudicate the disputes before them.[310] But when Congress passed AEDPA, it both circumscribed the relief available to prisoners unconstitutionally confined by states and deprived the federal judiciary of a robust vehicle to develop doctrines to protect criminal defendants in the first instance. This created hydraulic pressure on the Court, prompting it to take this previously disfavored subset of cases in order to cure a real problem in the administration of criminal justice in the states. In other words, the Court pushed back to reclaim part of its oversight role over state administration of criminal justice.

The emergence of direct collateral review is a critical component of the ever-evolving administration of criminal law because it restores federal judicial primacy in developing constitutional law. Scholars have recently recognized the more central role that states play in adjudicating collateral challenges, attributing that role, in part, to AEDPA.[311] Indeed, AEDPA includes an exhaustion remedy, requiring federal habeas petitioners to first avail themselves of available state collateral proceedings before bringing a petition in federal court.[312] Taken in conjunction with AEDPA's relitigation bar, this means that state courts are the primary fora in which constitutional criminal procedure on collateral-review issues is being developed. But there is reason to be troubled by a system in which state courts are the primary architects of federal constitutional rights.

There are structural differences between state and federal courts that make federal courts a better and more neutral forum for adjudicating federal constitutional rights.[313] The constitutional guarantee of life tenure is meant to insulate federal judges from majoritarian pressures that elected state judges cannot escape.[314] Federal judges also develop specific expertise and competency over the federal Constitution, whereas state judges likely focus more time on state law and state constitutions.[315] These are not abstract; these differences manifest themselves. Professor Primus has chronicled the various ways in which some states systemically subvert federal rights, focusing on right-to-counsel violations, due process

309. See supra Part III.

310. See supra section III.B.

311. See Kovarsky, supra note 1, at 460–61.

312. 28 U.S.C. § 2254(b)(1)(A) (2018).

313. Although the debates concerning parity span a broad range of substantive domains that lie beyond the scope of this piece, this Essay is limited to only criminal procedure rights.

314. Neuborne, supra note 3, at 1127–28.

315. See id. at 1125–26 (arguing that life tenure and other institutional factors better insulate federal judges from majoritarian pressure than their state counterparts, which explains the historical preference for federal enforcement of constitutional rights).

violations, and widespread prosecutorial misconduct.[316] Her account persuasively shows how states can use procedural rules effectively to preclude individuals from accessing their constitutional rights.[317] And Professor Kovarsky has shown how even when the Supreme Court intervenes by developing substantive doctrine, states often narrow those substantive rules through interpretation.[318] For instance, when the Supreme Court determined that intellectual disability precluded a death sentence,[319] some states attempted to define intellectual disability narrowly or adopted stringent IQ cutoffs.[320]

Although the Court engages in direct collateral review only a handful of times a Term, each time the Court chooses to use its oversight role, the Court is able to set the terms for its broader collateral-review agenda. Supreme Court review, while rare, has profound impact. A case like *Montgomery v. Louisiana*, for example, set a new retroactivity benchmark for all states to follow.[321] Significantly, the Court's propensity for direct collateral review means that habeas doctrines are no longer frozen in time. The Court has a vehicle to develop law and articulate new rules for collateral-review issues like ineffective assistance of counsel, *Brady*, retroactivity, and Eighth Amendment claims.

Of course, direct collateral review is not a perfect substitute for robust federal habeas. Although each time the Court speaks, its doctrinal words have the potential to reach untold numbers, as a matter of particular relief to particular imprisoned individuals, its reach is limited. This Essay does not mean to overstate its impact. It means to correct the misconception, perpetuated by the Court's own words, that it is disfavored or unavailable. The criminal defense bar—facing extreme resource scarcity—should consider the opportunities that direct collateral review affords. Professor Amanda Tyler has recognized the criminal defense bar's strident critique of the Court's practice of granting certiorari in so few cases. As she notes, "[R]eview in the Supreme Court on direct appeal, by and large, is the only meaningful opportunity for federal-court review of [defendants'] state-court convictions in this age of incredibly limited collateral federal habeas corpus jurisdiction."[322] The criminal defense bar should welcome the idea

316. Primus, Structural Vision, supra note 77, at 17–23.

317. Very recently, the Commonwealth of Pennsylvania litigated several cases seeking to disqualify federally funded counsel from also representing individuals on death row in their state proceedings on the theory that their representation violates the federal Criminal Justice Act. See In re Pennsylvania, No. 13-CV-1871, 2013 WL 4193960, at *1 (E.D. Pa. Aug. 15, 2013).

318. Kovarsky, supra note 1, at 451–52.

319. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

320. Kovarsky, supra note 1, at 451–52.

321. 136 S. Ct. 718, 729 (2016).

322. Amanda Tyler, Setting the Supreme Court's Agenda: Is There a Place for Certification?, 78 Geo. Wash. L. Rev 1310, 1315 (2010).

that the Supreme Court has opened another avenue for potential relief, and seasoned Supreme Court litigators, who have a higher success rate than average,[323] should take on cases at the direct-collateral-review stage because the posture no longer forecloses review.[324]

Those seeking to reform the criminal justice system through doctrinal development should seize the opportunity to develop nationally applicable doctrine through direct collateral review. Although AEDPA largely froze constitutional law on collateral-review issues, there is now an avenue, quickly becoming the preferred avenue, for lawyers to pursue doctrinal development on a national level. Direct collateral review is a way for the Court to keep law current, correct course, and do justice.

* * *

This Essay concludes by laying out an analytical research agenda with an eye toward understanding the substantive rights likely to be taken up by the Supreme Court in a direct-collateral-review posture. How do the procedural peculiarities of direct collateral review affect the articulation of substantive constitutional rights? Does the specter of federal–state friction caution narrow articulations of law? Does the difficulty of definitively establishing federal jurisdiction to adjudicate the case in the first instance counsel in favor of broad rights articulations to counterbalance the low likelihood of review? Although these rights will be defined in this peculiar phase, they will apply throughout all stages of criminal proceedings across the United States and govern standards of practice for criminal defense lawyers and prosecutors. Direct collateral review thus has tremendous potential if understood and used to its fullest.

---

323. See Lazarus, supra note 109, at 1544–45 (writing about the Supreme Court Bar and its members' relative effectiveness).

324. Professor Huq has recognized that postconviction counsel are better positioned in what he terms the two-track structure of federal habeas "because of an exogenously determined political economy of litigation-related resources. That is, [criminal defendants] tend to be poorly represented in state court and effectively represented in federal postconviction proceedings." Huq, supra note 87, at 551. Equipped with accurate information about their likelihood of success on direct collateral review, perhaps seasoned counsel's behavior would change.