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The Problem with Direct Collateral Review

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Abstract

Federal habeas review of state convictions is sharply circumscribed for a reason: Granting the writ of habeas corpus disrupts the federalism and finality interests that lie at the heart of state sovereignty over criminal law. Both AEDPA and the Supreme Court's equitable bars to relief reflect the structural dangers inherent in collateral review of state convictions. Given the increasing unavailability of federal habeas relief, state prisoners have turned to another vehicle for collateral federal review, one that bypasses AEDPA's demanding standard: direct review of state postconviction proceedings. And regrettably, the Court has entertained this AEDPA arbitrage in recent years.

This Essay explains why there is no principled reason to treat the Supreme Court's direct collateral review differently from federal habeas review of state convictions. Direct collateral review constitutes an intrusion into state sovereignty identical to that of habeas relief, but without the guardrails that attend habeas review. The Court should either decline to grant certiorari in such cases or apply AEDPA deference when it does. To do otherwise countenances a breathtaking arrogation of power to the Supreme Court at the expense of the interests protected by AEDPA. The Court should close this finality-busting loophole.

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I. INTRODUCTION

Collateral, federal review of state convictions is an extraordinary thing reserved for extraordinary circumstances. The writ of habeas corpus is one such method of review. "[H]abeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal."[1] Granting the writ of habeas corpus to a prisoner who has been convicted and sentenced by a state court exacts considerable costs on the states and crime victims alike. For that reason, the Antiterrorism and Effective Death Penalty Act of 1996[2] (AEDPA) sharply cabins relief. For claims adjudicated on the merits by state courts, a petitioner may obtain relief only if "*every* fairminded jurist would agree"[3] that the state court's adjudication "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."[4]

As a result, state prisoners have recently sought to deploy a different mechanism of collateral review, but one that avoids AEDPA's demanding standard[5]—direct Supreme Court review of state collateral proceedings.[6] This "direct collateral review . . . may sound like a contradiction in terms, [but] it precisely explains what the Court does in this posture: It directly reviews a state collateral proceeding."[7] Historically, such review was unavailing, as the Supreme Court "rarely granted certiorari to review direct appeals of . . . state collateral challenges."[8] But the Court has been more willing in recent years to exercise its certiorari power in this unique posture rather than waiting for federal habeas review. The consequences are sprawling, as direct review of state collateral proceedings avoids the deference required by AEDPA but raises the same finality and federalism concerns animating that deference in the first place. It allows "finality-busting error-correction without the deference to state courts that AEDPA demands."[9]

This Essay's thesis is straightforward: The Supreme Court should not

1. Harrington v. Richter, 562 U.S. 86, 102–03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (2011) (Stevens, J., concurring in judgment)).

2. Antiterrorism and Effective Death Penalty Act of 1996, S. 735, 104th Cong.

3. Brown v. Davenport, 596 U.S. 118, 136 (2022).

4. 28 U.S.C. § 2254(d).

5. *See* Brief of Jonathan F. Mitchell & Adam K. Mortara as Amici Curiae in Support of Respondent at 8, Cruz v. Arizona, 598 U.S. 17 (2022) (No. 21-846).

6. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163 (2021).

7. *Id.* at 164.

8. *Id.* at 161.

9. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 8.

exercise its certiorari power to review state collateral proceedings[10] (with one exception). And if it continues to do so, it should apply AEDPA's deferential standard rather than plenary review. Part I describes the origins of federal habeas review and recounts the federalism and finality interests that suffer when a federal court grants collateral relief to a state prisoner. Part II traces the emergence of direct Supreme Court review of collateral proceedings and emphasizes the problems with this recent trend. Part III offers two solutions to ameliorate the costs that attend this troubling development.

II. FEDERAL HABEAS CORPUS, FINALITY, AND FEDERALISM

To understand the anomaly that is contemporary direct review of state collateral proceedings, it is necessary to comprehend in broad terms the evolution of federal habeas corpus. Section A traces the origins of federal review of state convictions. Section B explicates the costs that accompany federal habeas. Section C explains how the Court's modern equitable precedents and AEDPA's statutory bars to relief temper those costs.

A. The Origins of Modern Habeas

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States. The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty."[11] So inviolable was the States' authority over criminal matters that for the first century of our Nation's history, "there was no federal habeas jurisdiction to inquire into detentions pursuant to state law."[12] The American writ of habeas corpus instead paralleled its British common law antecedent by allowing courts to "relieve detention by executive authorities without judicial trial,"[13] but it generally extended no further.[14] The writ could not be used to challenge criminal judgments entered by a state court of competent jurisdiction; "[i]f the point of the writ was to ensure due process attended an individual's confinement, a trial was generally considered proof he had

10. *See id.* at 7–11.
11. Shinn v. Ramirez, 596 U.S. 366, 375 (2022) (citations and quotation marks omitted).
12. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465 (1963).
13. Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in judgment).
14. *See* Brown v. Davenport, 596 U.S. 118, 127–29 (2022).

received just that."[15] In 1867, Congress conferred on federal courts the power to issue writs of habeas corpus to state authorities, but it remained "far from clear that federal courts sitting in habeas had the power to entertain petitions from state prisoners previously decided in state court."[16]

Federal review of state convictions—what we colloquially call "federal habeas" today—finds its origins in the 1950s. In *Brown v. Allen*,[17] the Court suggested that "a federal district court approaching the same case years later should be free to decide *de novo* whether the state-court proceedings 'resulted in a satisfactory conclusion' and to issue habeas relief if that conclusion is found wanting."[18] In a breathtaking arrogation of power, *Brown v. Allen* transformed the writ of habeas corpus into a never-before-seen tool of federal appellate review of state convictions. "[M]ere errors in adjudication" by the state court became cognizable in federal habeas for the first time.[19] Justice Robert Jackson, concurring in only the judgment, predicted that the majority's reasoning would "sanction[ ] progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own."[20] His prediction was prescient. As the Warren Court began to recognize new due process requirements in criminal cases, "[f]ull-blown constitutional error correction became the order of the day."[21]

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15. *Id.* at 128.

16. Ahdout, *supra* note 6, at 168; *see also* Edwards v. Vannoy, 593 U.S. 255, 285–86 (2021) (Gorsuch, J., concurring) ("Even then, however, this Court continued to interpret the habeas statute consistent with historical practice. If a prisoner was in custody pursuant to a final state court judgment, a federal court was powerless to revisit those proceedings unless the state court had acted without jurisdiction."); *see also Allen*, 344 U.S. at 533 (Jackson, J., concurring in judgment) ("At that time, the writ was not available here nor in England to challenge any sentence imposed by a court of competent jurisdiction.").

17. 344 U.S. 443 (1953).

18. *Davenport*, 596 U.S. at 130 (quoting *Allen*, 344 U.S. at 463).

19. *Id.*

20. *Allen*, 344 U.S. at 536 (Jackson, J., concurring in judgment).

21. *Davenport*, 596 U.S. at 130. To be sure, the conclusion that modern habeas is an outgrowth of *Brown v. Allen* is the subject of academic and judicial debate. *Compare, e.g.*, Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1043–44 (2013) ("*Allen* is now seen as the case that 'ushered in the modern era of federal habeas corpus . . . ." (citation omitted)); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 565 (1994) ("With its landmark decision in *Brown v. Allen*, the Supreme Court ushered in the modern era of habeas corpus."); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1142 (1995) (concluding that *Allen* "broke . . . ground by allowing a federal court to reexamine all constitutional claims raised by a state prisoner . . . .") *with Davenport*, 596 U.S. at 151 n.3 (Kagan, J., dissenting) (compiling scholarship finding that *Brown v. Allen* was consistent with historical practice). Importantly, though, a majority of the Supreme Court has recently adopted the view that *Brown v. Allen* precipitated the emergence of modern habeas. *See Davenport*, 596 U.S. at 130 ("By 1953, however, federal habeas practice began to take on a very different shape" in light of "*Brown* v. *Allen* . . . .").

B. The Costs of Issuing the Writ

The unprecedented expansion of federal habeas review "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."[22] The Supreme Court has recognized two costs as "particularly relevant."[23]

First, federal habeas relief disturbs state sovereignty. "Because federal habeas review overrides the States' core power to enforce criminal law, it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"[24] Our constitutional structure reinforces the notion that "state courts are the principal forum for asserting constitutional challenges to state convictions,"[25] so hierarchically situating federal courts as the monitors of state judges frustrates states' "good-faith attempts to honor constitutional rights."[26]

Second, issuing the writ undermines finality interests. "Finality is essential to both the retributive and the deterrent functions of criminal law."[27] States and victims alike have an interest in finality: "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out."[28] When a federal court "unsettle[s] these expectations" by issuing the writ of habeas, it "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike."[29]

In the years following the Warren Court's reformation of federal habeas review, the Supreme Court recognized the need to cabin habeas relief to only the most "extreme malfunctions in the state criminal justice systems,"[30] lest habeas vitiate states' interests in sovereignty and finality. The next Section describes the equitable and statutory guardrails that currently accompany federal habeas review.

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22. Ahdout, *supra* note 6, at 169.
23. Shinn v. Ramirez, 596 U.S. 366, 376 (2022).
24. *Id.* (citation omitted).
25. Harrington v. Richter, 562 U.S. 86, 103 (2011).
26. Engle v. Isaac, 456 U.S. 107, 128 (1982).
27. Calderon v. Thompson, 523 U.S. 538, 554 (1998).
28. *Id.* at 556.
29. *Id.* (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).
30. Shinn v. Ramirez, 596 U.S. 366, 377 (2022) (citation omitted).

C. Contemporary Limits on Habeas Relief

Faced with a deluge of federal habeas petitions raising a litany of constitutional errors, the Supreme Court "devis[ed] new rules aimed at separating the meritorious needles from the growing haystack."[31] Several equitable doctrines emerged. "The Court established procedural-default standards to prevent petitioners from evading independent and adequate state-law grounds sustaining their convictions."[32] The Court also developed an abuse-of-the-writ doctrine to prevent successive and repetitious filings of federal habeas petitions.[33] "It crafted a heightened harmlessness error standard, calibrated to reflect the finality interests at stake in the post-conviction context."[34] And the Court erected a bar on retroactive application of new constitutional rules of criminal procedure to convictions that had already become final.[35]

Although the Court's equitable doctrines imposed formidable obstacles to petitioners seeking federal habeas relief, the judge-made reforms apparently did not go far enough.[36] Congress erected its own obstacles in AEDPA. In both procedure and substance, AEDPA makes habeas relief unavailing for nearly every petitioner. AEDPA requires that federal petitions be filed within one year of the date the conviction becomes final,[37] forecloses the filing of second or successive petitions,[38] and demands the exhaustion of state-court remedies.[39]

Perhaps the most significant change effectuated by AEDPA is the substantive standard federal courts must employ when reviewing state court decisions. Before AEDPA, federal courts reviewed the decisions of state courts de novo.[40] Section 2254(d), however, codifies a standard notably deferential to state courts. For claims adjudicated on the merits by a state court, a federal court may not issue the writ unless the state court's

31. Brown v. Davenport, 596 U.S.118, 132 (2022).

32. *Id.* at 133; *see* Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977).

33. *See* McCleskey v. Zant, 499 U.S. 467, 491–93 (1991); Edwards v. Vannoy, 593 U.S. 255, 290 (2021) (Gorsuch, J., concurring) (noting that *McCleskey* "applied abuse-of-the-writ rules to prevent an endless cycle of petition and re-petition by prisoners with nothing but time on their hands").

34. *Edwards*, 593 U.S. at 290 (Gorsuch, J., concurring); *see* Brecht v. Abrahamson, 507 U.S. 619, 633–38 (1993).

35. *See* Teague v. Lane, 489 U.S. 288, 304–10 (1989) (plurality).

36. *See Davenport*, 596 U.S. at 134 ("[A]pparently finding the Court's equitable doctrines insufficient, Congress introduced its own reforms in AEDPA.").

37. *See* 28 U.S.C. § 2244(d)(1).

38. *See id.* § 2244(b)(1).

39. *See id.* § 2254(b)(1)(A).

40. *See* Ahdout, *supra* note 6, at 171; *see also* Summerlin v. Schriro, 427 F.3d 623, 628 (9th Cir. 2005) (noting that de novo review applies to pre-AEDPA habeas petitions).

adjudication "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."[41] To satisfy § 2254(d)'s demanding standard, "a petitioner must persuade a federal court that no 'fairminded juris[t]' could reach the state court's conclusion under [the Supreme] Court's precedents."[42] Put another way, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[43] Under this standard, "an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law."[44]

"If this standard is difficult to meet, that is because it was meant to be."[45] AEDPA's substantive standard—no less than its procedural requirements—vindicates the states' interests in sovereignty and finality. It ensures that the states are the primary forum for adjudicating constitutional challenges to a conviction, and as such, it is a manifestation of the Madisonian Compromise that lies at the heart of the Constitution's design.[46]

III. THE RISE AND PROBLEM OF DIRECT COLLATERAL REVIEW

"Sandwiched between a state criminal trial and a federal habeas corpus proceeding is a lesser-known phase of criminal process called 'state postconviction review'"[47] (PCR) or "collateral review."[48] Once a person's conviction becomes final—usually, when the Supreme Court denies certiorari or when the time for seeking certiorari expires—a prisoner may collaterally attack his conviction in state courts. State PCR "refers to judicial review that occurs in a proceeding outside of the direct review process."[49] In broad terms,

41. 28 U.S.C. § 2254(d)(1).
42. Brown v. Davenport, 596 U.S. 118, 135 (2022) (first alteration in original) (citation omitted).
43. Harrington v. Richter, 562 U.S. 86, 103 (2011).
44. Williams v. Taylor, 529 U.S. 362, 412 (2000).
45. *Harrington*, 562 U.S. at 102.
46. Haywood v. Drown, 556 U.S. 729, 745–46 (2009) (Thomas, J., dissenting); *Harrington*, 562 U.S. at 103 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.").
47. Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 443 (2018).
48. Wall v. Kholi, 562 U.S. 545, 560 (2011).
49. *Id.*

state PCR might properly be conceptualized as state habeas,[50] although its contours vary from state to state. Much like it can review a conviction following a prisoner's direct appeal in state courts, the Supreme Court may review a state court's PCR decision[51] unless the state court rejected the PCR petition on an "adequate and independent" procedural rule.[52]

Supreme Court review of a state PCR decision is at odds with the rationales underlying AEDPA and the Court's equitable habeas doctrines. Section A of this Part first illustrates a recent trend of the Court in granting certiorari from denials of state PCR petitions. Section B explains the costs of doing so.

A. The Rise of Direct Collateral Review

Until recently, state PCR "languished as an underfunded afterthought."[53] "State PCR is globally afflicted by resource scarcity, which manifests in a spectacular failure to guarantee effective legal representation"[54] because there is no constitutional right to counsel in PCR proceedings.[55] Those concerned with state prisoners' constitutional rights devoted little attention to state PCR because it "was regarded generally as a redundant forum for relitigating certain claims that could have been litigated in the direct-review chain or other claims that could be entertained on federal habeas review."[56]

Today, state collateral review "is a backwater no longer."[57] Two trends—one procedural and one substantive—have rendered state PCR an increasingly important vehicle. First, as described above, AEDPA contains several procedural requirements, all of which are onerous. The combination of the exhaustion requirement and the procedural default doctrine "bars federal habeas relief on a claim that an inmate forfeited in state proceedings,"[58] thus incentivizing a litigant to raise certain claims in state PCR. Moreover, AEDPA's one-year statute of limitations is statutorily tolled while a prisoner

50. *See, e.g.*, Carey v. Saffold, 536 U.S. 214, 217 (2002) ("A week before the federal deadline, Saffold filed a *state* habeas petition in the state trial court.").

51. *See, e.g.*, Cruz v. Arizona, 598 U.S. 17 (2023); *see also* 28 U.S.C. § 1257.

52. *See* Harris v. Reed, 489 U.S. 255, 260 (1989) ("This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.").

53. Kovarsky, *supra* note 47, at 444.

54. *Id.* at 448.

55. Coleman v. Thompson, 501 U.S. 722, 755 (1991) ("[T]here is no right to counsel in state collateral proceedings.").

56. Kovarsky, *supra* note 47, at 448.

57. *Id.* at 444.

58. *Id.* at 464.

pursues a properly filed state PCR petition.[59] AEDPA's procedural requirements "effectively forc[e] State PCR to the front of the postconviction sequence."[60] The law governing habeas creates "a hydraulic pressure on the broader criminal justice system, rendering state collateral review an increasingly central aspect of criminal justice administration."[61]

The Supreme Court has jurisdiction to review state PCR decisions.[62] Until recently, the Court has used that power sparingly. In 1990, Justice Stevens articulated a presumption against direct review of state collateral proceedings: "[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. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims."[63] Nearly two decades later, the Supreme Court enshrined this presumption in a published opinion.[64]

This stated presumption against review of state PCR decisions is, in many respects, remarkable. The certiorari process is shrouded in much secrecy, permeated only by the occasional opinion respecting or dissenting from the denial of certiorari.[65] "Contrary to its usual secrecy, the Supreme Court has a *stated* practice against granting cases originating on state collateral review . . . ."[66] Unlike any justice's one opinion as to the cert-worthiness of a given case, the presumption against direct review of state PCR decisions articulates a heuristic that applies to a category of cases and spells out a rare rule of decision in the certiorari context.

It is all the more remarkable that the Supreme Court has "silently reversed course and exhibited the exact opposite preference: a propensity *for* granting cases from state collateral review as against federal habeas review."[67] During October Term (OT) 2015, the Supreme Court decided five cases on a direct collateral-review posture—three of which were on the Court's published

59. *See* 28 U.S.C. § 2244(d)(2).

60. Kovarsky, *supra* note 47, at 463.

61. Ahdout, *supra* note 6, at 176.

62. *See* 28 U.S.C. § 1257.

63. Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of a petition for certiorari).

64. Lawrence v. Florida, 549 U.S. 327, 335 (2007).

65. *See, e.g.*, Cunningham v. Florida, 144 S. Ct 1287, 1287 (2024) (Gorsuch, J. dissenting from the denial of a petition of certiorari).

66. Ahdout, *supra* note 6, at 178.

67. *Id.* at 163–64.

docket and two of which were on the shadow docket.[68] Justice Alito has emphasized that trend, pointing out that "[r]ecently, this Court has evidenced a predilection for granting review of state-court decisions denying postconviction relief."[69] This trend continued in the following terms. In OT 2016, the Court took four cases on this posture; the Court considered three such cases in both OT 2018 and OT 2019.[70]

The Supreme Court shows no signs of returning to its presumption against granting cases from state collateral review. Direct review of PCR decisions "is likely here to stay."[71] That is a problem.

B. The Problem of Direct Collateral Review

Direct review of state collateral proceedings sanctions "AEDPA arbitrage."[72] It allows petitioners to escape the deference owed to states, thereby circumventing the judicial and statutory protections of state sovereignty and finality. "By intervening . . . before AEDPA comes into play, the Court avoids the application of [§ 2254(d)'s 'unreasonable application of federal law'] standard and is able to exercise plenary review."[73]

That result might be tolerable if the federalism and finality interests were somehow lesser in direct review of collateral proceedings than in federal habeas. But they are not. "When the process of direct review—which, if a federal question is involved, includes the right to petition [the Supreme] Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence."[74] Direct review of state PCR, even though outside the habeas vehicle, frustrates state sovereignty and finality all the same. "If anything, the State's interests are all the more heightened in this posture. Plenary review by the Supreme Court of the United States—indeed, plenary review that would first entail discussion of the adequacy of the State's own procedural bar—is comity-frustrating, to say the least."[75]

It is anomalous to treat one form of collateral review (federal habeas) differently from another form of collateral review (direct review of state PCR). That differential treatment finds no support in the Supreme Court's

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68. *Id.* at 180–81.

69. Foster v. Chatman, 578 U.S. 488, 524 (2016) (Alito, J., concurring in judgment).

70. Ahdout, *supra* note 6, at 181–82.

71. *Id.* at 183.

72. Malone v. Williams, 112 F.4th 867, 869 (9th Cir. 2024) (Bybee, J., respecting the denial of rehearing en banc).

73. Wearry v. Cain, 577 U.S. 385, 402 (2016) (Alito, J., dissenting).

74. Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

75. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 10.

precedents. To the contrary, the salient distinction is not between federal habeas and review of state PCR, but is instead between collateral review and direct review: "The principle that collateral review is different from direct review resounds throughout . . . [Supreme Court] jurisprudence."[76] Indeed, "[t]he reason most frequently advanced . . . for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system."[77] The deference that attends habeas review is not unique to habeas, nor should it be. Instead, it is a reflection that *any* collateral review by a federal court trenches upon the states' sovereign and finality interests.

To understand how this AEDPA arbitrage happens in practice, consider a pair of cases—one on a habeas posture, and one on direct review of a collateral proceeding. Under the Supreme Court's decisions in *Ford* and *Panetti*, "[t]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."[78] In *Dunn v. Madison*, the petitioner's lawyer had argued that the prisoner was legally insane under *Ford* and *Panetti* and therefore could not be executed.[79] The state trial court denied relief, and the prisoner filed a federal habeas petition, whichwas later denied under AEDPA's demanding standard.[80] The Eleventh Circuit reversed, and the Supreme Court granted certiorari.[81] The Supreme Court reversed the Eleventh Circuit and denied habeas relief.[82] Applying § 2254(d)'s deferential standard of review, the Court held that "[t]he state court did not unreasonably apply *Panetti* and *Ford* . . . . as to give rise to error 'beyond any possibility for fairminded disagreement.'"[83] The Court "express[ed] no view on the merits of the underlying question outside of the AEDPA context."[84]

In *Madison v. Alabama* just two years later, the Supreme Court granted relief on an identical question—but this time, on review of a state collateral proceeding.[85] As in *Dunn*, "the state court . . . found Madison mentally

76. *Brecht*, 507 U.S. at 633.
77. *Id.* at 635.
78. Panetti v. Quarterman, 551 U.S. 930, 934 (2007) (quoting Ford v. Wainwright, 477 U.S. 399, 409–10 (1986)).
79. 583 U.S. 10, 11–12 (2017) (per curiam).
80. *See id.* at 12.
81. *See id.* at 12–13.
82. *See id.* at 13–14.
83. *Id.* (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
84. *Id.* at 14.
85. 586 U.S. 265, 267–68 (2019).

competent."[86] In reviewing that determination, the Court emphasized that AEDPA's deferential standard did not apply: "Because the case now comes to us on direct review of the state court's decision (rather than in a habeas proceeding), AEDPA's deferential standard no longer governs."[87] In light of plenary standard of review, the Supreme Court "return[ed] this case to the state court for renewed consideration of Madison's competency."[88]

The difference in outcome between these two cases was driven solely by the difference in procedural vehicles by which the case arrived at the Court (and derivatively, the appropriate standard of review). The State of Alabama's sovereign and finality interests were no less important in *Madison* than in *Dunn*, and the petitioner's constitutional claim in *Madison* was no greater than the petitioner's constitutional claim in *Dunn*. Yet the Court reached an outcome in *Madison* that it could not have reached in habeas merely because of the idiosyncratic procedural posture. "Whither finality and deference?"[89]

One important exception is worth mentioning. In some instances, claims of constitutional error cannot be presented on direct appeal—whether for legal or practical reasons. *Brady* violations, for example, are often not realized until well after a prisoner's conviction has become final. Most ineffective-assistance-of-trial-counsel claims, too, must be raised in the first instance in state PCR.[90] In these cases, Supreme Court review of a collateral proceeding is in effect equivalent to review of a claim on direct appeal.[91] So, when a petitioner's claim could not have been presented to the state courts in a direct appeal, the Supreme Court might appropriately apply a de novo standard when reviewing a claim presented for the first time in a state PCR proceeding.

In sum, the Supreme Court has recently been more willing to grant direct review of state collateral proceedings rather than waiting to review those claims on a habeas posture. "And state prisoners have been exploiting this loophole with increasing frequency, as they seek and obtain review directly from [the] Court at the conclusion of their state postconviction proceedings, while bypassing the lower federal courts whose authority is constrained by

86. *Id.* at 273.

87. *Id.* at 274.

88. *Id.* at 282.

89. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 8.

90. *See* Martinez v. Ryan, 566 U.S. 1, 13 (2012) (explaining why many states have chosen to "reserv[e] the claim of ineffective assistance for a collateral proceeding").

91. *See* Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 9 n.8 ("For those . . . claims, state post-conviction review should be regarded as 'direct review' as that term is understood in habeas parlance, because it marks the first time those claims are adjudicated on the merits.").

AEDPA."[92] The Court should stop entertaining such an affront to finality, comity, and federalism.

IV. TWO PROPOSALS

We are in need of course correction. Thankfully, the problems discussed above are not intractable, and two straightforward solutions would avoid the costs of direct review of state PCR proceedings. First, the Supreme Court could decline to grant direct review of claims presented in a PCR petition that were previously adjudicated by the state courts on direct appeal. Second, the Supreme Court could continue granting certiorari in such cases but apply AEDPA deference. This Part addresses each in turn.

A. Declining Certiorari

"Section 1257 should not be an HOV lane for . . . [state prisoners] to evade finality doctrines."[93] The Supreme Court should return to the presumption that Justice Stevens announced in *Kyles* and decline to grant direct review of state PCR decisions "'even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims,' choosing instead to wait for 'federal habeas proceedings.'"[94]

The Supreme Court has previously applied the principles undergirding AEDPA when exercising its own discretion, even when AEDPA does not, by its terms, apply.[95] The Court retains the power under 28 U.S.C. § 2241 to issue "original" habeas writs—that is, the Court may issue habeas relief on a petition filed directly in the Supreme Court.[96] In *Felker v. Turpin*,[97] the Court assumed that AEDPA's bar on second or successive petitions did not apply to the Court's ability to issue original writs, but it concluded that such

92. *Id.* at 4.

93. *Id.* at 6.

94. Lawrence v. Florida, 549 U.S. 327, 335 (2007) (quoting Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of a petition for certiorari)).

95. *See* Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 5 ("This Court has used AEDPA to cabin its own discretion with respect to post-conviction review before, even in situations where the terms of AEDPA do not apply.").

96. *See* Felker v. Turpin, 518 U.S. 651, 658 (1996) (finding that the Supreme Court could still assert original jurisdiction over a habeas petition that did not meet the jurisdictional requirement of AEDPA); *cf. Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807) (noting that the power to issue an original writ of habeas corpus is actually an exercise of appellate jurisdiction under Article III).

97. 518 U.S. 651 (1996).

restrictions "certainly inform [its] consideration of original habeas petitions" all the same.[98] Even assuming that AEDPA's limits did not formally restrict the Court's discretionary power to issue an original habeas writ, the Court used AEDPA's principles to cabin its discretion. As the Court explained in *Williams v. Taylor*,[99] "[f]ederal 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."[100]

Wainwright v. Sykes[101] supports the conclusion that certiorari should not be granted to review a state PCR decision. The adequate-and-independent-state-ground doctrine precludes the Supreme Court from reviewing "an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision."[102] *Wainwright* applied this doctrine to a Florida contemporaneous-objection requirement. In relevant part, Florida required defendants to object contemporaneously at trial to the admission of a confession to preserve that issue for appeal; the failure to lodge a contemporaneous objection would forfeit a defendant's ability to appeal a conviction on that basis.[103] Because Sykes did not object to the admission of his confession at trial, the state court's denial of relief was supported by an adequate and independent state ground, even if Sykes could have demonstrated that the admission of his confession was unconstitutional.

Normally, that adequate and independent state ground would have precluded direct review of Sykes's conviction.[104] But *Wainwright* was not a direct appeal from a state conviction. Instead, the case came to the Court following the denial of federal habeas relief. The Court ultimately held that Florida's adequate and independent contemporaneous-objection rule foreclosed federal habeas relief as well.[105]

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98. *Id.* at 663.

99. 529 U.S. 420 (2000).

100. *Id.* at 436.

101. 433 U.S. 72, 81 (1977) ("As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts").

102. Harris v. Reed, 489 U.S. 255, 260 (1989); *see also* Cruz v. Arizona, 598 U.S. 17, 33 (2023) (Barrett, J., dissenting) ("So if an independent state ground of decision is adequate to sustain the judgment, we lack jurisdiction over the entire dispute.").

103. *Wainwright*, 433 U.S. at 74, 85–87.

104. *Id.* at 86–87 (noting that Sykes's "failure to timely object to [the confession's] admission amounted to an independent and adequate state procedural ground which would have prevented direct review here").

105. *Id.* at 87; *see also* Coleman v. Thompson, 501 U.S. 722, 747 (1991) (explaining that in *Wainwright*, "[w]e held that this independent and adequate state ground barred federal habeas as well,

Wainwright's logic is straightforward. A federal habeas court may not issue the writ if the Supreme Court would have been jurisdictionally barred from taking the case on direct review under the adequate-and-independent-state-ground doctrine. Stated differently, a federal habeas court's power is no greater than the Supreme Court's power on direct review. That statement is an expression of finality and federalism by respecting the independence of state-law procedural rules. The inverse logically follows with respect to Supreme Court review of state PCR decisions: The Court should not do on direct review of a collateral proceeding what a federal district court could not do in a federal habeas case.

One might object to this rule by suggesting that the Supreme Court should review whether a state rule is truly adequate or independent.[106] But most of the Supreme Court's cases passing on the adequacy of a state postconviction rule have come on a habeas posture, not on direct review of the state PCR proceeding.[107]

In short, "[w]hen a prisoner seeks collateral review under 28 U.S.C. § 1257 of a claim previously adjudicated on direct appeal, th[e] Court should deny certiorari."[108]

B. Apply AEDPA Deference

If the Supreme Court continues to grant certiorari on a direct collateral review posture, it should apply AEDPA's substantive standard when reviewing a petitioner's claims. As explained in the previous Section, AEDPA's restrictions may inform the scope of the Court's review, even when AEDPA does not formally govern the proceeding.[109] "The concerns for preserving finality that animate [the] Court's habeas jurisprudence and AEDPA are no less significant on the days that [the] Court receives a certiorari petition on state collateral review than they are on the days that a prisoner files

absent a showing of cause and prejudice").

106. *See, e.g.*, Brief for Petitioner at i, Cruz v. Arizona, 598 U.S. 17 (2022) (No. 21-846) (reciting the question presented: "Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.").

107. *See, e.g.*, Walker v. Martin, 562 U.S. 307, 310–11 (2011); Beard v. Kindler, 558 U.S. 53, 55 (2009); *Coleman*, 501 U.S. at 726.

108. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 5.

109. *See* Felker v. Turpin, 518 U.S. 651, 663 (1996).

a habeas petition in federal district court."[110] It should treat these postures equivalently and apply the same standard, lest clever lawyers continue to evade AEDPA's deferential standard to the detriment of federalism and finality.

Such an approach would offer obvious efficiency benefits. If the Supreme Court applied AEDPA when reviewing state collateral proceedings, it could summarily dispose of cases before they are ever presented in a federal habeas petition.[111] And unless the prisoner can identify "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence,"[112] a federal district court could dismiss a habeas petition with ease.

V. CONCLUSION

This Essay's proposal may seem draconian. But collateral review of state convictions—whether in federal habeas or otherwise—is not meant to be "a substitute for ordinary error correction through appeal."[113] If the Supreme Court continues to trod the path of granting plenary review of state PCR decisions, states may choose to eliminate collateral review entirely, forcing state prisoners to seek relief under AEDPA's demanding standard. Beyond the narrow exception for claims that could not be presented on direct appeal, a prisoner's constitutional interests are no greater on collateral review than in habeas, and a state's finality interests are no lesser. There is no principled reason to treat the Supreme Court's direct collateral review differently from federal habeas review of state convictions. The Court should close this "finality-busting" loophole for good.[114]

110. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 6.

111. *See, e.g.*, Sexton v. Beaudreaux, 585 U.S. 961 (2018) (per curiam) (summary reversal); Bobby v. Mitts, 563 U.S. 395 (2011) (per curiam) (same).

112. 28 U.S.C. § 2254(e)(2)(A)(i), (ii).

113. Shinn v. Ramirez, 596 U.S. 366, 377 (2022) (quoting Harrington v. Richter, 562 U.S. 86, 102–03 (2011)).

114. Brief of Mitchell & Mortara as Amici Curiae in Support of Respondent, *supra* note 5, at 4.