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## Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts

Giovanna Shay

Christopher Lasch

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# INITIATING A NEW CONSTITUTIONAL DIALOGUE: THE INCREASED IMPORTANCE UNDER AEDPA OF SEEKING CERTIORARI FROM JUDGMENTS OF STATE COURTS

GIOVANNA SHAY\* & CHRISTOPHER LASCH\*\*

## ABSTRACT

*The Antiterrorism and Effective Death Penalty Act (AEDPA) contains a provision restricting federal courts from considering any authority other than holdings of the Supreme Court in determining whether to grant a state prisoner's petition for habeas corpus. Through an empirical study of cert filings and cases decided by the Supreme Court, we assess this provision's impact on the development of federal constitutional criminal doctrine. Before AEDPA and other restrictions on federal habeas corpus, lower federal courts and state courts contributed to doctrinal development by engaging in a "dialogue" (as described by Robert M. Cover and T. Alexander Aleinikoff in a 1977 article). This dialogue served to articulate the broad constitutional principles set forth in Supreme Court precedent. AEDPA has effectively ended the conversation, because under AEDPA federal courts lack the power to resolve emerging constitutional issues in the context of state prisoners' federal habeas petitions. Now that only Supreme Court precedent can provide the basis for federal habeas relief under AEDPA, it is more important for open*

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\* Assistant Professor, Western New England College School of Law. B.A., Pomona College; M.Phil., Cambridge University; J.D., Yale. Former Robert M. Cover Clinical Teaching Fellow, Yale Law School (2005-2007). We are indebted to Ty Alper, John Blume, Erin Buzuvis, Amy Cohen, Jamison Colburn, Russell Covey, Eric Freedman, Dan Kahan, Art Leavens, Barbara Noah, Stephen Wizner, and Jon Wool for reading and commenting on drafts. We are grateful to Brett Dignam, Bob Solomon, Michael Wishnie, and the other Yale faculty and staff for their mentoring, guidance, and support during our fellowship years, and—particularly in Brett Dignam's case—many other years as well. Despite the great debt we owe these people, any errors that may remain herein are our own.

\*\* Associate Research Scholar and Clinical Lecturer in Law, Yale Law School. B.A., Columbia College; J.D., Yale.

*questions to be presented to the Supreme Court. Unless cert is sought and granted in cases arising out of state criminal proceedings, constitutional criminal doctrine may be frozen. Current certiorari practice is out of step with this reality. Our analysis of the procedural posture of criminal cases in which certiorari was granted by the Supreme Court over the past twelve years demonstrates that, since 1995, the Supreme Court's certiorari grants in criminal cases have been tilting away from federal prisoners' direct appeals and towards state prisoners' federal habeas and (to a lesser degree) state court direct appeals. Because the Court is not, as a general matter, using certiorari grants in state prisoners' federal habeas cases to develop doctrine, it appears that certiorari from state court direct appeals is poised to become the primary vehicle for such development. Yet an empirical analysis of certiorari petitions filed in the October 2006 Supreme Court term reveals a gap between this opportunity for doctrinal development and practitioners' current certiorari-seeking behavior. We coded 347 "paid" certiorari petitions and a sample of 300 in forma pauperis petitions, categorizing cases by procedural posture. Although certiorari grants in federal prisoners' direct appeals are declining dramatically, the leading category of cert filings remains federal prisoners' direct appeals. Given that there are far more state criminal proceedings each year than federal prosecutions, we argue these trends demonstrate an opportunity to file more and better certiorari petitions from state criminal proceedings. We urge the criminal defense community to close this "cert gap," both to ensure a better standard of review for individual clients and to promote continued development of the law.*

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## INTRODUCTION

Since its passage in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>1</sup> has attracted considerable attention for its impact on the availability of federal habeas corpus remedies for state prisoners. Legal scholars have written about AEDPA's impact on separation of powers,<sup>2</sup> federalism,<sup>3</sup> and the effectiveness of the Great Writ.<sup>4</sup> Empirical work also has documented AEDPA's effects on habeas litigation in the federal courts.<sup>5</sup>

We set out to understand the provision of AEDPA that prohibits federal habeas courts reviewing state court judgments from considering decisions other than those of the United States Supreme Court in determining whether the state court judgment adequately comports with federal law:

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 ... resulted in a decision that was contrary to, or involved

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

2. See Joseph M. Brunner, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307 (2006); James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Court*, 98 COLUM. L. REV. 696 (1998).

3. See Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385 (2007); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007); Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254 (d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677 (2003); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After Williams v. Taylor*, 2001 WIS. L. REV. 1493 (2001); Lee B. Kovarsky, *AEDPA's (Imaginary) Purposes* (2007) (unpublished manuscript), available at [http://works.bepress.com/lee\\_kovarsky/5](http://works.bepress.com/lee_kovarsky/5).

4. See Anthony G. Amsterdam, *Foreword to RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, at v, ix-xii (5th ed. 2005); Padraic Foran, Note, *Unreasonably Wrong: The Supreme Court's Supremacy, the AEDPA Standard, and Carey v. Musladin*, 81 S. CAL. L. REV. 571, 598-607 (2008) (discussing constitutional problems with AEDPA ranging from "habeas-specific" to separation of powers and federalism).

5. See NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 1-3 (2007).

an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.<sup>6</sup>

This provision not only increases the importance of Supreme Court precedent—and limits the value of lower federal court decisions—but also greatly heightens the significance of the procedural vehicle in which questions are presented to the Court. Because AEDPA limits the Court's ability to "break [] new ground" in cases arising from federal habeas petitions,<sup>7</sup> cutting edge questions must be presented in petitions for a writ of certiorari from the judgments of state courts if federal constitutional law is to continue to develop in state criminal proceedings. Last term, four justices of the Supreme Court recognized this new reality in their dissent in *Lawrence v. Florida*.<sup>8</sup> They wrote that the pre-AEDPA sentiment that "federal habeas proceedings were generally the more appropriate avenue for our consideration of federal constitutional claims" was no longer true in light of AEDPA's "as determined by the Supreme Court" provision.<sup>9</sup> "Since AEDPA," they explained, "our consideration of state habeas petitions has become more pressing."<sup>10</sup>

We wanted to examine how this provision might affect the development of criminal constitutional law when superimposed on

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6. 28 U.S.C. § 2254(d)(1) (2000) (emphasis added); see also David R. Row & Eric M. Freedman, *The Effects of AEDPA on Justice*, in CAPITAL PUNISHMENT: THE NEXT GENERATION OF EMPIRICAL RESEARCH (North Carolina Academic Press, forthcoming 2008) (finding that success rate in capital habeas cases has fallen to approximately one-fifth of pre-AEDPA success rate). It is also possible under AEDPA to obtain habeas relief if the judgment was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). We do not concern ourselves with § 2254(d)(2) in this Article, but note in passing that permitting lower federal courts to correct "unreasonable" factual determinations of the state courts does not permit those federal courts to engage in doctrinal development, and thus does not mitigate AEDPA's effect on doctrinal development, a central issue of our concern. We recognize the possibility, however, that there may be a subset of cases in which habeas relief is sought under § 2254(d)(2) but not under § 2254(d)(1), to which our analysis is inapplicable. Similarly, we recognize our conclusions may not apply to what we suspect is another narrow class of cases—those in which a habeas petitioner may avoid the operation of § 2254(d) altogether, because the federal claim was not "adjudicated on the merits in State court proceedings." § 2254(d).

7. See *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (quotation omitted) (Stevens, J., in a portion of the decision joined by only three other justices) (discussing AEDPA's "as determined by the Supreme Court" provision).

8. 127 S. Ct. 1079, 1086 (2007) (Ginsburg, J., dissenting).

9. *Id.* at 1089 n.7.

10. *Id.*

actual certiorari practice. To that end, we reviewed criminal cases decided by the Supreme Court over the last dozen terms, as well as certiorari petitions filed during the October 2006 term. We found that the Court's certiorari-granting behavior has changed over the past twelve terms. Certiorari from federal prisoners' direct appeal proceedings, once the dominant vehicle for criminal cases decided by the Court, has dropped to a third-place position behind state prisoners' federal habeas cases and state prisoners' direct appeals. We found practitioners' certiorari-seeking behavior to be out of step with this development—despite the relative decline in certiorari grants in federal prisoners' direct appeals, such cases remained the largest category of certiorari filings in the October 2006 term. Petitions from state prisoners' direct appeals appear to be grossly underrepresented, considering that state prosecutions far outpace federal prosecutions. Petitions from state prisoners' state post-conviction proceedings are a relatively small category of filings,<sup>11</sup> as Justice Stevens has recognized, they are rarely granted.<sup>12</sup> Based on our survey, we argue that defender and pro bono resources should be increased (and in some situations refocused) to improve the number and quality of cert petitions filed from state criminal proceedings (both direct appeal and postconviction).

This Article takes both doctrinal and empirical approaches. In Part I, we provide a doctrinal framework for understanding the historical importance of AEDPA's "as determined by the Supreme Court" provision. In Part II, we discuss the interpretation of the

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11. There is good reason to believe that state postconviction proceedings will be an increasingly important arena for the development of constitutional doctrine in criminal cases. In its recent decision in *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008), the Supreme Court held state courts are not bound by federal rules regarding the non-retroactivity of new constitutional rules which have inhibited doctrinal development in federal courts. *See infra* notes 46-51 and accompanying text (discussing *Teague's* non-retroactivity doctrine). Given the narrowing field of opportunities for doctrinal development, this is a significant development. A rise in cert grants from state postconviction judgments in recent years, *see infra* charts accompanying notes 147-48, may yet prove to be statistically significant, if such cases provided a needed opportunity for doctrinal development. Furthermore, if (as we expect), the Court's federal habeas docket begins to decline, state postconviction cert petitions will increase in importance. *See infra* Part IV.

12. 127 S. Ct. at 1084 ("As Justice Stevens has noted, '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 constitutional claims,' choosing instead to wait for 'federal habeas proceedings.'" (quoting *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring))).

provision and its impact on the development of criminal constitutional law. Part II.A examines Supreme Court opinions involving 28 U.S.C. § 2254(d)(1) to explain how the standard has been interpreted and to demonstrate the remarkable break with the past embodied in this provision. Part II.B offers brief case studies of this provision's impact on the development of constitutional doctrine. Part III offers an empirical attempt to place AEDPA's "as determined by the Supreme Court" provision in context. We begin in Part III.A with an overview of the procedural postures of criminal cases *decided* by the Court from October Term 1995 to October Term 2006. We continue in Part III.B with a survey of petitions for certiorari *filed* in October Term 2006 to see how practitioners are behaving in this new post-AEDPA climate. In Part IV, we consider possible explanations for the depressed cert-seeking rate for state prisoners in state court direct appeals and postconviction proceedings, and discuss results of a survey of certiorari-seeking practice. We conclude by offering some recommendations to close the gap and ensure the continued development of criminal constitutional law.

I. A FRAMEWORK FOR UNDERSTANDING THE SIGNIFICANCE OF  
AEDPA'S "[A]S DETERMINED BY THE SUPREME COURT"  
PROVISION—THE RISE AND DECLINE OF "DIALECTICAL  
FEDERALISM"

In 1977, Yale Professor Robert M. Cover and then-student T. Alexander Aleinikoff asserted that the Warren Court had instituted an "expanded federal writ of habeas corpus"<sup>13</sup> as the enforcement mechanism for its "reforms in criminal procedure."<sup>14</sup> While remedial plans for injunctive relief had been instituted in the desegregation and voting rights contexts, the Warren Court revolution in constitutional criminal procedure was enforced only indirectly, by an invigorated federal habeas.<sup>15</sup> The Warren Court's habeas doctrine, most notably *Fay v. Noia*,<sup>16</sup> was intended to safeguard the opportunity for "federal adjudications free from the impact of structural

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13. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977); see Steinman, *supra* note 3, at 1521-23.

14. Cover & Aleinikoff, *supra* note 13, at 1036.

15. *Id.* at 1039-42.

16. 372 U.S. 391 (1963).



deficiencies in state criminal processes.”<sup>17</sup> Cover and Aleinikoff described the structure of federal habeas under *Fay* as a “strategy of redundancy,”<sup>18</sup> by which they meant that the state and federal court systems “serve[d] as a check on one another.”<sup>19</sup> For this strategy to work, they wrote, the two systems had to function “independent[ly,] in the sense that malfunction of one [would] not affect the functioning of the other.”<sup>20</sup>

*Fay* constructed this “strategy of redundancy” by holding that “state court adjudications [of constitutional criminal procedure issues] could not estop federal court adjudication,”<sup>21</sup> and by permitting federal habeas review of state criminal convictions unless a defendant had “‘deliberately bypassed’ state procedures.”<sup>22</sup> Federal courts were “in an initially strong position” under the *Fay* regime, wrote Cover and Aleinikoff, because “no conviction can stand unless both tribunals concur, provided that the federal forum is invoked.”<sup>23</sup> However, they explained, “state courts ... are not helpless before federal power.”<sup>24</sup> “While the state court pays a price in released prisoners, it can exact a price from the federal court by frustrating that court’s objectives in the majority of cases which will never eventuate in a petition for federal habeas corpus.”<sup>25</sup> Cover and Aleinikoff wrote that this dynamic created “incentives for each court system to acknowledge and, if possible, satisfy some of the more reasonable demands of the other.”<sup>26</sup>

In their article, Cover and Aleinikoff explained that this “strategy of redundancy” not only implemented new constitutional criminal procedure reforms, but also “had a significant impact on the creation and reliability of protection of constitutional rights.”<sup>27</sup> “*Fay* permitted and encouraged a dialogue between state and federal courts that helped define and evolve constitutional rights,” they wrote.<sup>28</sup> In this

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17. Cover & Aleinikoff, *supra* note 13, at 1042.

18. *Id.* at 1044.

19. *Id.* at 1042.

20. *Id.*

21. *Id.*

22. *Id.* at 1044 (quoting *Fay*, 372 U.S. at 438).

23. *Id.* at 1052.

24. *Id.*

25. *Id.* at 1053.

26. *Id.*

27. *Id.* at 1044.

28. *Id.*

dialogue, "state and federal courts were required both to speak and listen as equals."<sup>29</sup> The "dialogue" between state and federal courts had a "profound impact on the development of constitutional law" in "the absence of controlling Supreme Court rules."<sup>30</sup>

Under this "dialectical federalism" described by Cover and Aleinikoff, the Supreme Court might "define the values from which a dialogue will proceed,"<sup>31</sup> but it would be the "ensuing dialogue" between lower federal courts and state courts that would have the "profound impact on the development of constitutional law."<sup>32</sup> Examining the development of the doctrine of effective assistance of counsel, Cover and Aleinikoff described how, by virtue of this dialogue, "a significant shift in doctrine has occurred in the federal and state courts with no more than dicta from the Supreme Court to guide it."<sup>33</sup>

The world of state-federal court "dialogue" in the area of constitutional criminal doctrine was already being cut back as Cover and Aleinikoff wrote in 1977.<sup>34</sup> Cover and Aleinikoff wrote about different attitudes of the Supreme Court towards habeas, and ways in which federal habeas corpus was being restricted in the seventies. For example, they discussed the Court's 1978 decision in *Stone v. Powell*,<sup>35</sup> virtually eliminating federal habeas relief for state prisoners' Fourth Amendment claims.<sup>36</sup> In an "epilogue" to their article, they acknowledged that after they completed their piece the Court had decided *Wainwright v. Sykes*,<sup>37</sup> replacing the deliberate bypass rule of *Fay* with a procedural default rule.<sup>38</sup> Now the Cover-Aleinikoff "dialogue" was limited to claims that had been presented

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29. *Id.* at 1036.

30. *Id.* at 1065.

31. *Id.*

32. *Id.*

33. *Id.*

34. See Steinman, *supra* note 3, at 1496-97 (discussing how the Supreme Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), sanctioning de novo review of federal constitutional claims in state prisoners' federal habeas cases, had occasioned criticism, most notably by Professor Paul M. Bator in his seminal article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963)).

35. 428 U.S. 465 (1976).

36. Cover & Aleinikoff, *supra* note 13, at 1076-78, 1086-88.

37. 433 U.S. 72 (1977).

38. Cover & Aleinikoff, *supra* note 13, at 1100.

first to state courts in accordance with state procedural rules, unless a defendant could establish "cause and prejudice" for the default.<sup>39</sup>

In the ensuing twenty years, federal courts continued to restrict federal habeas as "legal conservatives became uncomfortable with what they saw as expansive judicial intervention in the criminal justice process."<sup>40</sup> During this period, the Supreme Court issued decisions invigorating the doctrines of exhaustion and procedural default,<sup>41</sup> restricting the filing of "second or subsequent" habeas petitions,<sup>42</sup> limiting the circumstances in which federal courts could grant evidentiary hearings,<sup>43</sup> expanding deference to state courts' factual findings,<sup>44</sup> and imposing a harmless error standard in federal habeas.<sup>45</sup>

Most significant here, in *Teague v. Lane*,<sup>46</sup> the Court established a non-retroactivity doctrine, drastically restricting the application of "new" rules of constitutional criminal procedure in habeas

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39. *Id.* (quotation omitted). As Professor Larry Yackle has explained, the transition from *Fay's* "deliberate-bypass" standard to *Wainwright's* "procedural default" standard constituted a seismic shift in federal courts' role reviewing state court criminal judgments. LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 192-99 (2003). Now state procedural rules had preclusive effect and federal courts could not look beyond a prisoner's default to consider the merits of a constitutional claim. *Id.* at 192-94. *Fay's* "deliberate-bypass" rule required a "considered choice of the petitioner," *id.* at 197 (quoting *Fay v. Noia*, 372 U.S. 391, 439 (1963)), and thus "permitted prisoners to seek federal relief on the basis of claims that state courts found to be barred because of procedural default ascribable to defense counsel's ignorance or neglect." *Id.* Procedural default doctrine after *Sykes* was much less forgiving. While *Fay's* "deliberate-bypass" standard "did not foreclose federal habeas corpus[] except in cases in which there was good reason for penalizing a failure to comply with state procedural rules," Yackle writes, procedural default after *Sykes* barred federal habeas review "except in cases in which there is good reason for excusing a failure to comply with state procedural rules." *Id.* at 199.

40. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4-5 (1997).

41. See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 266-68 (2006). Professor Blume summarizes the doctrinal developments preceding AEDPA, including, inter alia, *Wainwright v. Sykes*, 433 U.S. 72 (1977) (abandoning *Fay's* doctrine of "deliberate bypass" in favor of rule that prisoner must demonstrate "cause and prejudice" to excuse procedural default); *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982) (establishing "total exhaustion" rule requiring courts to dismiss "mixed" petitions containing both exhausted and unexhausted claims); and *Duncan v. Henry*, 513 U.S. 364 (1995).

42. *McCleskey v. Zant*, 499 U.S. 467 (1991).

43. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

44. *Sumner v. Mata*, 449 U.S. 539 (1981).

45. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

46. 489 U.S. 288 (1989).

proceedings.<sup>47</sup> Under *Teague*, unless a prisoner fits within certain narrow exceptions, he or she:

[M]ay not seek to enforce a “new rule” of law in federal habeas corpus proceedings if the new rule was announced after the petitioner’s conviction became “final” or if the petitioner is seeking to establish a wholly new rule or to apply a settled precedent in a novel way that would result in the creation of a new rule.<sup>48</sup>

The *Teague* rule “has profoundly changed the law of habeas corpus and narrowed the range of relief that is available in habeas corpus proceedings.”<sup>49</sup> As we discuss below,<sup>50</sup> Congress codified and expanded *Teague* in the “as determined by the Supreme Court” provision of AEDPA.<sup>51</sup> We now turn to that radical restriction on habeas relief.

## II. AEDPA’S “AS DETERMINED BY THE SUPREME COURT” PROVISION—THE END OF “DIALECTICAL FEDERALISM” AND ITS IMPACT ON THE DEVELOPMENT OF CONSTITUTIONAL LAW

The constriction of federal habeas reached a new extreme in AEDPA.<sup>52</sup> AEDPA restricts federal habeas relief for state prisoners in a number of ways. The provision with which we are concerned—and which we claim has a significant impact on the development of federal constitutional law—bars federal district courts from granting a state prisoner’s habeas petition unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*.”<sup>53</sup>

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47. *Id.* at 316.

48. RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 1138 (5th ed. 2005) (citations omitted).

49. *Id.* at 1137-38.

50. *See infra* Part II.A.

51. *See also* HERTZ & LIEBMAN, *supra* note 48, at 1137-38.

52. Tushnet & Yackle, *supra* note 40, at 4-12 (explaining the slow restriction of habeas relief under Supreme Court jurisprudence that culminated with Congress’ passage of AEDPA).

53. 28 U.S.C. § 2254(d)(1) (2000) (emphasis added).

Upon signing AEDPA into law, President Clinton specifically commented on the "as determined by the Supreme Court" provision.<sup>54</sup> "Some have suggested," President Clinton wrote, "that this provision will limit the authority of the Federal courts to bring their own independent judgment to bear" in habeas cases.<sup>55</sup> Citing no less an authority than *Marbury v. Madison*,<sup>56</sup> President Clinton wrote that he expected the courts to construe AEDPA to avoid the constitutional problems that would accompany a law purporting to "preclude the Federal courts from making an independent determination about 'what the law is.'"<sup>57</sup> Thus, President Clinton implied that the "as determined by the Supreme Court" provision of AEDPA would be harmonized with prior habeas practice, and would work no significant change on federal habeas corpus.

#### *A. AEDPA and the End of "Dialectical Federalism"*

President Clinton's signing statement has been dismissed as nothing more than "lip service to meaningful federal court review of state court convictions."<sup>58</sup> Nonetheless, the constitutional argument (the substantive merits of which are beyond the scope of this Article)

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54. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630 (Apr. 24, 1996) [hereinafter Signing Statement].

55. *Id.* at 631.

56. 5 U.S. (1 Cranch) 137 (1803).

57. Signing Statement, *supra* note 54, at 631.

58. Blume, *supra* note 41, at 259. Professor Blume, like Professors Tushnet and Yackle, advances the argument that AEDPA did not enact sweeping changes, as the Supreme Court "had already significantly curtailed the writ of habeas corpus" through judicial decisions. *Id.* at 262. *Cf. Ides, supra* note 3, at 684 ("This focus on Supreme Court precedent can be seen as a major revision of the law of habeas. It effectively reins in circuit courts that may have a proclivity to expand the rights of habeas petitioners and leaves the development of the law in this context solely in the hands of the Supreme Court. Experimentation by the lower courts is, in essence, forbidden."); Brief for Marvin E. Frankel et al., as Amici Curiae Supporting Petitioner at 25, *Williams v. Taylor*, 529 U.S. 362 (2000) (No. 98-8384) ("The 'clearly established by Federal law, as determined by the Supreme Court' clause of 28 U.S.C. § 2254(d)(1) works a substantial change from previous law ....").

has been advanced in litigation<sup>59</sup> and by commentators,<sup>60</sup> and remains to be confronted directly by the Supreme Court.<sup>61</sup> The Court has construed the “as determined by the Supreme Court” provision of AEDPA—but not in a manner that suggests receptiveness to the constitutional concerns to which President Clinton alluded.<sup>62</sup>

In *Williams v. Taylor*, all members of the Court agreed that “clearly established Federal law” under AEDPA includes *only* decisions of the Supreme Court.<sup>63</sup> In this respect, all concurred, AEDPA goes further than prior Supreme Court non-retroactivity precedent in *Teague*.<sup>64</sup> Under this interpretation, AEDPA is more

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59. See *Crater v. Galaza*, 508 F.3d 1261, 1261-62 (9th Cir. 2007) (Reinhardt, J., dissenting from denial of rehearing en banc); *Irons v. Carey*, 479 F.3d 658, 667-68 (9th Cir. 2007) (Noonan, J., concurring); *Foley v. Parker*, 481 F.3d 380, 399 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part); *Davis v. Straub*, 430 F.3d 281, 296-98 (6th Cir. 2005) (Merritt, J., dissenting); *Lindh v. Murphy*, 96 F.3d 856, 869-70 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

60. See, e.g., *Liebman & Ryan*, *supra* note 2, at 868-84 (arguing that interpretations of § 2254(d)(1) by the Fifth, Seventh, and Eleventh Circuits were unconstitutional).

61. Although the Court has declined to grant certiorari to decide the constitutionality of the “clearly established federal law” clause, see, e.g., *Green v. French*, 143 F.3d 865, 874-75 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999) (rejecting Article III challenge to § 2254(d)(1)), the most that can be said is that the Court “probably” deems the clause to be constitutional. *Irons v. Carey*, 479 F.3d 658, 671 (9th Cir. 2007) (Fernandez, J., concurring). Indeed, many questions about AEDPA’s provisions remain unresolved over a decade after its passage. See *Marceau*, *supra* note 3, at 387 (“[A]lthough AEDPA is now over a decade old, courts, commentators, and practitioners all continue to struggle to make sense of the Act’s key provisions dealing with questions of fact in federal habeas proceedings.”).

62. See *supra* text accompanying notes 54-57.

63. 529 U.S. 362, 381 (2000). Compare *id.*, with *id.* at 412-13 (O’Connor, J., concurring in part). Amici Marvin E. Frankel, James K. Logan, Lawrence W. Pierce, George C. Pratt, and Harold R. Tyler (retired Article III judges) urged the Court to refrain from interpreting the “as determined by the Supreme Court” clause of § 2254(d)(1) to avoid constitutional questions not squarely presented. Brief for the Petitioner, *supra* note 58, at 25. The Court did not refrain from interpreting the clause, but neither did the Court explicitly address its constitutionality.

64. 489 U.S. 288, 310 (1989) (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”). Prior to AEDPA’s enactment, some commentators warned that *Teague* itself would “largely eliminate[] habeas corpus as a mechanism for the development of federal law.” YACKLE, *supra* note 39, at 87; see also James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 575 (1990-1991) (criticizing the *Teague* plurality’s suggestion that retroactivity question should be resolved before the merits on the grounds that “the plurality approach would forbid lower federal judges from interpreting the United States Constitution in habeas corpus cases and would relegate those judges to the nearly ministerial task of putting into operation decisions that

than a mere codification of judge-made rules (as some have argued)<sup>65</sup>—it is a radical extension of Supreme Court habeas doctrine.<sup>66</sup> There appears to be little room left for lower federal courts to “mak[e] an independent determination about ‘what the law is,’” as President Clinton had suggested.<sup>67</sup>

This is particularly so given Justice O'Connor's gloss on the “as determined by the Supreme Court” provision.<sup>68</sup> “That statutory phrase refers to the holdings,” Justice O'Connor wrote, “as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.”<sup>69</sup>

Although Justice O'Connor was writing for a bare 5-4 majority in *Williams*, it appears her formulation is now settled law.<sup>70</sup> Concurring in *Carey v. Musladin*,<sup>71</sup> Justice Stevens was alone in criticizing the notion that “clearly established Federal law” is restricted to Supreme Court holdings, excluding dicta.<sup>72</sup> He described this

the Supreme Court renders on direct review”). Section 2254(d)(1) realizes these fears. It not only codifies but extends *Teague*, explicitly restricting “clearly established Federal law” to decisions of the Supreme Court. 28 U.S.C. § 2254(d)(1) (2000).

65. A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 23 (2002) (“*Williams* stands for the proposition that AEDPA codified the antiretroactivity principle of *Teague*.”); Tushnet & Yackle, *supra* note 40, at 42 (“Specifically, we think courts will read this crucial new provision essentially to codify the *Teague* doctrine as articulated by Justice O'Connor.”). But see Horn v. Banks, 536 U.S. 266, 271 (2002) (per curiam) (describing the analyses under *Teague* and § 2254(d)(1) as “distinct,” insofar as the *Teague* retroactivity test must be conducted as a “threshold” analysis before the AEDPA standard of review is applied).

66. See HERTZ & LIEBMAN, *supra* note 48, at 1580 § 32.3 (stating that “section 2254(d)(1) establishes a strict choice-of-law rule that is analogous to, but considerably stricter than, the rule of *Teague v. Lane*”).

67. Signing Statement, *supra* note 54, at 631; see *supra* notes 54-57 and accompanying text. See generally Liebman & Ryan, *supra* note 2, at 767-68 (discussing four ways in which AEDPA “accords more respect to state court finality than did *Teague*”).

68. 28 U.S.C. § 2254(d)(1).

69. *Williams*, 529 U.S. at 412 (O'Connor, J., concurring in split majority opinion).

70. It is beyond the scope of this Article to determine how faithful the Court has been to Justice O'Connor's formulation. In *Panetti v. Quarterman*, a 5-4 majority of the Court found “clearly established Federal law” in Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). 127 S. Ct. 2842, 2855-56 (2007). The four dissenting Justices found this “tenuous.” *Id.* at 2867 n.5 (Thomas, J., dissenting). Furthermore, one might question whether distilling the “gross disproportionality principle” from the Court's prior holdings—as the Court did in confronting an Eighth Amendment challenge to California's “three-strikes” law in *Lockyer v. Andrade*, 538 U.S. 63 (2003)—was a reading of only the “holdings” as opposed to “dicta” of prior cases.

71. 127 S. Ct. 649 (2006).

72. *Id.* at 655-56 (Stevens, J., concurring).

formulation as “Justice O’Connor’s dictum about dicta,”<sup>73</sup> and argued that restricting “clearly established Federal law as determined by the Supreme Court” to the Court’s holdings alone deprived lower courts of guidance. “Virtually every one of the Court’s opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases.”<sup>74</sup> Justice Stevens wrote that it was wrong to encourage state courts to devalue the Supreme Court’s guidance.<sup>75</sup> He concluded, “[t]he text of AEDPA itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden’s side of the scales.”<sup>76</sup>

Certainly, Justice Stevens is right to say that the “as determined by the Supreme Court” provision, construed to mean “holdings” as opposed to “dicta,” sets a high bar. For a state court’s opinion to merit deference under AEDPA, it need not cite—nor even be aware of—Supreme Court precedents, so long as “neither the reasoning nor the result of the state-court decision contradicts them.”<sup>77</sup> The presence of a circuit split may reflect a “lack of guidance” by the Supreme Court,<sup>78</sup> and reinforce the conclusion that federal law is not “clearly established.”<sup>79</sup>

*Carey v. Musladin*, a case from the Court’s October 2006 Term, illustrates the impact of the provision.<sup>80</sup> *Musladin* involved the issue of whether the presence in the courtroom of spectators wearing buttons with pictures of a murder victim deprived the defendant of a fair trial.<sup>81</sup> Although Supreme Court precedent established that courtroom practices might give rise to “inherent prejudice,” the Court had applied this test only in cases involving state-sponsored conduct, not in cases involving “private-actor courtroom conduct.”<sup>82</sup>

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73. *Id.* at 655.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Early v. Packer*, 537 U.S. 3, 8 (2003) (per curiam); see also *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam).

78. *Musladin*, 127 S. Ct. at 654 (majority opinion).

79. *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam).

80. 127 S. Ct. at 654.

81. *Id.* at 651-52.

82. *Id.* at 653-54.



This factual variance spelled doom for *Musladin*'s chance of obtaining habeas relief.<sup>83</sup> "Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," the Court wrote, "it cannot be said that the state court unreasonably applied clearly established Federal law" in denying relief.<sup>84</sup> The Court's opinion concluded only that there was no "clearly established Federal law" about the impact of spectator conduct in the courtroom, and contributed nothing to the development of the constitutional doctrine at stake.

The Court's analysis in *Musladin* highlights the paradoxical nature of review of federal constitutional questions under AEDPA.<sup>85</sup> In deciding that the state court's ruling was not "contrary to or an unreasonable application of clearly established federal law," the Court pointed to the fact that the U.S. Circuit Courts of Appeal were split on the proper standard for judging spectator conduct.<sup>86</sup> The presence of a circuit split, the *Musladin* majority reasoned, supported its conclusion that the law in this area was not "clearly established":<sup>87</sup> if there were governing Supreme Court precedents on

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83. Padraic Foran has written about *Musladin*, arguing that "*Musladin* serves to underline the AEDPA's gnawing premise that in novel fact patterns even the most shocking injustice will never be federally resolved." Foran, *supra* note 4, at 606-07. Foran also makes the good point that certain constitutional violations that would qualify for retroactive application of "watershed" rules under the Supreme Court's decision in *Teague v. Lane*, 498 U.S. 288 (1989), would not qualify for relief under § 2254(d)(1)—"no matter how unfair the conviction"—if Supreme Court case law was not "contrary to federal law at the time." *Id.* at 612.

84. *Musladin*, 127 S. Ct. at 654 (quotation omitted).

85. After *Musladin*, the Court granted cert in several cases, vacated the judgments below, and remanded for consideration in light of its *Musladin* decision. See *Hudson v. Spisak*, 128 S. Ct. 373 (2007) (claimed Eighth Amendment violation resulting from jury instructions regarding capital sentencing verdicts); *Knowles v. Mirzayance*, 127 S. Ct. 1247 (2007) (claim of ineffective assistance of counsel arising from withdrawal of insanity defense on morning of trial); *Patrick v. Smith*, 127 S. Ct. 2126 (2007) (claim of insufficiency of the evidence in shaken-baby case based on expert testimony); *Miller v. Rodriguez*, 127 S. Ct. 1119 (2007) (claim of denial of right to public trial stemming from exclusion of defendant's family members from courtroom); *Schmidt v. Van Patten*, 127 S. Ct. 1120 (2007) (claim of denial of right to counsel by virtue of counsel's appearance telephonically rather than in person). Two of those cases have returned to the Supreme Court's docket. *Wright v. Van Patten*, 128 S. Ct. 743 (2008); *Knowles v. Mirzayance*, 128 S. Ct. 2996 (2008) (granting certiorari to consider, *inter alia*, whether the Ninth Circuit exceed its authority by granting habeas relief "despite the absence of a Supreme Court decision addressing the point"); see also *infra* note 92 (discussing *Wright v. Van Patten*).

86. *Musladin*, 127 S. Ct. at 654.

87. *Id.* We do not mean to suggest that *Musladin* conclusively determined that the

point, there would be no room for disagreement. When occurring outside of the AEDPA context, the presence of a jurisdictional split increases the likelihood that the Court will grant certiorari and resolve the question,<sup>88</sup> but in § 2254 federal habeas cases, a jurisdictional split means the Supreme Court will not reach the merits.

As construed in *Musladin*, AEDPA's "as determined by the Supreme Court" provision clearly sets the final nail in the coffin of the "dialectical federalism" described by Cover and Aleinikoff. If lower federal courts are instructed to measure the state-court judgment at issue against only the holdings of the Supreme Court, and are not permitted to have a role in amplifying Supreme Court doctrine, state and federal courts are no longer "required both to speak and listen as equals,"<sup>89</sup> or to attend to one another's views with "mutual respect and awareness."<sup>90</sup> The conversation is now one-sided. Federal courts must defer to state courts' resolution of federal constitutional issues in state prisoners' federal habeas cases,<sup>91</sup> unless the state court determination is clearly out of bounds under the terms delineated by AEDPA.<sup>92</sup>

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presence of a circuit split necessarily means that the law is not "clearly established" for all purposes and in all circumstances. Indeed, we do not mean to suggest that there is no room for further litigation about the exact parameters of AEDPA. Our discussion in this Article is in many ways premised on a "worst-case scenario" of AEDPA interpretation.

88. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 407 (2004) ("[E]ven allegations of a conflict between lower court decisions, where actual conflict is absent, increase the likelihood that the Court will grant certiorari.").

89. Cover & Aleinikoff, *supra* note 13, at 1036.

90. *Id.* at 1048.

91. Professor Yackle has written that the true purpose of § 2254(d) "may be only to remind inferior federal courts that state courts are their co-equals in a single system, that state courts do not answer to federal district and circuit courts, and that both state and inferior federal courts do answer only to the Supreme Court." YACKLE, *supra* note 39, at 108. While it is true that both state and federal courts are sibling courts under AEDPA, they are now parallel tracks that are not forced to engage in individual prisoners' cases—not the system of "redundancy" that Cover and Aleinikoff described. Cover & Aleinikoff, *supra* note 13, at 1042.

92. For example, in *Wright v. Van Patten*, the Supreme Court applied *Musladin* to reverse the Seventh Circuit, concluding the state court's determination that a defendant's federal constitutional rights were not violated when his attorney appeared by speaker phone at the plea hearing was not "contrary to, or an unreasonable application of, clearly established Federal law." 128 S. Ct. 743, 746 (2008) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)). Concurring in the judgment, Justice Stevens wrote, "I emphasize that today's opinion does not say that the state courts' interpretation of *Cronic* was correct, or that we would have

A lower court decision in the aftermath of *Musladin* dramatizes this lack of reciprocal comity. Emboldened by the Supreme Court's pronouncements in *Musladin*, the Washington Supreme Court dismissed Ninth Circuit case law as "neither controlling *nor persuasive*."<sup>93</sup> "The Washington State Supreme Court has the same duty *and authority* as a federal circuit court to apply the United States Constitution and United States Supreme Court opinions in criminal matters," it wrote.<sup>94</sup> Thus, AEDPA allows "state appellate courts to determine and follow their own constitutional precedent" where no clear rule has been established by Supreme Court holdings,<sup>95</sup> and to dismiss lower federal courts' decisions as irrelevant.<sup>96</sup>

### *B. The Future of Doctrinal Development After AEDPA*

AEDPA also freezes the development of doctrine by forbidding lower courts from relying on and developing Supreme Court teaching. It is no longer permissible, as Cover and Aleinikoff described in 1977, 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."<sup>97</sup> The lower courts are not permitted to work forward from the Supreme Court's general pronouncements of constitutional principle—at least not in the vehicle of federal habeas.<sup>98</sup>

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accepted that reading if the case had come to us on direct review rather than by way of 28 U.S.C. § 2254." 128 S. Ct. at 748 (Stevens, J., concurring).

93. *State v. Lord*, 165 P.3d 1251, 1257 (Wash. 2007) (emphasis added).

94. *Id.* (emphasis added).

95. *Id.*; see also *State v. White*, 129 P.3d 1107, 1109 n.4 (Haw. 2006) (continuing to rely on prior Hawaii Supreme Court precedent although federal district court's grant of habeas relief had been affirmed by the Ninth Circuit on the grounds that the Hawaii case was "contrary to, and involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court").

96. Of course, lower federal court opinions in § 2254 cases were never binding precedent for state courts in subsequent cases. But prior to AEDPA, state courts would have wanted to study federal opinions to reduce the likelihood that a conviction would be reversed in federal habeas proceedings. After AEDPA, state courts can now disregard lower federal courts' interpretation of federal law with impunity. In this way, AEDPA has conclusively ruptured the dialogue between state and federal courts described by Cover and Aleinikoff. Cover & Aleinikoff, *supra* note 13, at 1044.

97. Cover & Aleinikoff, *supra* note 13, at 1065.

98. In 2001, Professor Adam Steinman, in an article advocating that federal courts accord state courts "opinion deference" rather than "result deference" under § 2254(d)(1), identified

Federal judges have recognized this doctrinal stall.<sup>99</sup> In an early articulation of the constitutional arguments against § 2254(d)(1), Judge Kenneth F. Ripple of the Seventh Circuit expressed the argument in terms which explicitly emphasized the role of the lower federal courts in developing constitutional doctrine. "The relationship and interreaction of the various levels of the judiciary in molding constitutional doctrine is the product of a carefully crafted balance of power between the judiciary and the legislative branch," he wrote.<sup>100</sup> And while "Congress certainly can influence the development of the constitutional doctrine," Judge Ripple allowed, only the Supreme Court may "determine[] the degree to which the lower courts ought to be permitted to engage in constitutional doctrinal development."<sup>101</sup> Judge John T. Noonan, Jr. of the Ninth Circuit similarly has written that under AEDPA, "[t]he development of doctrine is despised."<sup>102</sup> Two judges of the First Circuit recently noted that "[w]ith the congressionally dictated reliance on Supreme Court precedent, [the] large body of constitutional law developed by the lower federal courts becomes largely irrelevant."<sup>103</sup>

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as a "remaining ... thorny" issue the question of whether district courts should address state prisoners' constitutional claims before considering whether § 2254(d)(1) permits relief. Steinman, *supra* note 3, at 1535-36. Also invoking Cover and Aleinikoff's concept of "dialogue," he urged that district courts first consider the merits of the claim and then whether AEDPA allows relief. *Id.* ("[I]f federal habeas courts routinely uphold state court convictions because they are supported by reasonable state court opinions, without ever addressing the legal issues independently, then federal habeas courts will have no part in the 'dialogue' over federal rights."); see also Ides, *supra* note 3, at 684 (arguing that under § 2254(d)(1) "[e]xperimentation by the lower courts is, in essence, forbidden").

99. Of course, not all members of the judiciary are concerned about this phenomenon. Some see AEDPA's restrictions as a convenient way to dispose of habeas cases. See Kovarsky, *supra* note 3, at 507 ("'Comity, finality, and federalism' is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.").

100. Lindh v. Murphy, 96 F.3d 856, 886 (7th Cir. 1996) (Ripple, J., dissenting).

101. *Id.* at 887.

102. Irons v. Carey, 479 F.3d 658, 667 (9th Cir. 2007) (Noonan, J., concurring) ("In our system of law where precedent prevails and is developed, AEDPA denies the judge the use of circuit precedent, [and] denies the development of Supreme Court and circuit precedent .... The development of doctrine is despised. That despisal is a direct legislative interference in the independence of the judiciary."); see also Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 90-93 (2007) (describing how AEDPA "thwarts the development of constitutional law").

103. Evans v. Thompson, 524 F.3d 1, 4 (1st Cir. 2008) (Lipez & Torruella, JJ., dissenting from the denial of rehearing en banc).

*Lockyer v. Andrade*<sup>104</sup> provides an example of how the development of doctrine is slowed.<sup>105</sup> In *Lockyer*, the Supreme Court disposed of an Eighth Amendment challenge to California's "three strikes" law. The Court examined the "thicket of [its] Eighth Amendment jurisprudence" and identified one principle that emerged as "clearly established"—"[a] gross disproportionality principle is applicable to sentences for terms of years."<sup>106</sup> However, the Court concluded that its precedent "exhibit[ed] a lack of clarity" with respect to this "gross disproportionality principle," such that the "precise contours" of that principle "are unclear."<sup>107</sup>

Before AEDPA, the Supreme Court's pronouncement of broad constitutional principles, like the "gross disproportionality principle" described in *Lockyer*, could be articulated on a case-by-case basis by the lower courts—state and federal—engaging in the "dialogue" described by Cover and Aleinikoff. AEDPA forbids the federal courts from engaging in that dialogue. As long as the state courts do not stray far from Supreme Court precedent, AEDPA prevents the federal courts from interfering. In *Lockyer*, the Court held that the state court did not unreasonably apply "clearly established Federal law."<sup>108</sup> But the Court's decision—like the decision in *Carey v. Musladin*<sup>109</sup>—contributed nothing to development of the doctrine at issue, despite the admitted "lack of clarity" present.<sup>110</sup> The Court concluded only by saying, "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case."<sup>111</sup>

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104. 538 U.S. 63 (2003).

105. See Bloom, *supra* note 3, at 535 (arguing that *Lockyer v. Andrade* "excuses state courts from the often onerous task of making the right doctrinal choice").

106. 538 U.S. at 72.

107. *Id.* at 72-73.

108. *Id.* at 77.

109. See *supra* notes 80-84 and accompanying text.

110. See Ides, *supra* note 3, at 747 (criticizing the *Andrade* Court for "compact[ing] the unreasonable-application standard into a rule that seems more like an abdication than it does like a respectful deference for proper state-court judgments").

111. 538 U.S. at 76. Indeed even if some doctrinal development could be squeezed from the Court's discussion of the "gross disproportionality principle" in *Lockyer*, it would be dicta and hence unavailable for use by the lower federal courts in habeas cases. See *supra* notes 68-76 and accompanying text. Perhaps to remedy this, the Court simultaneously issued a decision in *Ewing v. California*, 538 U.S. 11 (2003), in which a similar Eighth Amendment challenge to application of California's three-strikes law came to the Court on a petition for writ of certiorari following direct appeal. Because of this procedural posture, *Ewing* presented an

The type of doctrine likely to founder on AEDPA's shoals—and thus the type of doctrine most in need of development through petitions for certiorari from state court decisions—is one in which the Supreme Court's opinions outline a rule which is very generally stated, or has significant gaps. Two case studies of doctrinal development further illustrate this dynamic.

The first example is in the area of ineffective assistance of counsel, in which the pre- and post-AEDPA stories vary dramatically. In 1977, Cover and Aleinikoff described how the Supreme Court's dictum in *McMann v. Richardson*<sup>112</sup>—that defendants are due advice “within the range of competence demanded of attorneys in criminal cases”<sup>113</sup>—produced a rich variety of lower court opinions attempting to implement this constitutional principle.<sup>114</sup> Cover and Aleinikoff concluded that this debate among lower courts “inform[ed] the Supreme Court” by allowing “state and lower federal courts to evaluate and discuss experiences ....”<sup>115</sup> As a result, they concluded, it would be “far easier ... than it would have been ten years ago” for the Court to reject the then-prevailing and less-protective “farce and mockery” standard for judging ineffective assistance of counsel claims.<sup>116</sup> Indeed, seven years after their article, the dialogical development Cover and Aleinikoff described came to fruition in the holding of *Strickland v. Washington*<sup>117</sup>—that habeas relief is warranted if counsel is not reasonably effective.

The post-AEDPA story of ineffective assistance of counsel is not as dynamic. In a trilogy of post-AEDPA habeas cases in which the Court has held trial counsel to be ineffective—*Williams v. Taylor*,<sup>118</sup> *Wiggins v. Smith*,<sup>119</sup> and *Rompilla v. Beard*<sup>120</sup>—the Court has disavowed any claim to be breaking new ground.<sup>121</sup> In each of these

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opportunity for the Court to develop doctrine, unfettered by the strictures of AEDPA.

112. 397 U.S. 759 (1970).

113. *Id.* at 771.

114. Cover & Aleinikoff, *supra* note 13, at 1060-64.

115. *Id.* at 1065.

116. *Id.*

117. 466 U.S. 668 (1984).

118. 529 U.S. 362 (2000).

119. 539 U.S. 510 (2003).

120. 545 U.S. 374 (2005).

121. *Williams*, 529 U.S. at 390 (“[T]he merits of [petitioner’s] claim are squarely governed by our holding in *Strickland v. Washington* ....”); *Wiggins*, 539 U.S. at 522 (*Williams* “made no new law”); *Rompilla*, 545 U.S. at 393-94 (O’Connor, J., concurring) (“[T]oday’s decision

cases, the Court described the result as dictated by its 1984 *Strickland* decision. This illustrates the notion articulated by Judge Noonan that, under the AEDPA regime, “[t]he development of doctrine is despised.”<sup>122</sup> The formal categorization of the doctrine remains static and rigid. Doctrinal developments, if they occur at all,<sup>123</sup> occur *sub rosa*—shoehorned into existing doctrinal boxes.

The possibility of *sub rosa* or surreptitious developments cannot fully overcome AEDPA’s impediments to doctrinal development. First, abrupt shifts in doctrine—as have been seen, for example, in landmark decisions such as *Crawford v. Washington*<sup>124</sup> and *Atkins v. Virginia*<sup>125</sup>—are simply not possible in habeas corpus cases after AEDPA.<sup>126</sup> Second, even gradual migratory shifts in doctrine are

simply applies our longstanding case-by-case approach to determining whether an attorney’s performance was unconstitutionally deficient under *Strickland v. Washington* ....”). While jurists may disagree as to whether this trilogy of cases broke new ground or not, the question is beyond the scope of our Article. See *Wiggins*, 539 U.S. at 542-43 (Scalia, J., dissenting) (“The Court is mistaken to assert that [Williams] ‘made no new law’ ....”); *Rompilla*, 545 U.S. at 397 (Kennedy, J., dissenting) (describing majority opinion as a “distortion of *Strickland*”).

122. *Irons v. Carey*, 479 F.3d 658, 667-68 (9th Cir. 2007) (Noonan, J., concurring).

123. See *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973) (DeCoster I), *aff’d en banc*, 624 F.2d 196 (D.C. Cir. 1976) (DeCoster III); see also *id.* at 276 (Bazelon, J., dissenting). See generally John H. Blume & Stacey D. Neumann, “It’s Like Déjà Vu All Over Again,” *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 07-019, 2007), available at <http://ssrn.com/abstract=1024307> (discussing the doctrinal development represented by the *Williams*, *Wiggins*, and *Rompilla* decisions); *id.* at 27 (concluding these three decisions mark a doctrinal “shift towards the effective assistance of counsel standard once hailed by Judge Bazelon” of the D.C. Circuit).

124. 541 U.S. 36 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)).

125. 536 U.S. 304 (2002) (declaring execution of the mentally retarded violates the Eighth Amendment).

126. That the *Atkins* decision banning execution of the mentally retarded would not have been possible after AEDPA underscores the differences between § 2254(d)(1) and the *Teague* analysis. Not only does AEDPA go beyond *Teague* by restricting the sources of “clearly established” law to Supreme Court precedent, see *supra* note 63 and accompanying text, but AEDPA also apparently fails to incorporate the *Teague* exceptions to non-retroactivity. See Liebman & Ryan, *supra* note 64, at 867-68. On this reading, the Court’s pre-AEDPA indication that a constitutional rule prohibiting execution of the mentally retarded (as was finally realized in *Atkins*) would fall within the *Teague* exception for rules declaring “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (quoting *Teague*, 489 U.S. at 307), is inconsequential after AEDPA.

At least one circuit has held that AEDPA incorporates the *Teague* exceptions. *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005). Whether this holding—in conflict with decisions from the Fourth and Seventh Circuits—was erroneous was among the questions presented to the

impeded. Ordinarily, each constitutional decision proceeds from the previous decision addressing the issue.<sup>127</sup> Under AEDPA—as is seen in the *Williams-Wiggins-Rompilla* line of cases—each new decision proceeds not from the previous decision, but from the bedrock pre-AEDPA decision in *Strickland v. Washington*.<sup>128</sup> Even if these decisions embody *sub rosa* or surreptitious development,<sup>129</sup> it seems unlikely the doctrine will migrate as far as it might if untethered from *Strickland*.<sup>130</sup>

A second example of AEDPA's freezing effect involves two Supreme Court decisions involving claims of improper influence on the jury—*Remmer v. United States*<sup>131</sup> and *Smith v. Phillips*.<sup>132</sup> *Remmer* and *Smith* are in sufficient tension that the general proposition to be drawn from them remains a matter of lively debate.<sup>133</sup> In *Remmer*, the Court wrote: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ...."<sup>134</sup> In *Smith*, the Court addressed a claim of improper influence stemming from a juror's pending application for employment as an investigator in the prosecutor's office, but found that no presumption of bias was appropriate.<sup>135</sup>

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Supreme Court on certiorari review in *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). See Petition for Writ of Certiorari, *Whorton*, 127 S. Ct. 1173 (No. 05-595), at i, 17 (citing *Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir. 1999); *Ramdass v. Angelone*, 187 F.3d 396, 406-07 (4th Cir. 1999)). The Court, however, did not reach the issue.

127. See *supra* notes 112-17 and accompanying text.

128. See *supra* notes 117-23 and accompanying text.

129. See *Blume & Neumann*, *supra* note 123, at 27-29.

130. If the *Strickland v. Washington* decision is imagined as an apple tree at the north end of a large field, *Williams v. Taylor* was the first post-AEDPA tree to grow in the field. As the offspring of *Strickland*, the *Williams* tree of necessity grew close to the *Strickland* tree. Without AEDPA, *Williams* would have been permitted to bear its own fruit, and the decisions in *Wiggins* and *Rompilla* might have shown a gradual migration toward the south end of the field. AEDPA effectively requires all new trees to be seeded by *Strickland*, and prevents the new trees from bearing fruit of their own. Cf. J.B. Ruhl, *The Fitness of Law: Using Complexity Theory To Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1448-56 (1996) (describing the evolutionary "walk" of nuisance law around its "fitness landscape").

131. 347 U.S. 227 (1954).

132. 455 U.S. 209 (1982).

133. See *infra* note 136 and accompanying text.

134. *Remmer*, 347 U.S. at 229.

135. *Smith*, 455 U.S. at 215 (holding that "the remedy for allegations of juror partiality is



Seeking guidance from these decisions, the lower federal courts have divided as to whether and when to accord a presumption of bias to a claim of improper influence. While some courts extend the *Remmer* presumption generally to all claims of improper jury influence, others limit the presumption to claims involving third-party contact with jurors, and yet others have limited the presumption even in such cases.<sup>136</sup> Before AEDPA, such confusion in the lower courts would have contributed to doctrinal development and increased the likelihood of an eventual grant of certiorari by the Court. After AEDPA, however, federal habeas courts simply deny petitioners relief, saying that the law is not clearly established.<sup>137</sup> What is most striking about this example, however, is that these habeas petitioners overwhelmingly failed to pursue certiorari from state court proceedings when they had the opportunity—even in capital cases.<sup>138</sup> Collectively, this failure means the Court was not

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a hearing in which the defendant has the opportunity to prove actual bias”).

136. See *Tunstall v. Hopkins*, 306 F.3d 601, 610-11 (8th Cir. 2002) (“Several circuits, including ours, have extended the *Remmer* presumption to claims alleging juror exposure to extraneous information, including claims of mid-trial media exposure .... However, other circuits have confined the application of *Remmer* to cases alleging third-party contact with jurors.” (citations omitted)); *Parker v. Head*, 244 F.3d 831, 839 n.6 (11th Cir. 2001) (discussing cases holding “at least in part, that *Phillips* abandoned *Remmer*’s presumption of prejudice”).

137. See, e.g., *Billings v. Polk*, 441 F.3d 238, 248-49 (4th Cir. 2006) (finding that a state court could reasonably conclude *Remmer* presumption is limited to cases involving third-party contact with jurors); *Harnden v. Rowland*, No. 04-16850, 2006 WL 1477762, at \*1 (9th Cir. May 26, 2006) (mem.) (“[T]he Supreme Court has not clearly extended the *Remmer* presumption of prejudice beyond jury tampering cases.”); *Sims v. Rowland*, 414 F.3d 1148, 1155 (9th Cir. 2005) (citing *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003) (finding no habeas relief available for jury bias allegations under AEDPA given that *Remmer* and *Smith* provide a “flexible rule”)); *Tunstall*, 306 F.3d at 611 (“When the federal circuits disagree on the application of *Remmer* regarding any presumption of prejudice, it is difficult to say the Iowa court’s decision is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court.”). The rare decisions granting habeas relief on a *Remmer/Smith* issue circumvent AEDPA by relying on circuit precedent. See *Brooks v. Dretke*, 444 F.3d 328, 331 (5th Cir. 2006) (holding under Fifth Circuit case law the question whether a *Remmer* presumption will apply is governed by whether the case is among “the genre of cases Justice O’Connor pointed to in her concurring opinion in *Phillips*”); *Oswald v. Bertrand*, 374 F.3d 475, 480 (7th Cir. 2004) (purporting to apply AEDPA yet using circuit case law to “distill the principle that adequacy” of the trial court’s inquiry into alleged improper jury influence “is a function of the probability of bias; the greater that probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled”); *id.* at 487-88 (Evans, J., dissenting) (lamenting majority’s mere “lip service to the commands of AEDPA”).

138. See *Brooks*, 444 F.3d at 328 (capital case wherein petitioner failed to seek certiorari from state postconviction proceedings where claim was first raised); *Tracey*, 341 F.3d at 1037

given the opportunity to develop its constitutional doctrine in this area. The need for practitioners to adapt their certiorari-seeking practices to the realities of AEDPA is discussed more fully in Sections III.B and IV below.

Some federal courts have determined to soldier on in expounding the Constitution despite AEDPA. The Second Circuit has approved an analysis in habeas petitions similar to that espoused by the Supreme Court for addressing qualified immunity questions in civil rights litigation.<sup>139</sup> In habeas cases where doctrinal explication is appropriate, the Second Circuit will first address whether the state court erred, and second, whether the error was an unreasonable application of Supreme Court precedent.<sup>140</sup> Thus, although the

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(petitioner failed to seek certiorari from state court judgments); *Tunstall*, 306 F.3d at 601 (petitioner, serving life sentence, failed to seek certiorari from direct appeal and proceeded directly to federal habeas).

139. *Kruelski v. Conn. Super. Ct.*, 316 F.3d 103 (2d Cir. 2003). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court instructed lower federal courts to first determine whether a federal constitutional violation has occurred, and then to determine whether the federal law was “clearly established” at the time of the incident so as to deprive a state actor of qualified immunity. *Id.* at 201. Deciding the questions in this order, explained the Court, allows federal constitutional law to continue to develop, even if state actors are only liable for violations of it that were clearly established at the time that they acted. *Id.* (“This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.”); see also Steinman, *supra* note 3, at 1536-37. The “order of battle” requirement of *Saucier* has been criticized as inconsistent with principles of judicial restraint. See generally *Morse v. Frederick*, 127 S. Ct. 2618, 2641-42 (2007) (Breyer, J., concurring in part and dissenting in part) (“I would end the failed *Saucier* experiment now.”). Justice Breyer may soon have the opportunity to revisit the issue. On March 24, 2008, the Supreme Court granted certiorari in a civil rights damages case, and sua sponte directed the parties to address specifically whether *Saucier* should be overruled. *Pearson v. Callahan*, 128 S. Ct. 1702 (2008). The case is set for oral argument on October 14, 2008. The petitioner, 2008 WL 2367229, as well as amici, the Solicitor General, 2008 WL 2436685, thirty-one states and the Commonwealth of Puerto Rico, 2008 WL 2445507, and the Texas Association of School Boards, 2008 WL 2367228, argue for a decision overruling or limiting *Saucier*’s “order of battle” holding. A brief for the National Association of Counties, Council of State Government, and other amici, 2008 WL 2445508, argues in support of *Saucier*’s two-step approach, noting that “[c]onstitutional principles might never be clarified if every novel claim were met with the answer that it involved no violation of clearly established right,” *id.* at \*26, and that the circuit court’s decision to consider the merits of the constitutional question before proceeding to the qualified immunity issue “reflects a sound regard for the proper development of constitutional law.” *Id.* at \*32.

140. *Kruelski*, 316 F.3d at 108.

circuit court decision is dicta and not binding on state courts, or even on lower federal courts,<sup>141</sup> “state courts faced with federal questions may want to consult” such decisions.<sup>142</sup> The Supreme Court has not approved that approach.<sup>143</sup>

For the most part, however, it seems that doctrinal development will have to originate from some source other than federal habeas corpus. State prisoners’ certiorari petitions seeking review of direct appeals and state postconviction decisions will present increasingly important opportunities for the Court to develop its criminal constitutional doctrine. The dissenters in *Lawrence v. Florida* acknowledged this point, writing that, after AEDPA, “[e]ven if rare, the importance of our review of state habeas proceedings is evident.”<sup>144</sup>

In theory, then, the “as determined by the Supreme Court” provision of AEDPA threatens to impede the development of constitutional doctrine. Our empirical work, discussed in the next section, reinforces this conclusion.

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141. *Id.* at 106-07.

142. *Id.* Compare *Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000) (adopting similar approach), with *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (rejecting approach), and *Kruelski*, 316 F.3d at 111 (2d Cir. 2003) (Sack, J., concurring) (rejecting approach). Whereas in the pre-AEDPA world described by Cover and Aleinikoff the redundant structure of habeas review forced state courts to view federal decisions with “respect and awareness,” Cover & Aleinikoff, *supra* note 13, at 1048, whether a state court chooses to “consult” federal decisions in the post-AEDPA world is completely up to the state court. See *supra* notes 93-96 and accompanying text.

143. See *supra* notes 71-88 and accompanying text (discussing *Carey v. Musladin*, 127 S. Ct. 649 (2007)); see also *supra* notes 104-11 and accompanying text (discussing *Lockyer v. Andrade*, 538 U.S. 63 (2003)). Writing in 2005, before *Musladin*, Professors Hertz and Liebman concluded that *Williams* determined that § 2254(d)(1) “require[s] careful attention not only to the ultimate judgment of the state court but also to the validity of the court’s reasoning process.” HERTZ & LIEBMAN, *supra* note 48, at 1612 § 32.3. In that same section, they wrote that “the Court’s overall pattern in applying section 2254(d)(1) thus far” demonstrates that “situations other than the exceptional one presented in [*Lockyer v. Andrade*] ... are usually best resolved by addressing the merits before deciding the section 2254(d)(1) issue.” *Id.* at 1621-22. Three years later, Padraic Foran, building on Professor Steinman’s article advocating “opinion deference,” *supra* note 3, argued that *Musladin* represents “an enshrinement of the result-deference framework that *Williams* had purportedly rejected for all the right reasons.” Foran, *supra* note 4, at 624.

144. 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting). The majority decision in *Lawrence* which prompted this dissent may further discourage cert filings from state postconviction proceedings, because it concluded that such filings do not toll the one-year statute of limitations for filing a federal habeas petition under AEDPA. *Id.* at 1081 (majority opinion).

### III. WHERE DO THE SUPREME COURT'S CASES COME FROM?

#### A. The Supreme Court's Certiorari-Granting Behavior

To better understand the practical impact of AEDPA's "as determined by the Supreme Court" provision, we examined the Court's certiorari-granting behavior by compiling a list of criminal cases<sup>145</sup> decided<sup>146</sup> over the last twelve terms, from October Term

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145. No two commentators are likely to agree on what cases are "criminal." For example, looking at two reviews of the Court's docket of criminal cases *decided* in the October 2006 Term resulting in published opinions, we see differences that typify some of the issues that arise when attempting to define what is a "criminal case."

The Annual Review of the Supreme Court's Term Criminal Cases, prepared for the American Bar Association (ABA) Criminal Justice Section, identified thirty-one "criminal law related" cases, of which twenty-five were "fully criminal." RORY LITTLE & SHARIF JACOB, ANNUAL REVIEW OF THE SUPREME COURT'S CRIMINAL CASES 2 (2007). These numbers included civil rights cases, prison cases, the challenge to the Partial-Birth Abortion Act of 2003, immigration, securities, and others arising under federal statutes with implications for criminal cases. *Id.* at 4-33. The analysis on SCOTUSblog prepared by Ben Winograd counted twenty-two criminal cases. Posting of Ben Winograd to SCOTUSblog, *By the Numbers: Criminal Cases in OT06*, [www.scotusblog.com/wp/by-the-number-criminal-cases-in-OT06/](http://www.scotusblog.com/wp/by-the-number-criminal-cases-in-OT06/) (July 9, 2007 10:55 EST). Of the 22 cases in the SCOTUSblog list, three—*Scott v. Harris*, 127 S. Ct. 1769 (2007), *Wallace v. Kato*, 127 S. Ct. 1091 (2007), and *Jones v. Bock*, 127 S. Ct. 910 (2007)—were civil rights cases brought pursuant to § 1983. Two cases—*Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007) and *Lopez v. Gonzales*, 127 S. Ct. 625 (2007)—were certiorari grants from immigration proceedings, in which the Court addressed the immigration consequences of criminal convictions.

Although issues that arise in § 1983 suits and immigration cases can have important implications for criminal law doctrine, these procedural vehicles are not the subject of our inquiry. Because our interest here is not only in the development of doctrine, but also in determining whether the criminal defense bar's certiorari-seeking behavior is out of step with the Supreme Court's certiorari-granting behavior, we defined "criminal case" somewhat narrowly, to include only those cases in which a criminal judgment was being attacked or defended. Thus, civil rights cases and immigration cases were excluded.

146. Just as people may reasonably disagree about which cases are "criminal," determining when the Supreme Court has "decided" a case is a matter of interpretation. Ultimately, we opted to include cases in which there was a per curiam opinion or summary reversal, provided that there was sufficient legal reasoning to constitute an opinion, rather than an order. We also included cases in which certiorari was dismissed as improvidently granted, or the case was dismissed as moot, provided that the memorandum decision was substantive enough to explain the reason for the dismissal.

Thus, by way of example, we included in our analysis three cases that SCOTUSblog did not (although Professor Little did), in which the Court granted cert but did not issue opinions on the merits for procedural reasons. These cases were *Burton v. Stewart*, 127 S. Ct. 793 (2007), in which the Court determined that the petitioner had failed to seek permission to file a "second or successive" petition and so did not address the merits issue; *Roper v. Weaver*, 127

(OT) 1995 through OT 2006. Recognizing it is possible to count the cases in many different ways, we initially relied on two sources to gather our historical information.<sup>147</sup> We then checked and supplemented those secondary sources by searching the Supreme Court reports for the twelve terms.

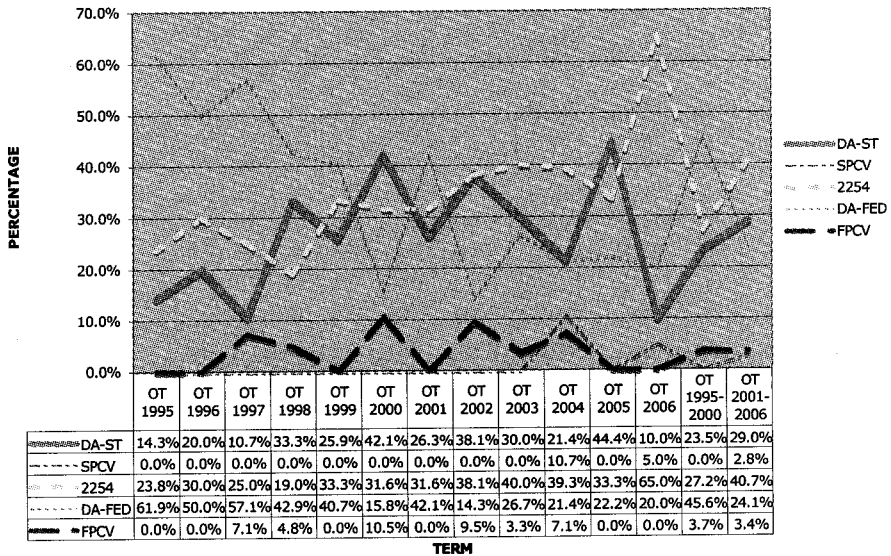
Below is a chart summarizing the “criminal certiorari grants” that we analyzed, as broken down by term and by procedural vehicle.

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S. Ct. 2022 (2007), in which the Court determined that cert was improvidently granted; and *Claiborne v. United States*, 127 S. Ct. 2245 (2007), in which the case was dismissed as moot when the petitioner died.

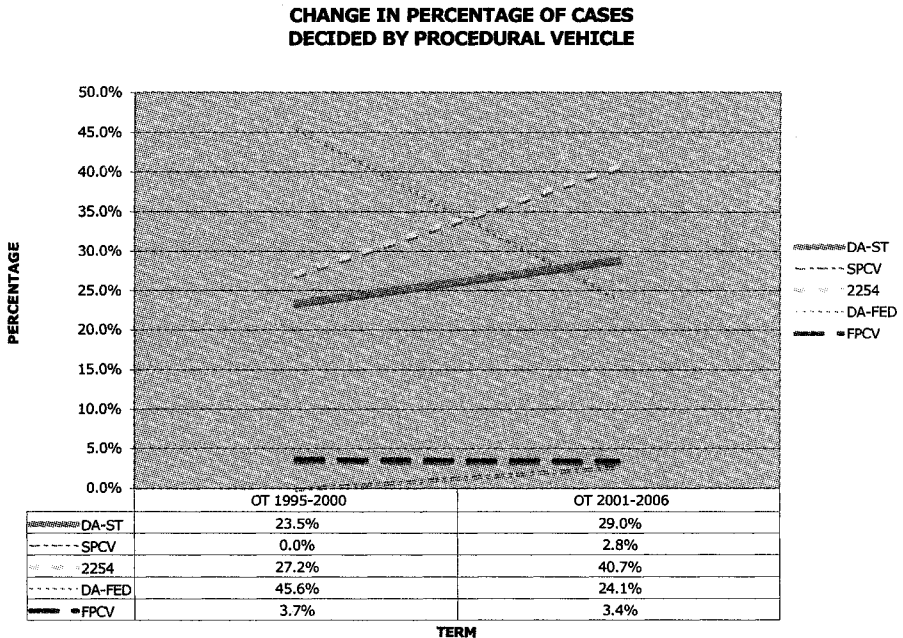
147. For the period from October Term (OT) 2002 through OT 2006, we used Westlaw’s “United States Supreme Court Actions” database, which includes a yearly review of cases decided. *E.g.*, 07-24-2007 U.S. Sup. Ct. Actions 9. In OT 2006, we included one additional case in which certiorari was granted, and the judgment of the court of appeals was vacated as moot after the defendant died. *Claiborne v. United States*, 127 S. Ct. 2245 (2007). We think inclusion of this case is appropriate, though the Court did not reach the issues presented, given our emphasis on certiorari-granting behavior of the Court. For the period from OT 1995 through OT 2001, we relied on a very useful and exhaustive series of articles written by Professor Christopher E. Smith. See Christopher E. Smith & Madhavi McCall, *Criminal Justice and the U.S. Supreme Court’s 2001-2002 Term*, 2003 MICH. ST. L. REV. 413 (2003); Christopher E. Smith & Steven B. Dow, *Criminal Justice and the 2000-2001 U.S. Supreme Court Term*, 79 U. DET. MERCY L. REV. 189 (2002); Christopher E. Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1 (2001); Christopher E. Smith, *Criminal Justice and the 1998-99 United States Supreme Court Term*, 9 WIDENER J. PUB. L. 23 (1999); Christopher E. Smith, *Criminal Justice and the 1997-98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443 (1999); Christopher E. Smith, *Criminal Justice and the 1996-97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 29 (1997); Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1 (1996).

**CHANGE IN PERCENTAGE OF CASES  
DECIDED BY PROCEDURAL VEHICLE**



DA-ST: Direct appeal of state criminal conviction  
 SPCV: State postconviction proceeding  
 2254: State prisoner's federal habeas petition  
 DA-FED: Direct appeal of federal criminal conviction  
 FPCV: Federal prisoner's postconviction proceeding

The general trends discernible from this chart are more apparent when one compares the most recent six terms cumulatively to the terms before that, as shown in the following chart:



Viewed cumulatively, it appears the Court has shifted away from certiorari grants in federal direct appeals and toward certiorari grants in federal habeas cases and, to a lesser degree, direct appeals from the state courts. Certiorari grants in federal direct appeals dropped from being the clearly dominant procedural vehicle, accounting for nearly half of the Court's criminal cert grants, to a third-place position, accounting for only a quarter of the Court's criminal docket. (Because the size of the Court's criminal docket varies from year to year,<sup>148</sup> we compared the percentages of the criminal docket represented by each procedural vehicle, rather than the absolute number of certiorari grants.) The ascendant star has

148. During the OT 1995-OT 2006 period we reviewed, the number of criminal cases decided in a given term ranged from a low of 19 (in both OT 2000 and OT 2001) to a high of 30 (in OT 2003). Cumulatively, the criminal docket was 136 cases decided in the period OT 1995-OT 2000 and 145 cases decided in the period OT 2001-OT 2006.

been federal habeas cases, expanding from a quarter of the Court's criminal docket to slightly over 40 percent. Also noteworthy is an increase in the percentage of cases granted from the direct appeal track in state court, modest in comparison to the rise in § 2254 cases, yet still enough to place such cases above federal direct appeals in the hierarchy. We believe this modest increase<sup>149</sup> in the Court's acceptance of criminal cases from the state appellate process is actually the most significant change over the last twelve terms, and is the true harbinger of the direction the Court's certiorari-granting practice is headed in the wake of AEDPA.

The Court's certiorari-granting practice appears to us consistent with the theory that the Court is increasingly turning to state court judgments for certiorari grants which will allow the Court to develop criminal constitutional doctrine. To understand how this could be true, it is necessary to consider more specifically the characteristics of each procedural vehicle. First, certiorari grants from state court judgments will nearly always present the Court with an opportunity to develop criminal constitutional doctrine, whether from the direct appellate process<sup>150</sup> or the more rare grant from the state postconviction process.<sup>151</sup>

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149. The increase accounted for eight more certiorari grants from state courts on direct review for the OT 2001-OT 2006 period than would have been expected, or 1.33 per term. While this seems a small increase, it is nonetheless an increase in certiorari grants that afford an opportunity for doctrinal development such as was seen in *Crawford v. Washington*, 541 U.S. 36 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Atkins v. Virginia*, 536 U.S. 304 (2002). Furthermore, one might expect that the rise in § 2254 certiorari grants—if attributable to litigation over the meaning of AEDPA (*see supra* note 88 and accompanying text)—will be temporary. The decline in § 2254 grants which may be on the horizon will yield even more opportunities for the Court to increase its caseload with certiorari grants in criminal cases from state courts.

150. *See, e.g.*, *Brendlin v. California*, 127 S. Ct. 2400 (2007) (passenger of vehicle has standing to bring Fourth Amendment claim for traffic stop); *Cunningham v. California*, 127 S. Ct. 856 (2007) (California sentencing scheme violated Sixth Amendment jury trial guarantee); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (whether hearsay was "testimonial" for purposes of Confrontation Clause claim); *Kansas v. Marsh*, 126 S. Ct. 2516 (2006) (Kansas death penalty statute does not violate Eighth Amendment); *Oregon v. Guzek*, 126 S. Ct. 1226 (2006) (no constitutional right to present alibi at resentencing that was inconsistent with prior conviction).

151. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (reconsidering *Stanford v. Kentucky*, 492 U.S. 361 (1989), and holding execution of defendant who was under eighteen at the time of the crime violates the Eighth Amendment and Due Process); *Florida v. Nixon*, 543 U.S. 175, 186-87 (2004) ("We granted certiorari ... to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of



Certiorari grants from federal criminal cases *may* present the Court with such opportunities, but need not. Federal criminal prosecutions certainly implicate constitutional rights, and the Court may develop criminal constitutional doctrine through review of such cases as they proceed through the appellate process.<sup>152</sup> However, the Court may also—and often does—review federal cases solely to address nonconstitutional questions of federal law, such as the application of federal rules,<sup>153</sup> interpretation of federal statutes,<sup>154</sup> interpretation or application of the United States Sentencing Guidelines,<sup>155</sup> or application of federal common law.<sup>156</sup> Often the Court has the ability to resolve federal criminal cases on nonconstitutional grounds, applying the principle of constitutional avoidance.<sup>157</sup> Thus, whether and to what extent the Court uses certiorari grants in federal criminal cases to develop constitutional doctrine seems to be in the Court's control.

Moreover, federal criminal cases may not present the same kinds of constitutional issues as state criminal cases. Because the vast

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conceding guilt in a capital trial automatically renders counsel's performance deficient, and whether counsel's effectiveness should be evaluated under *Cronic* or *Strickland*.”) (citing *United States v. Cronic*, 466 U.S. 648 (1984), and *Strickland v. Washington*, 466 U.S. 668 (1984)); *Smith v. Texas*, 543 U.S. 37 (2004) (finding that jury instructions violated Eighth Amendment by preventing jury from giving effect to mitigating evidence).

152. See, e.g., *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (holding that the denial of the Sixth Amendment right to counsel of one's choosing is complete without showing of prejudice and is not susceptible to harmless error analysis); *Sell v. United States*, 539 U.S. 166 (2003) (announcing Due Process limitations to government's ability to forcibly medicate criminal defendant to restore competency).

153. See, e.g., *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) (delineating prejudice requirement for violation of Federal Rules of Criminal Procedure Rule 11); *Old Chief v. United States*, 519 U.S. 172 (1997) (interpreting Federal Rules of Evidence Rules 401 and 403).

154. See, e.g., *Small v. United States*, 544 U.S. 385 (2005) (interpreting “convicted in any court,” as used in felon-in-possession-of-firearm statute, to exclude convictions from foreign courts); *Nguyen v. United States*, 539 U.S. 69 (2003) (allowing Chief Judge of the Northern Mariana Islands to sit by designation on the Ninth Circuit violated the designation statute).

155. See, e.g., *Salinas v. United States*, 547 U.S. 188 (2006) (holding simple possession is not “controlled substance offense” within meaning of career offender sentencing guideline); *Neal v. United States*, 516 U.S. 284 (1996) (holding that the weight of blotter paper is to be considered in calculating sentence under sentencing guideline for LSD crime).

156. See, e.g., *United States v. Jimenez Recio*, 537 U.S. 270 (2003) (holding that a conspiracy does not automatically terminate when the government defeats the conspiracy's object).

157. See, e.g., *Nguyen*, 539 U.S. at 76 n.9 (“We find it unnecessary to discuss the constitutional questions because the statutory violation is clear.”).

majority of criminal cases in the U.S. are prosecuted in state courts,<sup>158</sup> certain kinds of important federal constitutional issues may arise more frequently—or nearly exclusively—in state court criminal proceedings. For example, the paradigm shift in confrontation clause jurisprudence in *Crawford v. Washington*,<sup>159</sup> and its successor case *Davis v. Washington*,<sup>160</sup> was announced in cases arising out of local criminal proceedings from Washington. The confrontation issues presented in *Crawford* and *Davis* appeared with greater frequency and in more extreme ways in state prosecutions, particularly domestic violence cases.<sup>161</sup> Accordingly, these decisions have huge implications for domestic violence and child abuse cases in state courts,<sup>162</sup> in which certain kinds of out-of-court statements by complainants and witnesses had been previously regularly admitted.

Finally, the Court's opportunity to develop criminal constitutional doctrine through certiorari grants in federal habeas cases has diminished over time.<sup>163</sup> During the period that represents the first

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158. The Bureau of Justice Statistics reports that, in 2004, 1,079,000 adults were convicted in state courts, compared with 66,518 adults convicted in federal courts. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL SENTENCING STATISTICS, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Sept. 20, 2008). Certain kinds of prosecutions, like family violence, may be even more heavily concentrated in state and local courts. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS 2 (June 2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. The Bureau reported that "more than 207,000" family violence crimes were "recorded by police in 18 States and the District of Columbia in 2000," but that only "757 suspects [were] referred to U.S. attorneys for domestic violence offenses between 2000 and 2002 ...." *Id.* By contrast, about one-third of the 1500 defendants charged with felony assault in 11 large counties in a single month—May 2000—were charged with family violence. *Id.* Thus, the total number of federal domestic violence prosecutions over a two-year period probably equaled only a couple of months of state domestic violence prosecutions in the local courts of a few large U.S. counties.

159. 541 U.S. 36 (2004).

160. 547 U.S. 813 (2006).

161. See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1180-81 (2002) ("Many of the cases that have used dial-in testimony—statements made in 911 calls and to responding officers—have involved charges of domestic violence.").

162. See, e.g., Jeffrey L. Fisher, *What Happened—And What Is Happening—to the Confrontation Clause*, 15 J.L. & POLY 587 (2007); Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005).

163. Some kinds of federal constitutional claims by state prisoners cannot be litigated in federal habeas. Under *Stone v. Powell*, 428 U.S. 465 (1976), exclusionary claims under the Fourth Amendment generally cannot be raised by state prisoners in federal habeas

half of our empirical study, from OT 1995 through OT 2000, it remained possible for cases to arrive at the Court still unconstrained by the strictures of AEDPA. In OT 1999, for example, the Court granted certiorari in three cases in which the underlying habeas petition was filed before AEDPA's effective date, and the Court was therefore able to develop constitutional doctrine in each case.<sup>164</sup> This is not to say that the Court often availed itself of this opportunity—many of the Court's decisions arising from habeas review during this period merely administered the habeas-restricting doctrines discussed above which preceded AEDPA.<sup>165</sup> Nonetheless it was theoretically possible to accept cases to which AEDPA would not apply and to develop doctrine through those cases. In more recent terms, however, the availability of cases to which AEDPA does not apply is limited.<sup>166</sup>

Thus, the increase in certiorari grants in § 2254 cases does not represent the Court's attempt to develop constitutional doctrine. Instead, it appears that the spate of federal habeas grants represents a continued effort to administer habeas-limiting doctrines such as retroactivity<sup>167</sup> and exhaustion,<sup>168</sup> as well as procedural

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proceedings, and must be litigated on direct appeal or state postconviction.

164. *Portuondo v. Agard*, 529 U.S. 61 (2000) (holding prosecutor's comments in summation—regarding defendant's opportunity to observe witnesses' testimony before taking the stand—did not violate defendant's constitutional rights); *Smith v. Robbins*, 528 U.S. 259 (2000) (extending *Strickland* standard to cover claim that appellate counsel was ineffective for failing to file a merits brief); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (extending *Strickland* standard to cover claim that counsel was ineffective for failing to file notice of appeal).

165. See, e.g., *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (exhaustion doctrine); *Trest v. Cain*, 522 U.S. 87 (1997) (procedural default); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (*Teague* retroactivity doctrine); *Gray v. Netherland*, 518 U.S. 152 (1996) (*Teague* retroactivity doctrine).

166. The Court's recent decision in *Arave v. Hoffman*, 128 S. Ct. 749 (2007) (per curiam), presented a rare case for the Court to develop doctrine through federal habeas review unconstrained by AEDPA. The Court, however, ultimately dismissed petitioner's claim for ineffective assistance of counsel as moot so that petitioner could "proceed with the resentencing ordered by the District Court." *Id.* at 750.

167. See, e.g., *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004)); *Beard v. Banks*, 542 U.S. 406 (2004) (retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988)); *Schiro v. Summerlin*, 542 U.S. 348 (2004) (retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002)).

168. See, e.g., *Dye v. Hofbauer*, 546 U.S. 1 (2005) (holding that petitioner presented claim to state courts with sufficient particularity to satisfy exhaustion requirement); *Baldwin v. Reese*, 541 U.S. 27 (2004) (finding that petitioner did not fairly present ineffective assistance of appellate counsel claim to state courts).

litigation concerning the interpretation and operation of AEDPA. In the decade since AEDPA's passage, litigants have raised questions regarding whether AEDPA applies,<sup>169</sup> administration of AEDPA's statute of limitations,<sup>170</sup> certificate of appealability requirements,<sup>171</sup> and procedural barriers to second or successive petitions.<sup>172</sup>

The increase in federal habeas cases accepted by the Court may also reflect concern with administration of the death penalty. The majority of federal habeas certiorari grants in the past five terms have involved capital cases, while capital cases are rarely reviewed from the direct appeal track.<sup>173</sup> The dissent in *Kansas v. Marsh* suggests that at least four members of the Court are concerned about the death penalty in light of the DNA exonerations.<sup>174</sup> It is also possible that large firms and experienced Supreme Court practitioners are more likely to take on capital cases at the federal habeas stage as pro bono projects.<sup>175</sup>

With the characteristics of each procedural vehicle in mind, and examining the change in the Court's certiorari-granting behavior

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169. See, e.g., *Woodford v. Garceau*, 538 U.S. 202 (2003) (holding that habeas petition was not pending on AEDPA's effective date and AEDPA therefore constrained review).

170. *Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (holding AEDPA's statute of limitation was not tolled while petitioner sought certiorari in Supreme Court from denial of state postconviction relief); *Day v. McDonough*, 547 U.S. 198 (2006) (holding that district court may raise AEDPA's statute of limitations sua sponte); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) (holding AEDPA's statute of limitations was not tolled by untimely postconviction motion filed in state court).

171. See, e.g., *Banks v. Dretke*, 540 U.S. 668 (2004) (holding petitioner was entitled to Certificate of Appealability (COA) as to *Brady* claim); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (holding petitioner was entitled to COA as to claim that prosecutor exercised peremptory strikes in racially discriminatory manner); *Slack v. McDaniel*, 529 U.S. 473 (2000).

172. See, e.g., *Burton v. Stewart*, 127 S. Ct. 793 (2007) (holding that the district court lacked jurisdiction to review petition where petitioner did not seek order permitting second or successive petition); *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (discussing what constitutes "second or successive habeas petition" under AEDPA); *Slack*, 529 U.S. 473.

173. Rates of capital cases for the procedural vehicles over the past five terms were as follows: DA-FED, 0 percent (0 capital cases of 26 decided); DA-ST, 15 percent (5/34); 2254, 56 percent (29/52) SPCV, 100 percent (4/4).

174. *Kansas v. Marsh*, 126 S. Ct. 2516, 2541 (2006) (Souter, Stevens, Ginsburg, and Breyer, JJ., dissenting). This focus on the death penalty may not be limited to the Court. Professor King's study of post-AEDPA habeas petitions in district courts concludes that capital habeas petitioners win relief at a rate thirty-five times higher than in non-capital cases. KING ET AL., *supra* note 5, at 10.

175. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court By Transforming the Bar*, 96 GEO. L. J. 1487, 1557 (2008).

over the past twelve terms, as depicted in the chart above, it seems likely the Court is turning, and will continue to turn, to state court cases for doctrinal development. The Court is deciding fewer federal direct appeals than it did half a dozen years ago.<sup>176</sup> The increase in certiorari grants in federal habeas cases reflects, we believe, technical litigation about AEDPA rather than doctrinal development, because procedural questions are emerging as more petitions are governed by AEDPA. In light of these developments, the increase in certiorari grants from the state courts—cases where a federal constitutional question is nearly always decided on the merits—seems important.

But the Court can only decide the cases presented to it. What types of cases are being presented to the Supreme Court, and in what procedural posture do they arise?

### *B. Practitioners' Certiorari-Seeking Behavior*

To answer this question, we set out to survey all criminal certiorari petitions filed during OT 2006 (those with 06- docket numbers).<sup>177</sup> We divided petitions into five categories: (1) direct appeals from federal criminal convictions, (2) federal prisoners'

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176. It is important to keep in mind that our analysis in Part III reflects overall trends, and that there are, of course, year-by-year decreases or increases in certain categories of cases. For example, among criminal cases with 06- docket numbers (certiorari petitions filed in OT 2006), the Court granted cert in a good number of federal direct criminal appeals—some of which were argued and decided as this Article was being written. Many of these cases (although not all) address questions about federal sentencing. See *Begay v. United States*, 128 S. Ct. 32 (2007), *Boulware v. United States*, 128 S. Ct. 32 (2007); *Claiborne v. United States*, 127 S. Ct. 2245 (2007) (vacated as moot); *Cuellar v. United States*, 128 S. Ct. 436 (2007); *Gall v. United States*, 127 S. Ct. 2933 (2007); *Gonzalez v. United States*, 128 S. Ct. 32 (2007); *Kimbrough v. United States*, 127 S. Ct. 2933 (2007); *Logan v. United States*, 127 S. Ct. 1251 (2007); *Watson v. United States*, 127 S. Ct. 1371 (2007); *United States v. Williams*, 127 S. Ct. 1874 (2007); *Rita v. United States*, 127 S. Ct. 551 (2007); *United States v. Rodriguez*, 128 S. Ct. 33 (2007). This series of cert grants ultimately could affect the procedural composition of the 2007-2008 docket.

177. We recognize it would be of interest to track certiorari-seeking trends for more than one term. Only through such an analysis will it become clear whether certiorari-seeking behavior has evolved over time, in response to AEDPA's passage. However, as described in footnote 178, which sets out our methodology, obtaining and coding the data for even a single term required a significant investment of resources. The Court's electronic database, from which we obtained data about IFP petitions, does not even catalogue cases prior to 2004. Limiting our examination to OT 2006 petitions is also consistent with our focus on *current* certiorari-seeking behavior.

postconviction motions (usually brought pursuant to 28 U.S.C. § 2255), (3) state prisoners' direct appeals from state court convictions, (4) state prisoners' federal habeas petitions (brought pursuant to 28 U.S.C. § 2254), and (5) state court postconviction proceedings. For the "paid" petitions, we also had a group of appeals under the Uniform Code of Military Justice (UCMJ), which were included as federal direct appeal cases or federal postconviction cases, depending on their procedural posture.<sup>178</sup>

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178. The first step was to obtain data on the cert petitions filed. BNA/U.S. Law Week maintains a database of all "paid" petitions and granted IFP petitions, which it categorizes by subject area. We wrote a computer program to search this database for cases identified as criminal. For comparison, we wrote a computer program that identified criminal cases from the Supreme Court's web-based docket. It flagged cases as potentially criminal based on the presence of certain words in the caption: for example, the words "United States" or "State," or the proper name of a state, were identified as flags, as were terms common to habeas case captions, such as "Warden" and "Superintendent." We also excluded in forma pauperis (IFP) cases from this chart, because only granted IFP cases were included in these sources, and we developed a separate IFP analysis.

We compared the results of these programs, found very little disagreement, and aggregated them. An additional five cases that were not identified by the search of the BNA/U.S. Law Week database were added by our program that flagged potential criminal cases based on key words in the caption. We also did a "spot check," comparing our database against selected orders lists from OT 2006. We excluded pro se filings, because the focus of our investigation is into the certiorari-seeking behavior of practitioners, not individual litigants. We recognize that this system would not count filings in which a pro se prisoners's cert petition was granted and counsel was later appointed by the Supreme Court, such as *Burgess v. United States*, 128 S. Ct. 1572 (2008), in which Professor Jeffrey L. Fisher of the Stanford Supreme Court Litigation Clinic was appointed to represent the criminal defendant. However, we are primarily interested here in attorney cert-seeking behavior; the Court's cert-granting behavior is addressed in Part II.A.

That left us with 347 "paid," counseled criminal petitions for OT 2006. Although the BNA database did not include the procedural posture of the case, it did include a cite to the lower court opinion. Copies of cert petitions in all "paid" and granted cases are available on Westlaw. Using the published lower court opinions and the cert petitions, we were able to determine the procedural vehicle for the 347 "paid" counseled cases identified as criminal.

Information was considerably more difficult to obtain for the IFP cases, particularly those in which certiorari was not granted. BNA/U.S. Law Week and Westlaw do not maintain information about the petitions in such cases—in part because of the large numbers, but also because IFP litigants are not required to provide as many copies of their filings to the Court, so there is no copy for the press. Indeed, for a time, it seemed we would have to travel to the National Archives or the United States Supreme Court to review the IFP cert petitions on paper. (We submitted a comment to the Court's proposed revised rules in the summer of 2007, suggesting that the Court require parties in all counseled cases (including counseled IFP cases) to submit electronic versions of their filings, in order to promote transparency at the Court and facilitate this type of research project. Letter from Professors Giovanna Shay & Christopher Lasch to the Court Clerk (June 2, 2007) (on file with authors). The Court declined our suggestion, instead requiring electronic copies of briefs only in granted cases. SUP. CT. R.

What did this empirical study reveal? For both the “paid” cases and the counseled IFP cases, federal direct appeal was the leading procedural vehicle for criminal certiorari petitions.<sup>179</sup> Also, in both categories of cases, state prisoners’ filings from state postconviction proceedings lagged behind their filings out of federal habeas. The following chart illustrates our results.

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25 (2007); *see also* Letter from the Court Clerk to Professors Giovanna Shay & Christopher Lasch (Aug. 1, 2007) (on file with authors)).

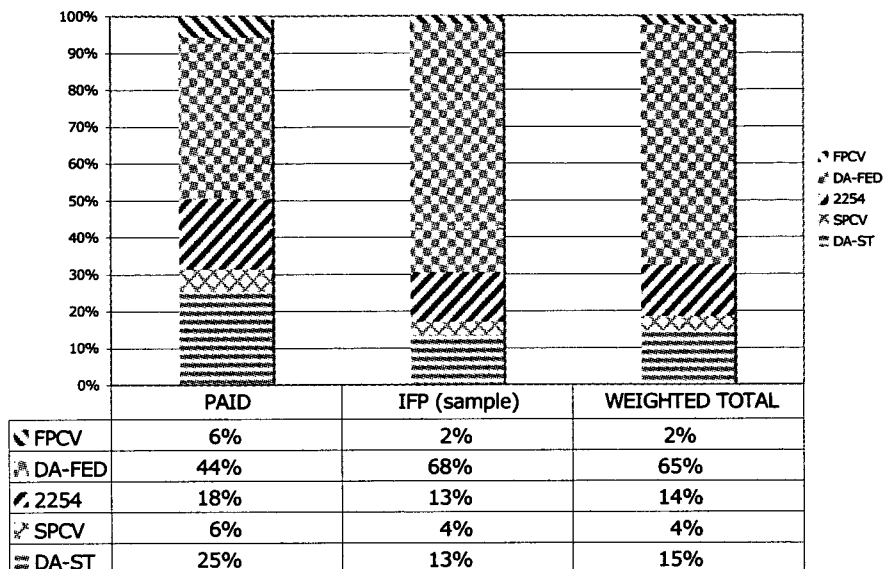
To get basic information about these cases, we used our computer program that examines the electronic Supreme Court docket sheets. The program produced a spreadsheet of all of the IFP cases, which have docket numbers beginning with 5000; it flagged those cases that might be criminal based on the presence of certain words in the captions. When we began the coding process, however, it became obvious that the overwhelming majority of IFP cases were indigent criminal defendants’ cases, and so we decided to code a representative sampling of all the IFP cases, eliminating the few noncriminal cases that turned up as we did the coding.

When we ran the program, some 6854 IFP cert petitions filed in OT 2006 were identified as potential criminal cases, based on our flags. Many of these were *pro se*. Again, as with the “paid” cases, we decided to exclude the *pro se* petitions. For the IFP petitions, we did this both for the reasons discussed above, but also because the *pro se* IFP petitions were simply too numerous (we did the coding without the benefit of research assistants, but recommend them for future studies). Excluding the *pro se* cases yielded 3117 counseled IFP cases.

To obtain a random sampling—designed to guard against a concentration of filings of one type at a certain time of the year—we assigned the IFP cases random integers and sorted them by the random number assigned. We then coded the first 300 of the IFP cases (eliminating noncriminal cases), producing a coded group of randomly-selected, counseled IFP petitions, which we believe provides a random, representative sampling of the IFP petitions.

179. Among the “paid” petitions filed, more than one-third of the cert petitions filed from federal direct appeals contained a sentencing question, probably reflecting litigation in the wake of *United States v. Booker*, 543 U.S. 220 (2005).

PERCENTAGE OF COUNSELED PETITIONS FILED BY PROCEDURAL POSTURE



The breakdown among the “paid” cases was 44 percent federal prisoners’ direct appeals, 25 percent state prisoners’ direct appeals, 18 percent state prisoners’ federal habeas cases, 6 percent state prisoners’ state postconviction proceedings, and 6 percent federal postconviction proceedings.<sup>180</sup>

The domination of federal appeals appears to be even more complete in the indigent criminal defense community—68 percent of counseled IFP petitions in criminal cases were filed in federal criminal direct appeals. This percentage is particularly dramatic considering there were many more people admitted to state prison than to federal prison during this period.<sup>181</sup> The remaining percent-

180. There were 42 government appeals among the 347 paid petitions that we coded. The U.S. Solicitor General filed two cert petitions in federal direct appeals, Docket, *United States v. Williams*, 127 S. Ct. 1874 (2007) (No. 06-694), Docket, *United States v. Rodriguez*, 128 S. Ct. 33 (2007) (No. 06-1646), and one in a § 2255 proceeding, Docket, *United States v. Santos*, 127 S. Ct. 2098 (2007) (No. 06-1005). All of the Solicitor General’s cert petitions were granted. Although our principal focus is the defense community, AEDPA’s effect on doctrinal development has implications for all criminal practitioners.

181. The Bureau of Justice Statistics reported that 56,057 prisoners were admitted to the



ages for IFP petitions were 13 percent state court direct appeals, 13 percent state prisoners' federal habeas petitions, 4 percent state postconviction proceedings, and 2 percent federal postconviction proceedings.

The weighted totals<sup>182</sup> reflect the fact that IFP petitions are much more common than "paid" petitions—so much so that the pattern of filing in IFP cases is close to representative of the pattern for all counseled petitions as a group. Based on our review of *all* "paid" petitions and a representative sample of IFP petitions, the weighted totals indicate that of all counseled petitions filed in criminal cases, the vast majority are direct appeals in federal cases, while direct appeals from state court are grossly underrepresented.

Thus, although both a doctrinal analysis of AEDPA's "as determined by the Supreme Court" provision and an empirical analysis of the Court's certiorari-granting behavior suggest the increasing importance of seeking certiorari—and of the *opportunity* to seek certiorari—from state direct appeal and postconviction judgments, state prisoners simply do not file cert petitions at the same rate as federal criminal defendants.<sup>183</sup> And state prisoners filed far more petitions from federal habeas proceedings than they did from state postconviction proceedings—despite the nearly absolute barrier AEDPA seems to impose on doctrinal development through habeas. In the next section we consider factors that could contribute to the cert-filing gap between federal and state proceedings and the imbalance between practitioners' certiorari-seeking behavior and the Court's certiorari-granting behavior.

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federal system in calendar year 2005, compared with 676,952 admitted to state jurisdictions. WILLIAM J. SABOL ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 3, <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

182. Because we coded *all* "paid" petitions, but only a representative sample of IFP petitions, it would make little sense to simply add these numbers together. Our "weighted total" column weights the sampled IFP results to account for the 3117 counseled IFP petitions from which the sample was drawn.

183. That nearly two-thirds of the counseled certiorari petitions filed were on direct appeal from federal criminal convictions is particularly astonishing given that federal convictions comprise only a fraction of total criminal convictions. See *supra* note 158 and accompanying text.

#### IV. REPRESENTATION IN SEEKING CERTIORARI FROM STATE COURT JUDGMENTS

Our findings have a number of implications for the potential effects of AEDPA's "as determined by the Supreme Court" provision. Federal prisoners' dominance of the certiorari filings may not seem at first blush directly related to the AEDPA issues that are the focus of our research. But this gap may indicate that state court criminal practitioners are not as focused on Supreme Court practice, which could help explain why state prisoners file more petitions out of federal habeas than out of state postconviction.

The logical next question is: what factors contribute to the relatively low rate of certiorari filing out of state court? The reasons for the gap may be numerous and varied. Many state convictions may not be serious enough to warrant pursuing through the cert stage.<sup>184</sup> "Cert-worthy" questions, as currently understood by sophisticated Supreme Court practitioners (questions generating jurisdictional splits),<sup>185</sup> may not arise as often in state criminal cases. State court criminal practitioners may not be as comfortable or familiar with federal (let alone Supreme Court) practice, and may not be admitted to the Supreme Court bar. State public defender statutes and policies may prohibit defenders from filing cert petitions, or may not provide funding for doing so.<sup>186</sup>

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184. State prisoners will generally have a longer wait than federal prisoners before arriving at the Supreme Court. A federal prisoner need only pursue one appeal before the certiorari stage, but many state prisoners will have one appeal of right and an additional level of discretionary review to be exhausted before seeking certiorari. This discretionary appeal may take years to complete. Thus, some state prisoners may be more likely to serve their sentences entirely before the time for seeking certiorari arrives.

185. See Cordray & Cordray, *supra* note 88, at 407; H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1990) ("[T]he single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

186. Defense counsel operating under the federal Criminal Justice Act, by contrast, may be *required* (and paid) to file a cert petition if the client requests it and there are nonfrivolous issues to be raised. See, e.g., 6TH CIR. R. 101(g); Sixth Circuit CJA Form 20 Submission Instructions at 7, available at <http://www.ca6.uscourts.gov/internet/forms/documents/CJA200507.pdf> ("Time and expenses in connection with the filing of a petition for writ of certiorari should be included on the CJA Form 20 submitted to the Court of Appeals.").

Indeed, as former state public defenders with some exposure to Supreme Court litigation practice, we suspect there might be a cultural disconnect between state criminal practice and certiorari practice in the Supreme Court. Although state court criminal practice is by definition a local endeavor, Supreme Court litigation has become a national enterprise, with sophisticated advocates searching for federal circuit splits that are readily identifiable to Supreme Court law clerks as “cert-worthy.”<sup>187</sup> By contrast, local criminal defense attorneys are often under-resourced<sup>188</sup> and may not readily expend resources on cert petitions deemed to be “long-shots.” The low percentage of cert petitions granted each year probably further discourages practitioners.<sup>189</sup>

Other factors may limit the number of cert petitions filed from state court judgments by the private bar. Litigants who are not eligible for appointed counsel may not want to expend the resources for a cert petition that has little chance for success.<sup>190</sup> Their local counsel may advise them it is not worth the effort. By contrast, federal defendants may feel their chances at a cert grant are better, or they may simply have the resources to expend to hire a lawyer. And Supreme Court practitioners may be willing to file a cert petition pro bono on behalf of a federal defendant with a classically cert-worthy issue—for example, a question of federal statutory interpretation on which the circuit courts are split—particularly if the case, if granted, will garner a Supreme Court argument.

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187. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 980 (2007) (book review) (“Ascertaining the presence of a lower court conflict requires less subjectivity from law clerks than determining, for example, whether [a case presents an] ‘important question of federal law ....’” (quoting SUP. CT. R. 10cc)); see also Cordray & Cordray, *supra* note 88, at 407; PERRY, *supra* note 185, at 246.

188. See AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE*, at iv-vi (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *GIDEON'S BROKEN PROMISE*].

189. Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, LAW LIB. J. 193, 195, available at [http://www.aallnet.org/products/pub\\_llj\\_v92n02/2000-17.pdf](http://www.aallnet.org/products/pub_llj_v92n02/2000-17.pdf) (finding that in 1995, Court granted 4 percent of “paid” petitions and 0.3 percent of IFP petitions).

190. Indeed, for litigants who cannot proceed in forma pauperis, even the costs of printing a certiorari petition may be daunting.

Another factor undoubtedly contributing to the gap between local criminal litigation and Supreme Court practice is the increasing professionalization of the Supreme Court bar. In a recent paper, Professor Richard Lazarus describes “the emergence of a new elite Supreme Court Bar,” beginning in about 1985.<sup>191</sup> This group of elite lawyers enjoys great success in convincing the Court to grant cases. For example, in OT 2005, twenty-four of the sixty-seven [non-Solicitor General] petitions in which certiorari was granted were filed by counsel who Professor Lazarus defined as “expert.”<sup>192</sup> Expert counsel are skilled at casting a case as “cert-worthy,”<sup>193</sup> and enjoy the respect and confidence of the Supreme Court law clerks who make recommendations regarding cert.<sup>194</sup> Although the new Supreme Court elite may take on the occasional pro bono criminal case as a “loss leader” to increase their exposure before the Court,<sup>195</sup> their usual clients are large private sector companies.<sup>196</sup> Lazarus writes (albeit without citation) that the criminal defense bar is reluctant to allow experienced Supreme Court practitioners to assist with their cases.<sup>197</sup> Whether this assertion is true, whether it applies uniformly to all Supreme Court experts, and whether there is any legitimate basis for defenders’ reluctance to surrender control of their clients’ cases are all questions that may be debated.

There may be a kind of emerging “market” for the most cert-worthy criminal cases, in which sophisticated Supreme Court practitioners shop for jurisdictional splits and take on pro bono cases,<sup>198</sup> and the growing number of law school Supreme Court

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191. Lazarus, *supra* note 175, at 1490, 1497.

192. *Id.* at 1516-17. Prof. Lazarus defined “expert” to mean that they had personally argued a case before the Supreme Court at least five times, or that they were affiliated with a firm whose lawyers had done at least ten Supreme Court arguments. *Id.* at 1502.

193. *Id.* at 1528.

194. *Id.* at 1525.

195. *Id.* at 1557.

196. *Id.* at 1531 (“The individuals dominating the Supreme Court bar today as petitioners are mostly private sector attorneys working with law firms and representing business interests.”).

197. However, a number of recent cases have been argued by elite Supreme Court practitioners from “white shoe” firms. *E.g.*, *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007) (argued by Donald Verrilli, of Jenner & Block); *Hill v. McDonough*, 547 U.S. 573 (2006) (same); *Wiggins v. Smith*, 539 U.S. 510 (2003) (same); *Florida v. Nixon*, 543 U.S. 175 (2004) (argued by Edward H. Tillinghast, III, of Coudert Brothers, LLP).

198. Lazarus, *supra* note 175, at 1557-58.

clinics may contribute to the competition for cert-worthy cases.<sup>199</sup> Judgments of state courts may be a relatively untapped source of potential pro bono cases for this market.<sup>200</sup> However, the pro bono market is small and focuses primarily on a single indicator of cert-worthiness—jurisdictional splits susceptible to computer searching. Moreover, even expert offers of help sometimes are met with a cold reception. Criminal practitioners may be reluctant to relinquish cases that they have developed, suspicious of the motives of “big firm” counsel who represent mostly private interests, or resentful that offers of help arrive only when a client’s case is headed to the Supreme Court.<sup>201</sup>

Obviously, it is a complicated task to unravel the role of all of these factors to explain why state prisoners seek cert on direct appeal less frequently than federal prisoners, and why state prisoners’ postconviction cert filings lag behind state prisoners’ filings out of federal habeas. We decided to focus on only a single aspect of the problem—possible structural or common barriers to appointed counsel seeking certiorari from judgments of state courts. To that end, we did a small survey of public defenders regarding cert-seeking practices and the factors that influence these practices.

### *A. Defender Certiorari Survey*

We disseminated a survey through the National Legal Aid and Defender Association (NLADA) leadership group.<sup>202</sup> It asked whether respondents’ offices represented clients in seeking certiorari from judgments of state courts in direct appeals and state postconviction proceedings.<sup>203</sup>

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199. *Id.* In the spirit of full disclosure, while a Cover Fellow, coauthor Giovanna Shay was an instructor in the Yale Supreme Court Advocacy Clinic.

200. *See, e.g.,* Golphin v. Florida, 128 S. Ct. 40 (2007) (denying certiorari in Fourth Amendment case out of Florida Supreme Court, in which Yale clinic filed cert petition); Petition for Writ of Certiorari, Golphin v. Florida, 128 S. Ct. 40 (2007) (No. 06-1251).

201. Lazarus, *supra* note 175, at 1560-61.

202. NLADA, Certiorari Survey (2007) (on file with authors) [hereinafter Survey].

203. We also asked questions designed to identify some of the factors governing whether cert petitions are filed. We do not attach statistical significance to the results. We offer it only as an initial, exploratory instrument to tease out some future areas of inquiry. We asked the respondents who said they represented clients in filing cert petitions on direct appeal of criminal convictions from state court to select (or write in) factors that influenced their decision whether to file. *Id.* The leading response was “significance of the issue” (twenty-six

We received forty-two responses.<sup>204</sup> Of these, one state public defender office—Pennsylvania’s—said it was statutorily barred from providing representation to clients seeking certiorari from a judgment of a state court on direct appeal.<sup>205</sup>

Pennsylvania and seven more state public defender respondents (Massachusetts,<sup>206</sup> Louisiana, Florida, Connecticut,<sup>207</sup> New Hampshire,<sup>208</sup> Virginia, and Delaware<sup>209</sup>) said they did not usually file cert petitions from state postconviction matters.<sup>210</sup> The reasons given included that these offices do not represent clients in state postconviction proceedings (in part because such proceedings often allege ineffective assistance of counsel at trial or on direct appeal, which would create a conflict of interest for the public defender

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respondents). The second most-frequently response was “death penalty case” (twenty responses). *Id.* Closely following were “likelihood of success” (nineteen respondents), “contradicts U.S. Supreme Court precedent” (eighteen), and “attorney interest” (sixteen). *Id.* The presence of a jurisdictional split—the leading indicator of whether the Supreme Court will grant cert—ranked sixth in frequency of selection (fifteen respondents). *Id.* Fourteen respondents selected “severity of penalty” (which overlaps with “death penalty”), and thirteen respondents cited “availability of resources.” *Id.* Only three said that their decision to file was affected by their statutory mandate. *Id.*

204. One respondent was exclusively a federal defender agency that did not represent clients in state court. *Id.* We received seven responses from a single federal defender office that did some state court work to exhaust clients’ claims. *Id.*

205. 16 PA. STAT. ANN. § 9960.6 (2008) (listing situations in which the “public defender shall be responsible for furnishing legal counsel”). One California public defender responded that the courts appointed appellate counsel (and that the issue had not arisen in his tenure), and two South Carolina offices reported that a separate state defender agency handles cert petitions. Survey *supra* note 202.

206. The survey respondent noted that cert petitions from postconviction were “generally handled by the Committee’s Private Counsel Division,” which confirmed in its response that it did handle such petitions. See *infra* note 218.

207. The Connecticut public defender responded that office policy was that the public defender *could* file a petition for a writ of certiorari in a meritorious postconviction case, but that “to this point a case of sufficient import has not come up.” Survey *supra* note 202. The respondent also cited resource constraints and small likelihood of success as factors. *Id.*

208. While the respondent noted that the office was generally precluded from representing clients in postconviction proceedings, because it had represented most defendants at trial or on appeal, she noted that “when we can represent [postconviction] clients, we would consider seeking cert.” *Id.*

209. The survey respondent noted that the office was “unlikely to represent clients on postconviction because most claims involve [ineffective assistance of counsel].” *Id.*

210. The Virginia Indigent Defense Commission responded in a follow-up phone interview that it does not file cert petitions from state postconviction proceedings because it does not represent clients in state postconviction. Telephone Interview with David J. Johnson, Executive Dir., Va. Indigent Def. Comm’n (Dec. 5, 2007).

agency). A Florida office cited a statutory bar. Two offices also named resource constraints.

Two responses gave some insight into the relatively small group of cert filings from state postconviction. One state public defender from Florida said his office would be more inclined to pursue federal habeas relief before filing a certiorari petition from state postconviction. A federal defender who represents clients in capital cases said her office would return to state court to exhaust state postconviction remedies but would not file a cert petition at that stage; she also explained they would return to federal court after exhausting state claims and would seek cert from the judgment of the United States courts of appeal.

These remarks provide some insight into the structural forces that may make filing a petition for a writ of certiorari from state postconviction seem less worthwhile than seeking cert after federal habeas (even in the absence of a statutory bar). Defenders may feel pressure to focus resources on filing a federal habeas petition rather than on filing a petition for a writ of certiorari from a judgment of state postconviction. These pressures may be exacerbated by the Supreme Court's recent decision in *Lawrence v. Florida* that the filing of a cert petition from a state postconviction proceeding does not toll the one-year statute of limitations for filing a federal habeas petition under AEDPA.<sup>211</sup> The *Lawrence* Court also recognized that a prisoner is not required to file a cert petition to "exhaust state remedies."<sup>212</sup>

Thus, assuming a low grant rate and limited resources, there is little incentive for defenders to file cert petitions at the state postconviction stage. Of course, one potentially under-appreciated reason for filing a cert petition at the state postconviction stage is that—for the reasons we discuss in this paper—the Supreme Court will be able to review de novo the merits of the federal constitutional issue.

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211. 127 S. Ct. 1079, 1081 (2007).

212. *Id.* at 1083.

*B. Provision of Counsel to State Prisoners Seeking Certiorari*

We were particularly interested in structural barriers to the filing of cert petitions—statutory bars, prohibitive policies, or lack of resources.<sup>213</sup> The Supreme Court has concluded that the federal Constitution does not require states to provide representation to indigent defendants at the cert stage.<sup>214</sup> One noted criminal law commentator—citing only the Supreme Court decision that appointed counsel is not obligated to file a frivolous petition—has written that “[although] the Supreme Court does not provide counsel for defendants preparing petitions for certiorari ... state and federal public defenders generally carry through their representation to include the certiorari petition where warranted.”<sup>215</sup> Although this may be true in the federal system, our research suggests it is far from universally true for state public defenders. The gap in appointed counsel may explain the difference in filing rates out of state and federal court.

In the federal system, the Criminal Justice Act requires the filing of nonfrivolous cert petitions by appointed counsel.<sup>216</sup> Some state and local jurisdictions—such as the District of Columbia—also guarantee appointed counsel at the certiorari stage for meritorious

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213. In 1963, no less an authority than Professor Bator conceded that one troublesome argument for robust review of state prisoners' federal claims in federal habeas was that the poor quality of state prisoners' cert petitions—“drafted usually without a lawyer” and often accompanied by an incomplete record—impeded adequate Supreme Court “supervision of the state courts' adjudication” and, if not addressed, “damage[d] the purposes served by the certiorari jurisdiction itself.” Bator, *supra* note 34, at 520-21.

214. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); see *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).

215. LAFAVE, ISRAEL, KING & KERR, 3 CRIMINAL PROCEDURE § 11.2 (3d ed. 2007).

216. See *Wilkins v. United States*, 441 U.S. 468, 469 (1979) (interpreting 18 U.S.C. § 3006A (1976)). But see *Austin v. United States*, 513 U.S. 5, 8 (1994) (noting that counsel appointed under the federal Criminal Justice Act are not required to file frivolous cert petitions).



petitions.<sup>217</sup> Others have promulgated standards for appointed appellate counsel that contemplate cert-stage representation.<sup>218</sup>

As demonstrated by our survey,<sup>219</sup> however, some jurisdictions do not provide counsel to file cert petitions<sup>220</sup> or do not provide counsel for seeking cert from judgments of state postconviction proceedings.<sup>221</sup> Indeed, some jurisdictions do not even recognize a statutory entitlement to counsel for the filing of petitions for discretionary review at the highest state court,<sup>222</sup> thereby creating

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217. See *Williams v. United States*, 783 A.2d 598, 603 (D.C. 2001) (citing *Qualls v. United States*, 718 A.2d 1039, 1040 (D.C. 1998)); *Corley v. United States*, 416 A.2d 713, 714 (D.C. 1980) (interpreting D.C. Code § 11-2601 *et seq.*). The State of Nevada recently joined this group when the Nevada Supreme Court issued an order detailing the responsibilities of counsel for indigent defendants, including the filing of petitions for certiorari in all capital cases and in criminal appeals when "warranted." See *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 Exhibit A, at 18, 23 (2008) (Standard 19(d) for capital counsel and Standard 8(c) for appellate counsel), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf>.

218. See Massachusetts Committee for Public Counsel Services, *Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters*, ¶ 20 ("In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the Chief Counsel or the Chief Counsel's designee, to seek relief from the client's conviction by petition for writ of certiorari to the United States Supreme Court ... when in the best judgment of the appellate defender there exists a reasonable possibility that such relief may be obtained."); New Mexico Public Defender Department, *Performance Guidelines for Appellate Criminal Defense Representation*, Guideline 2.1(g) (2000), available in 4 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (2000) ("The Appellate Defender, with the approval of the Chief Public Defender, shall have the discretion to seek review of any state court conviction in the United States Supreme Court by writ of certiorari.");

219. See, e.g., PA. CONS. STAT. § 9960.6 (2007) (providing for the appointment of counsel in Pennsylvania Supreme Court appeals and "postconviction hearings, including proceedings at the trial and appellate levels," and "[i]n any other situations where representation is constitutionally required," but not for representation in discretionary appeals).

220. See *Strozier v. Hopper*, 216 S.E.2d 847, 850 (Ga. 1975) ("[C]ounsel appointed by the State to represent an indigent has discharged his and the State's duty when the right of review by means of appeal within the State system has been completed."); *State v. Harrison*, 18 P.3d 890, 894 (Haw. 2001) (declining to authorize attorneys' fees and costs for appointed counsel for preparation of a cert petition to the U.S. Supreme Court).

221. See, e.g., ALASKA STAT. § 18.85.100(c)(2) (2007) ("[A]n indigent person is not entitled to representation ... for purposes of bringing ... a petition for review or certiorari from an appellate court ruling on an application for post-conviction relief ....")

222. See, e.g., *id.*; TENN. CODE ANN. § 40-14-203 (2007) ("Appointed counsel is required to represent the defendant only through the initial appellate review and is not required to pursue the matter through a second tier discretionary appeal by applying to the supreme court for a writ of certiorari."); *State v. Mata*, 730 N.W.2d 396, 398 (Neb. 2007) (concluding that it was not ineffective assistance of counsel to fail to timely file a petition for review with

the situation that federal law claims may be procedurally defaulted in federal habeas.<sup>223</sup>

Jurisdictions may be more generous in providing counsel to capital litigants at the certiorari stage.<sup>224</sup> The vast majority of jurisdictions in which the death penalty is imposed provide post-conviction counsel for capital defendants,<sup>225</sup> presumably increasing the odds that a cert petition will be filed at the postconviction stages in capital cases (assuming that counsel are also compensated for doing cert petitions).<sup>226</sup> However, a few jurisdictions—most notably

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the Nebraska Supreme Court); *Harris v. State*, 704 So.2d 1286 (Miss. 1997), *abrogated on other grounds*, *Jackson v. State*, 732 So.2d 187, 190 (Miss. 1999) (concluding that Mississippi statute does not require appointment of counsel to seek certiorari in noncapital case from state supreme court); *Peterson v. Jones*, 894 S.W.2d 370, 373 (Tex. Crim. App. 1995) (“There is nothing in the language of either Article 26.05(a)(3) or Article 1.051(d)(2) to indicate the Legislature intended for the appointment or compensation of counsel to file a petition for discretionary review.”); BALDWIN’S OHIO PRACTICE: CRIMINAL LAW § 75.10 (2007) (“In 1994 the Ohio Supreme Court held that a defendant’s right to counsel on appeal extends only to the first appeal of right, and there is no right to counsel on a second appeal to the Supreme Court.” (citing *State v. Buell*, 639 N.E.2d 110 (Ohio 1994)). *Contra Kargus v. State*, 162 P.3d 818, 824 (Kan. 2007) (recognizing the right to representation on discretionary appeal).

223. See, e.g., *O’Sullivan v. Boerckel*, 526 U.S. 838, 839-40 (1999) (holding that the failure to present claims to highest state court in petition for discretionary review resulted in procedural default of those claims in federal habeas proceedings).

224. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003), Guideline 1.1, Definitional Note 5 (defining scope of representation to encompass seeking certiorari both from direct appeal track and from postconviction review tract), 31 HOFSTRA L. REV. 913, 919 (2003); see *In re Anderson*, 447 P.2d 117, 131 (Cal. 1968) (en banc) (“We believe that it will protect the interests of defendants and promote the cause of justice for this court to appoint counsel to represent indigent defendants in capital cases in the following proceedings undertaken between the termination of their state appeals and their execution: ... Proceedings for appellate or other postconviction review of state court judgments in the United States Supreme Court ....”); see also CAL. GOV’T CODE § 15421 (West 2008) (authorizing the state public defender to represent defendants in automatic appeals in death cases in the filing of a petition for a writ of certiorari to the United States Supreme Court, and to represent defendants in appeals in noncapital matters as long as it is fulfilling its responsibilities to capital defendants, or it determines that taking a limited number of noncapital cases is necessary for staff training); B.E. WITKIN & NORMAN L. EPSTEIN, 1 CALIFORNIA CRIMINAL LAW § 31 (3d ed. 2006) (“No change was compelled [by the *Douglas* rule] in the existing California practice of selective appointment of counsel to represent defendants on petitions for hearing in the Supreme Court and on applications for extraordinary writs.”).

225. See Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086-87 (2006) (finding that “thirty-three of the thirty-seven death penalty states” appoint “defense counsel in capital postconviction proceedings,” although only “fourteen of those thirty-three states recognize a state statutory or constitutional right to have the appointed counsel be effective”).

226. A federal statute guarantees counsel in § 2254 federal habeas proceedings for state

Alabama—currently fail to provide comprehensive legal counsel to capital defendants in state postconviction proceedings,<sup>227</sup> claiming this state of affairs is justified by the Supreme Court's decision in *Murray v. Giarratano*.<sup>228</sup>

The spotty provision of counsel at the certiorari stage mirrors the uneven provision of counsel for indigent defendants generally. Professional organizations such as the NLADA have published standards for appellate counsel relating to the decision whether to seek discretionary review.<sup>229</sup> Nonetheless, in too many jurisdictions the appointed counsel system has gaps or is poorly funded,<sup>230</sup> and such standards have little chance of being met. In 2004, the ABA reported that, although “[national] standards recommend that counsel be provided at every stage of the proceedings, including sentencing, appeal, certiorari, and postconviction review,” reality did not meet that aspiration in many American jurisdictions.<sup>231</sup>

Moreover, it may be difficult to document all of the factors that discourage the filing of cert petitions from state courts. State statutes and decisional law regarding the appointment of counsel

death row inmates. 18 U.S.C. § 3599(a)(2) (2006).

227. See *Barbour v. Haley*, 471 F.3d 1222, 1232 (11th Cir. 2006) (“[W]e too recognize the logic in the argument that there simply are not enough volunteer lawyers willing to undertake a full review and investigation of a case in order to initiate postconviction proceedings on behalf of a death-sentenced inmate. If we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek in this case. However, we are bound by United States Supreme Court precedent, as well as our own precedent, which clearly establish that the United States Constitution does not afford appointed counsel on collateral review.”); see also *Freedman*, *supra* note 225, at 1089-90 (explaining that Alabama “has no system at all for providing pre-filing assistance to capital prisoners wishing to pursue postconviction actions, known locally as Rule 32 proceedings”) (footnote omitted).

228. 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (providing fifth vote in upholding Virginia scheme for furnishing postconviction counsel to death row inmates, Justice Kennedy emphasized that “[t]he requirement of meaningful access can be satisfied in various ways ....”). But see *Freedman*, *supra* note 225, at 1089 (“*Giarratano* did not decide that there is no right to counsel in state postconviction proceedings in capital cases. Rather, *Giarratano* only rejected the claim of constitutional entitlement in that particular instance, and implicitly held that other facts would lead to other results.” (citation omitted)).

229. See NATIONAL LEGAL AID & DEFENDER ASSOCIATION, STANDARDS AND EVALUATION DESIGN FOR APPELLATE DEFENDER OFFICES § I (N) (1980), available at [http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_Appellate\\_Defender\\_Offices](http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices).

230. See *GIDEON'S BROKEN PROMISE*, *supra* note 188, at 8-14. In November 2007, New York State was sued for alleged constitutional shortcomings in its indigent defense system. See Anthony Ramirez, *Suit by Civil Liberties Group Presses State on Legal Services for the Indigent*, N.Y. TIMES, Nov. 9, 2007, at B5.

231. *GIDEON'S BROKEN PROMISE*, *supra* note 188, at 22.

do not tell the whole story. Office policies and custom, the attitudes of courts that appoint counsel, and local standards of practice all contribute to the availability of appointed counsel at the cert stage. Trial courts may deny funds for appointed counsel to file cert petitions, even if attorneys are entitled to compensation.<sup>232</sup> Logistical problems with the appointment of counsel—such as delays—may impede counsel's ability to provide quality representation.<sup>233</sup> Lawyers may succumb to caseload pressure and too readily file the equivalent of *Anders* briefs.<sup>234</sup> Or appointed counsel may simply inform unsuccessful appellants—as one New York treatise advises—that they have ninety days to file a petition for a writ of certiorari with the Supreme Court<sup>235</sup>—a de facto, if unstated, evaluation that the petition is not sufficiently meritorious for the involvement of counsel.

Indeed, the cultural gap between local criminal practice and Supreme Court practice may be the greatest barrier to the filing of cert petitions. When asked about their cert practices, some dedicated state public defenders readily admit they are not familiar with federal practice, let alone Supreme Court practice. Others acknowledge that—given resource constraints and the perceived low likelihood of success—cert petitions are simply not a high priority.

In sum, it is far from clear that counsel is consistently available to file cert petitions on behalf of criminal defendants in state court,

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232. See *State v. Green*, 620 So.2d 188 (Fla. 1993) (overturning trial court's denial of funds for appointed counsel to petition for a writ of certiorari, based on the equal protection and equal access to the courts provisions of the Florida Constitution).

233. See, e.g., *State v. Hodges*, 671 P.2d 1051, 1059 n.1 (Idaho 1983) (Bistline, J., concurring in part and dissenting in part) ("As the *LePage* file in the clerk's office shows, following his conviction, *LePage*, without counsel and indigent, endeavored to obtain appointment of counsel to petition the Supreme Court for certiorari. By the time this Court caused counsel to be appointed, his allotted time had expired. Nevertheless, appointed counsel did so petition, but the petition was denied without comment leaving unknown whether untimeliness was the reason.").

234. Cf. *Austin v. United States*, 513 U.S. 5, 7 (1994) (noting that attorneys felt bound to file frivolous claims); *Qualls v. United States*, 718 A.2d 1039 (D.C. 1998) (adopting *Anders*-like provision for D.C.).

235. GARY MULDOON, *HANDLING A CRIMINAL CASE IN NEW YORK* § 23:111 (2007) ("If leave to appeal is denied, defense counsel should advise the client of the right to seek a writ of certiorari from the U.S. Supreme Court. The application for a writ must be filed within 90 days of denial of leave to appeal by the Court of Appeals. SUP. CT. R. 13. Only about 100 cases a year are accepted for argument by the United States Supreme Court. [www.supremecourtus.gov](http://www.supremecourtus.gov). Four justices must agree in order for a writ of certiorari to be granted.").

especially indigent criminal defendants.<sup>236</sup> When counsel is available, it is not clear whether defense attorneys are filing cert petitions in cases in which they are merited. In light of the fact that the development of federal constitutional law depends even more heavily on cert petitions from judgments of state courts—as the four dissenting justices pointed out in *Lawrence*<sup>237</sup>—this gap in the provision of representation could have significant long-term consequences for the development of criminal constitutional doctrine.

### CONCLUSION

Unless AEDPA is amended, the indigent criminal defense community and its allies should think hard about how to focus renewed attention on seeking certiorari from state court judgments. The Court appears increasingly disposed to grant certiorari in such cases. And it is in this procedural posture that state prisoners' cases will receive the least deferential, non-AEDPA-restricted review by a federal court. For criminal defendants with claims that may require an extension—even if modest—of existing Supreme Court precedent, the likelihood of success on the merits will be better on a grant of cert from state court than on federal habeas review under AEDPA. From a systemic perspective, emerging constitutional issues will be permitted to develop.<sup>238</sup> This paper is an initial attempt to understand current cert-seeking practices so they may be augmented and targeted most effectively.

We believe our results counsel in favor of rethinking common defense practice with respect to certiorari filings from state criminal proceedings. In general, with respect to both direct appeals and postconviction proceedings, certiorari from state proceedings will be the only opportunity for non-AEDPA-constrained review by the

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236. The lack of appointed counsel at the certiorari stage may reduce the likelihood of pro bono help, because elite practitioners sometimes get involved after a cert petition is filed, or even after cert is granted.

237. 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting) (joining in Ginsburg's dissent were Justices Stevens, Souter, and Breyer).

238. One example of rapid doctrinal development driven largely by certiorari grants from state-court judgments is the Court's recent expansion of the jury trial right beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and continuing with *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Cunningham v. California*, 127 S. Ct. 856 (2007).

Supreme Court—or any federal court. This is the moment for counsel to think systemically and to argue for development of the law. State court doctrine may be developing in a way that deviates from the likely trajectory of Supreme Court jurisprudence. Although state court proceedings often tend to focus on local precedent, this is the time for counsel to look outside the borders of her jurisdiction, and to conduct nationwide research to identify jurisdictional splits. *Atkins v. Virginia*,<sup>239</sup> *Crawford v. Washington*,<sup>240</sup> *Blakely v. Washington*,<sup>241</sup> and *Holmes v. South Carolina*,<sup>242</sup> are all excellent examples of positive doctrinal development arising from direct state appeals.

There is even more need for a revolution in state postconviction certiorari practice. State postconviction counsel often focuses on preparing for federal habeas—exhausting claims,<sup>243</sup> creating a factual record,<sup>244</sup> and avoiding procedural default.<sup>245</sup> Instead of viewing certiorari filings as a throwaway—a prelude to or distraction from the upcoming federal habeas—practitioners should recognize that certiorari from state postconviction proceedings may be their client's last opportunity to receive non-AEDPA-constrained review of federal law issues. Rather than focusing solely on technical or procedural issues relating to habeas litigation, counsel should think hard about raising substantive constitutional issues that push the envelope.<sup>246</sup> For example, *Roper v. Simmons* resulted in dramatic doctrinal development on certiorari from state postconviction proceedings.<sup>247</sup> And as Justice Ginsburg's dissent in

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239. 536 U.S. 304 (2002).

240. 541 U.S. 36 (2004).

241. 542 U.S. 296 (2004).

242. 547 U.S. 319 (2006).

243. See 28 U.S.C. § 2254(b)(1)(A) (2000) (requiring exhaustion of available state remedies).

244. See 28 U.S.C. § 2254(e)(2) (2000) (prohibiting federal district courts from conducting evidentiary hearings in habeas cases where the petitioner "failed to develop the factual basis of a claim in State court proceedings").

245. See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

246. As Professor Ty Alper pointed out to us, filing for certiorari from state postconviction may not always be intuitive, given state courts' tendency to issue "post-card" denials of state habeas appeals. However, state courts cannot evade federal review by refusing to give fulsome consideration to an issue that has been presented to them. See STERN, GRESSMAN & SHAPIRO, *SUPREME COURT PRACTICE* 150-51 (6th ed. 1986).

247. 543 U.S. 551 (2005).

*Lawrence*<sup>248</sup> suggests, four justices are attuned to the heightened importance of certiorari to judgments from state postconviction.

At a systemic level, at least two types of initiatives could be pursued to increase the quality and effectiveness of meritorious cert petitions from judgments of state courts. The first category of efforts would support the local criminal defense bar. Simply put, resources must be made available to permit criminal practitioners in state courts to file more and better cert petitions, so that cert filings are more representative of the criminal cases litigated nationally. To that end, local jurisdictions, professional organizations, and private firms must support criminal practitioners. Forms of material support could include increasing funding for local criminal defense programs, instituting office policies regarding certiorari seeking, and developing training programs on certiorari practice.

The second type of initiative falls on elite practitioners. Experienced Supreme Court practitioners, firms with access to Supreme Court expertise, and law school clinics should increase their pro bono commitments and should refocus their efforts to place greater emphasis on identifying "cert-worthy" state court criminal cases. The path of least resistance appears to be to identify circuit splits in federal prisoners' cases or to focus all pro bono efforts on (admittedly compelling) death penalty cases in the final stages of federal habeas. For all the reasons we have discussed, however, after AEDPA, development of federal constitutional criminal doctrine in state prisoners' cases will occur only on writ of certiorari from judgments of state courts.

A related challenge for the Supreme Court bar is to work more effectively with local criminal practitioners. Offers of help might be met with a warmer reception if accompanied by sustained pro bono assistance and efforts to build capacity within the local bar. While Supreme Court practitioners tend to view themselves as forum experts who can learn any subject matter, those who demonstrate a continued commitment to criminal issues may have greater success in developing relationships within the indigent defense community.<sup>249</sup>

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248. 127 S. Ct. 1079, 1086 (2007) (Ginsburg, J., dissenting).

249. For example, Donald Verrilli of Jenner & Block has argued three recent major criminal cases. See *Schiro v. Landrigan*, 127 S. Ct. 1933 (2007); *Hill v. McDonough*, 547 U.S. 573 (2006); *Wiggins v. Smith*, 539 U.S. 510 (2003).

Thirty years ago, Cover and Aleinikoff wrote of the benefits of a “dialogue” between state and federal courts regarding federal constitutional issues.<sup>250</sup> Through escalating limitations on federal habeas, culminating in AEDPA’s “as determined by the Supreme Court” provision, that dialogue has been shut down.

We believe a new dialogue can emerge as an engine for doctrinal development. Like the pre-AEDPA dialogue, the post-AEDPA dialogue will be “polycentric” in character and will “demonstrate a remarkable breadth of views and concerns.”<sup>251</sup> But the post-AEDPA dialogue will not be principally between state and lower federal courts. Federal courts will continue to play a role in doctrinal development,<sup>252</sup> but in the post-AEDPA world it can no longer be said that state and federal courts must “speak and listen as equals,”<sup>253</sup> with respect to state prisoners’ criminal cases. Whereas state courts “felt no need to converse with other state courts” in the pre-AEDPA dialogue,<sup>254</sup> the new dialogue—if it is to emerge—will increasingly feature conversations among state courts.

To invigorate this new dialogue, criminal defense practitioners and their allies must think carefully about how to build a vital practice of seeking certiorari from judgments of state courts. We hope this Article sparks recognition of the existence of a certiorari filing gap for state prisoners and initiates a discussion of how to begin closing this gap.

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250. Cover & Aleinikoff, *supra* note 13, at 1036.

251. *Id.* at 1065.

252. *See supra* Part III.A.

253. Cover & Aleinikoff, *supra* note 13, at 1036.

254. *Id.* at 1064-65 (“[T]he state cases ... consistently canvassed and considered leading federal cases .... It is far less common to see a sister state case cited.”).