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THE NEEDLE IN THE HAYSTACK: TOWARDS A NEW STATE POSTCONVICTION REMEDY

Henry B. Robertson*

INTRODUCTION

State postconviction remedies ("PCRs") are the counterparts to federal habeas corpus statutes found in 28 U.S.C. §§ 2241, 2254, and 2255.¹ They exist because of, and are modeled on or interpreted in light of, the federal statutes that allow relief to those in custody in violation of the Constitution of the United States. PCRs have come under increasing fire lately because of the ease with which convicted defendants can allege violations of their constitutional rights.

The central problem remains as it was identified by Justice Jackson: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."²

Opponents of wide-ranging postconviction relief often take "actual innocence" as their touchstone, following in the wake of Second Circuit Judge Henry J. Friendly's 1970 article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments.³ In practice, the federal courts' hands are tied because they deal with acts of Congress that are rarely amended. The United States Supreme Court has instead placed ever more difficult procedural obstacles in the path of habeas petitioners. Never mind the merits, the paramount goal is "stemming the overwhelming tide of prisoner petitions."⁴

Proponents of broadly available remedies view the procedure as a sort of civil rights act, a counterpart of 42 U.S.C. § 1983,⁵ only with a greater goal—freedom. Justice Marshall drew the parallel: "[H]abeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."⁶

Statistics do not tell the whole story. Both foes and friends of federal habeas enlist numbers into their arguments, the former pointing to the thousands of

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petitions filed annually by state prisoners, while the latter argue that the numbers have levelled off in recent years, and in any event make up only a small percentage of the federal court caseload and thus have minimal impact on the states' administration of criminal justice. The low success rate for federal petitioners likewise provides fodder for both camps. Depending on one's viewpoint, either there exists a deluge of frivolous petitions or the system poses no threat of a wholesale release of guilty defendants.

As a former public defender and current practitioner in the field, I can attest to the frustrations felt by criminal defense attorneys, not to mention judges and prosecutors, who have dealt with Missouri PCRs. My bitterness is impartial. I execrate the encouragement the present system gives even the most obviously guilty defendant to cast himself as a victim, and I execrate the eagerness of the courts to throw the baby out with the bathwater by using procedural bars to dispose of these pesky motions regardless of merit. I cannot speak for attorneys in other states where those involved with PCRs may have more fortunate experiences, although the scope of this Article is not limited by any means to Missouri PCRs.

Prisoners who file frivolous motions fall into roughly three categories. Some have no idea what it is all about; they do it because it is there. Their motions tend to consist of a regurgitation of issues reserved for an appeal, not a PCR. The second category includes the nitpickers, some manipulative, but many quite sincere, who, locked in their cells with a lot of time on their hands, become morbidly sensitive to the slightest error, real or perceived, in the proceedings that led them to conviction. I have had a client repeatedly urge upon me as a ground for relief his disagreement with the court reporter on the burning question of whether the voir dire at his trial was completed before or after lunch. Finally, the third group is made up of those who become intoxicated by their first visit to a law library and proceed to churn out reams of legal argument and glittering generalities about their constitutional rights without a fact in sight.

The only consistency in the courts' treatment of PCRs is that they almost always deny them out of hand. The proceedings are, and are intended to be, exercises in futility. Some judges never grant evidentiary hearings, some routinely do, while others do so haphazardly. The more tolerant judges regard the

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7. See Harris, 489 U.S. at 282 n.6 (Kennedy, J., dissenting) (predicting further increases in habeas petitions); Kuhlmann v. Wilson, 477 U.S. 436, 450 n.12 (1986) (detailing the steady increase in habeas applications from 1963-66); Patrick E. Higginbotham, Reflections on Reform of 2254 Habeas Petitions, 18 Hofstra L. Rev. 1005, 1022 (1990).
9. See Murray v. Giarratano, 492 U.S. 1, 23-24 (1989) (Stevens, J. dissenting) (noting low success rates in habeas petitions in noncapital cases); Brown v. Allen, 344 U.S. 443, 510 (1953) (Frankfurter, J.) (stating that only five state prisoners were discharged by federal courts over a four-year period prior to the case); Guttenberg, supra note 8, at 678 n.342, 693 n.419 (noting that only four percent of all habeas petitions are successful); Higginbotham, supra note 7, at 1023.
hearing as a gripe session. The defendant gets it off his chest by testifying to complaints almost invariably framed as issues of ineffective assistance of counsel. His trial attorney testifies to her trial strategy. The prisoner is returned to the pen where, having learned the name of the game, he will blame his post-conviction lawyer when he loses the PCR and his appellate lawyer when he loses the appeal. I'm tired of taking the rap for adverse decisions. The courts rule that way because they want to, not (usually) because of any incompetence on my part.

Postconviction remedies should exist because sometimes people are wrongly convicted, and an avenue of relief must be kept open. But the current system creates the mirage of a wide, open highway where, actually, there is only a narrow track. In legal terms, I agree with Judge Friendly that the "constitutional rights" formulation is no longer useful. It promises prisoners what it does not deliver, and infuriates the courts to the point where they hold in contempt the law they are sworn to enforce.

This Article is founded on the hope that some benefit is to be derived, at least in terms of efficiency and consistency, from concentrating the minds of all concerned on what is really at issue. Its goal is to replace the constitutional rights regime with a rule that actually says what it means and means what it says. Two big steps can be taken to make postconviction relief an extraordinary remedy rather than a routine irritant.

First, a PCR should state on its face what case law usually says for it: that issues available for direct appeal are barred. In other words, a PCR is a remedy in the nature of coram nobis, which requires the defendant to allege facts outside the trial record.

Second, a PCR should incorporate the requisite standard of constitutional prejudice, which is higher than most people realize. This may not deter inmates from filing frivolous motions, but it should guide the courts in winnowing them out and doing so on the merits, for with PCRs prejudice is the merits.

13. LARRY W. YACKLE, POSTCONVICTION REMEDIIES § 8, at 31-32 (1981); Documentary Supplement, State Post-Conviction Remedies and Federal Habeas Corpus, 12 Wm. & Mary L. Rev. 149, 150-51 n.4 (1970). The writ of error coram nobis "is an ancient common law writ used for the purpose of obtaining a review and correction of a judgment by the same court which rendered it, with respect to some error of fact affecting the validity and regularity of the judgment." 49 C.J.S. Judgments § 311 (1984).
14. See infra text accompanying notes 140-49 (discussing the levels of prejudice used to evaluate constitutional claims and noting that only "fundamental" errors merit issuance of a writ of habeas corpus).
I. Why PCRs Exist

Even the United States Supreme Court can sometimes mistake statutory habeas corpus for the Great Writ.15 They are distinct. The Writ, which may not be suspended except as provided in Article I of the Federal Constitution, was early identified with the common law writ of habeas corpus ad sub-ficiendum, which looked only to the jurisdiction of the court and shut its eyes to any defect in the judgment of a court of competent jurisdiction.16 Without rehearsing the old debate,17 it is now established that the statutory regime, at least as extended to the states by 28 U.S.C. § 2254, is a discretionary grant of jurisdiction by Congress under Article III of the Constitution.18

At one point, the Supreme Court threatened to hold that due process required the states to provide postconviction remedies,19 but it has now held that there is no such requirement.20

There was no stampede to abolish PCRs, as some might have expected. State court hostility to federal review is usually veiled by judicial decorum and legalism, although an occasional outspoken judge may vent a desire "to ward off the federal judiciary,"21 and express resentment of the Supreme Court's "view that state court judges could not be trusted to protect the rights given the people of their states by the Constitution of the United States."22 But the states have been known to use "a procedural morass"23 or "labyrinth . . . made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one";24 to create novel defaults that result in "procedural am-

18. See Wainwright v. Sykes, 433 U.S. 72, 77-78 (1977); id. at 105-06 (Brennan, J., dissenting); Stone, 428 U.S. at 474-76; id. at 511-12, 515 (Brennan, J., dissenting); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 444-45 n.6 (1963); Yackle, supra note 8, at 1024-25.
19. See Case v. Nebraska, 381 U.S. 336, 337 (1965) (vacating a state court's denial of a habeas petition and declining to assess the due process claim of a prisoner in a state formerly without postconviction relief after the state legislature enacted a statute permitting such relief).
20. See Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (stating the "the Due Process Clause does not require that the state supply a lawyer" for defendants in collateral postconviction proceedings).
24. Id. at 567 (Rutledge, J., concurring).
bush";\textsuperscript{25} or to raise nearly insurmountable procedural barriers that make the remedy illusory.\textsuperscript{26} Ohio’s Chief Justice in 1955 boasted of his state’s record in never allowing a prisoner’s writ of habeas corpus.\textsuperscript{27}

Missouri Supreme Court Rules 24.035 and 29.15,\textsuperscript{28} which have aptly been called "[possibly] the most cynical development in this field in a while,"\textsuperscript{29} have proven to be veritable forfeiture factories. Failure to meet the absolute filing deadlines of ninety days after delivery to prison, or thirty days after the filing of the record if a direct appeal is taken, cannot be excused for any reason.\textsuperscript{30} Verification of both the original and amended motions by the movant himself within the time limits is a jurisdictional requirement.\textsuperscript{31} Successive motions are categorically barred.\textsuperscript{32} One federal court expressed constitutional doubts about this scheme, but comity made it timid.\textsuperscript{33} Although the express language of Rules 24.035(a) and 29.15(a) states that they are the “exclusive procedure[s]” for adjudicating the claims they allow after a plea of guilty or jury trial respectively, the federal court stayed its hand in order to ascertain whether state habeas corpus was still available as an alternate remedy.\textsuperscript{34} The Missouri Supreme Court cheerfully accepted the invitation to this dance and proceeded to hint, without deciding, that state habeas relief might be available.\textsuperscript{35} To my knowledge, there are no reported decisions on the resort to state habeas in this posture because summary dismissal is the order of the day. Rules 24.035 and 29.15 are now in the fourth year of their reign.

In 1989, the Supreme Court of Arkansas abolished its PCR in a fit of pi-

\begin{itemize}
\item \textsuperscript{25} Dion A. Sullivan, Habeas Corpus: Ending Endless Appeals and the Paradox of the Independent and Adequate State Ground Doctrine, 11 Whittier L. Rev. 783, 800-02 (1990) (quoting Holloway v. Woodard, 655 F. Supp. 1245, 1250 (W.D.N.C. 1987)).
\item \textsuperscript{26} State v. Kapper, 448 N.E.2d 823 (Ohio), cert. denied, 464 U.S. 856 (1983); see Recent Case, 13 Cap. U. L. Rev. 329, 329-33 (1983) (discussing Kapper); see also Keener v. Ridenour, 594 F.2d 581, 589-91 (6th Cir. 1979) (criticizing the Ohio procedure and holding that the state remedy is generally unavailable and need not be exhausted).
\item \textsuperscript{28} Mo. Sup. Ct. R. 24.035, 29.15.
\item \textsuperscript{30} See State v. Wilson, 795 S.W.2d 590 (Mo. Ct. App. 1990) (trial court found as a fact that the prison was at fault for failing to provide a notary); Woodrome v. State, 788 S.W.2d 544, 546 (Mo. Ct. App. 1990) (ignorance of the deadline was no excuse); O’Rourke v. State, 782 S.W.2d 808 (Mo. Ct. App. 1990) (timely delivery to prison mail room was insufficient).
\item \textsuperscript{31} See Malone v. State, 798 S.W.2d 149 (Mo. 1990) (en banc), cert. denied, 111 S. Ct. 2044 (1991). In this case, counsel misguidedely signed the motion on her client’s behalf while the client was incarcerated in California. \textit{Id.} at 150. Note that the supreme court disposed of the case on procedural grounds even though the trial court had held a hearing on the merits. \textit{Id.} at 151. Note also that Malone was sentenced to death. \textit{Id.} at 149.
\item \textsuperscript{32} Mo. Sup. Ct. R. 24.035(k), 29.15(k).
\item \textsuperscript{33} See Richardson v. Miller, 716 F. Supp. 1246, 1247-51 (W.D. Mo. 1989).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} See Kilgore v. State, 791 S.W.2d 393, 396 (Mo. 1990) (en banc).
\end{itemize}
Eighteen months later, it reinstated the rule in modified form.\textsuperscript{87} Also in 1989, Michigan promulgated by court rule its first comprehensive postconviction remedy.\textsuperscript{88} All fifty states and the District of Columbia now have PCRs despite the states' distaste for such remedies.\textsuperscript{89} Why?

To put it cynically, state PCRs do not exist to provide a remedy but to prevent one—the remedy of federal habeas. They aim to take advantage of the presumption of correctness accorded to state court findings of fact under 28 U.S.C. § 2254(d),\textsuperscript{40} limited and riddled with exceptions though it is, and any procedural bars the federal courts will tolerate.

More and more states are incorporating procedural bars into their statutes and rules,\textsuperscript{41} sometimes by reference to federal habeas waiver rules\textsuperscript{42} or the "cause and prejudice" standard\textsuperscript{43} of \textit{Wainwright v. Sykes}.\textsuperscript{44} As far back as 1967, the Georgia legislature prefaced its PCR statute with this manifesto:

(a) The General Assembly finds that:

(1) Expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court together with other decisions of the court substantially curtailing the doctrine of waiver of constitutional rights by an accused and limiting the requirement of exhaustion of state remedies to those currently available have resulted in an increasingly large number of convictions of the courts of this state being collateraly attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this state;

(2) The increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights with a resultant deterioration of the federal system and federal-state relations; and

(3) To alleviate such problems, it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights be modified.\textsuperscript{45}

The pragmatic reformer will keep this attitude in mind: a state PCR is an insurance policy against federal court intervention, and the state wants the maximum possible coverage.

45. GA. CODE ANN. § 9-14-40(a) (Michie 1990).
II. THE PROBLEM OF CONSTITUTIONAL RIGHTS

The federal statutory requirement that habeas petitioners be "in custody in violation of the Constitution" could plausibly be read to mean that the prisoners must have suffered constitutional error so influential as to be the cause of their custody. This reading is rare, however. For the most part, interpretation of the federal habeas statutes has not been shackled to the plain meaning rule.

The "custody in violation" language entered the statute book in 1867, but for decades thereafter the Supreme Court continued to apply the traditional concept of lack of jurisdiction as the sole ground for relief. When the term "jurisdiction" had been stretched to its breaking point, the Court discarded it in order to reach "exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." The reach of habeas corpus into the realm of constitutional rights has since expanded and contracted. In Wainwright v. Sykes, Justice Rehnquist brazenly cited this interpretational history in order to assert the Court's power "to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."

The scope of constitutional protections for the criminally accused has expanded to such an extent that critics have come to believe it should no longer be coextensive with federal habeas jurisdiction. Here is a description, from the pen of Justice Cardozo, of how the Fourteenth Amendment applied to the states in 1934:

The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. Indictments by a grand jury may give way to

47. See Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977) (commenting that the Court has "grappled with the relationship" between the statutory writ and the common law writ for more than a century); Stone v. Powell, 428 U.S. 465, 475-76 (1976) (stating that, despite the existence of statutory habeas, limits on jurisdiction have persisted).

The traditional concept of jurisdiction limited "federal habeas jurisdiction to consideration of the jurisdiction of the sentencing court." Stone, 428 U.S. at 475.
48. Wainwright, 433 U.S. at 79 (tracing the expansion of habeas jurisdiction from 1856 to 1938); Bator, supra note 18, at 465-74, 494-95 (same).
50. Wainwright, 433 U.S. at 81. This exercise was repeated in Murray v. Carrier, 477 U.S. 478, 496 (1986) (defending the use of the cause and prejudice test despite its lack of "a perfect historical pedigree").

information by a public officer. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it.  

It seems like another world.

The turning point for Justice Black was *Mapp v. Ohio*, which bound the states to observe the Fourth Amendment. Until *Mapp*, constitutional rights "played a central role in assuring that the trial would be a reliable means of testing guilt." The majority in *Kaufman v. United States* would not withhold collateral review from Fourth Amendment or any other constitutional claims, "whether or not they bear on the integrity of the fact-finding process."

But in *Stone v. Powell*, the Court withdrew habeas jurisdiction from Fourth Amendment claims that the petitioner had an opportunity fully and fairly to litigate in state court. One theme in *Stone* was the idea that habeas should only look into the defendant's innocence, or at least "the basic justice of his incarceration." But the Court also relied on the exclusionary rule's lack of constitutional stature and its loss of deterrent effect in the setting of collateral relief.

That was as far as it went. The Court has refused to *Stone* claims of racial discrimination in grand jury selection, and for the time being *Stone* remains the only exception to the cognizability of all claims of constitutional error on federal habeas.

To obtain habeas corpus relief, however, it is not enough to allege and prove a constitutional violation. Perhaps in earlier days it was assumed that any constitutional error was by that nature so severe as to call for collateral relief. More recently, the Supreme Court has said that the defendant must prove a violation more serious than plain error on direct appeal.

In federal cases arising under 28 U.S.C. § 2255, the Court says that non-

52. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (citations omitted).
54. Id. at 655.
56. Id. at 229.
58. Apparently, the correctness of the state court's ruling is unreviewable. This curious qualification is a nod in the direction of Townsend v. Sain, 372 U.S. 293 (1963) (holding that federal courts reviewing habeas petitions can only scrutinize facts not properly resolved in the state proceeding). See *Stone*, 428 U.S. at 494 n.36 (withdrawing habeas jurisdiction on Fourth Amendment claims, relying on *Townsend*); YACKLE, supra note 13, § 99, at 384 (discussing *Stone* and *Townsend*).
60. Id. at 486, 489-94.
constitutional claims will be reached when they show "a fundamental defect which inherently results in a complete miscarriage of justice." 66 Stone v. Powell appears to extend this to section 2254 cases, 66 although this would seem to raise problems of federal jurisdiction in cases arising from the state courts.

This brings up the interesting question of whether errors of state law can become constitutional issues. Supreme Court pronouncements on this subject are not free from ambiguity. In Donnelly v. DeChristoforo, 67 the Court considered but rejected a claim that a prosecutor's remark in closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." 68 Dugger v. Adams 69 says, "[I]t is clear that 'mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.' "70 In Lewis v. Jeffers, 71 the Court held that "federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." 72

Other cases more guardedly seem to require violation of a specific constitutional right. 73 Yet even these cases leave open the possibility that "wrongs of constitutional dimension," in the language of Smith v. Phillips, 74 are discerned by their prejudicial effect. 75 Chandler v. Florida, 76 cited in Smith, clearly holds that media coverage of criminal trials may engender "prejudice of constitutional dimensions" in one case but not in another. 77

Misjoinder of offenses "would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." 78 In Loper v. Beto, 79 a majority, including Justice White in concurrence, concluded that impeachment of the defendant with an uncounseled prior conviction would violate due process where its use "might

68. Id. at 643.
70. Id. at 409-10 (quoting Barclay v. Florida, 463 U.S. 939, 957-58 (1983)).
72. Id. at 3102.
74. 455 U.S. 209 (1982).
75. Smith, 455 U.S. at 221.
77. Id. at 582.
78. United States v. Lane, 474 U.S. 438, 446 n.8 (1986).
well have influenced the outcome of the case.”\textsuperscript{80} When the prosecution fails to disclose favorable evidence, “a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.”\textsuperscript{81} The federal courts of appeals regularly address contentions that trial errors of state law have achieved constitutional magnitude.\textsuperscript{82}

All constitutional rights are equal, but not every violation entitles a person to relief. The doctrine of harmless constitutional error reinforces that notion.\textsuperscript{83} Properly understood, this argument is not about the nature of constitutional rights but about the scope of federal habeas corpus.\textsuperscript{84}

All this suggests that reference to the Constitution can be deleted from PCRs altogether. The question is not the source of the right but the magnitude of the prejudice.

### III. INNOCENCE AND PROCESS

I never cease to be shocked by the well settled rule that a PCR cannot be used to “relitigate” the issue of guilt, as by offering newly discovered evidence of innocence.\textsuperscript{85} The federal rule is the same: newly discovered evidence that “merely” disputes the prisoner’s guilt rather than the constitutionality of his detention is not cognizable.\textsuperscript{86} The reason is the courts’ obsession with the finality of jury verdicts.\textsuperscript{87}

There is constitutional logic to this rule. Due process is concerned “with the manner in which persons are deprived of their liberty.”\textsuperscript{88} It is entirely possible

\textsuperscript{80} Id. at 480; id. at 485 (White, J., concurring).

\textsuperscript{81} United States v. Bagley, 473 U.S. 667, 678 (1985). Most recently, in Estelle v. McGuire, 112 S. Ct. 475 (1991), the Supreme Court held that no federal due process violation occurred where the trial court admitted relevant prior injury evidence pursuant to a California law. Id. at 481. The Court declined to address a circumstance where the admitted evidence was not relevant. Id. The Estelle Court also held that certain jury instructions that deviated from the standard California Jury Instructions did not violate any federal constitutional rights. Id. at 482-84.


\textsuperscript{84} Id. at 707.

\textsuperscript{85} Fields v. State, 572 S.W.2d 477, 480 (Mo. 1978) (en banc); Drake v. State, 582 S.W.2d 711, 714 (Mo. Ct. App. 1979); Wilkes, supra note 12, § 1-13, at 11.


for an innocent person to be convicted at a trial that perfectly secures every constitutional right. Innocence is irrelevant, process is all; if "the whole proceeding is a mask," a habeas court will step in. But human fallibility cannot guarantee the innocent a remedy.

It is quite another thing to deny them relief. Professor Bator and Judge Friendly placed greater emphasis on innocence, more for its own sake than as a constitutional value. Various Supreme Court justices have made "colorable claims of innocence" their criterion for habeas relief, while the Court as a whole has tried to isolate issues that bear directly on the accuracy of the determination of guilt or innocence. In *Jackson v. Virginia*, the Court extended federal review to claims of insufficient evidence under "the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty."

The Court has said that the "ultimate objective" of our adversary system is "that the guilty be convicted and the innocent go free." No doubt there is much truth in this, although it must not lead to the dangerous conclusion that the guilty have no rights.

Pennsylvania's new PCR contains a clause allowing constitutional claims "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Just about any constitutional claim, however, except one that seeks the exclusion of relevant evidence of guilt has a possible relation to the determination of guilt or innocence and, as noted above, nearly every constitutional issue is still cognizable on federal habeas. Recognizing this, Pennsylvania added a clause to cover violations that "would require the granting of Federal habeas corpus relief to a state prisoner."

At least for the time being, the Supreme Court has relegated "actual innocence" to certain areas of the law where it serves as a test for exceptional claims that would not otherwise be heard: those that may have retroactive

90. Id. at 91.
91. See Bator, supra note 18, at 509.
92. See Friendly, supra note 3, at 509.
96. Id. at 314.
99. Id. § 9543(a)(2)(v).
effect\textsuperscript{100} or leap all procedural hurdles\textsuperscript{101} or justify a successive petition.\textsuperscript{102}

IV. CUTTING THE GORDIAN KNOT OF PROCEDURAL BARS

It may be fun to explore the labyrinth of procedural defaults, trailing a ball of thread for dear life, but I restrain myself. It is enough to encounter the beast and try to drive a stake through its heart.

The federal courts have the power to ignore defaults.\textsuperscript{103} In Justice Holmes' words, "\textit{[H]abeas corpus} cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell."\textsuperscript{104}

The doctrine of exhaustion of state remedies is now entrenched in 28 U.S.C. § 2254,\textsuperscript{105} despite the anomaly "which prompts th[e] Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none."\textsuperscript{106} The old rule of \textit{Waley v. Johnston}\textsuperscript{107} that the habeas writ will issue when it is the only effective remedy\textsuperscript{108} is now the exception.\textsuperscript{109} The assumed purpose of the writ is "to redetermine the merits of federal constitutional questions decided in state criminal proceedings."\textsuperscript{110} Absent a state decision, the doctrine "prescribe[s] a system of forfeitures in the last area where such a system should prevail."\textsuperscript{111} It would be foolish to seriously believe that comity is promoted by having the federal judiciary review state court decisions like professors grading exams in \textit{Con Law}.\textsuperscript{112}

The most compelling criticism of forfeitures is that they foreclose meritorious claims.\textsuperscript{113} By defaulting on the claim, usually through the agency of coun-

\textsuperscript{100}. Teague v. Lane, 489 U.S. 288, 312-13 (1989).
\textsuperscript{102}. McCleskey v. Zant, 111 S. Ct. 1454, 1467-72 (1991) (discussing successive petitions and abuse of the writ).
\textsuperscript{103}. See Granberry v. Greer, 481 U.S. 129, 135-36 (1987) (holding that states do not automatically waive the nonexhaustion defense when failing to assert the argument in a lower court proceeding); Murray, 477 U.S. at 510-14 (Stevens, J., concurring) (reviewing various cases where the Court has ignored procedural defaults).
\textsuperscript{104}. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).
\textsuperscript{105}. 28 U.S.C. § 2254(b), (c) (1988).
\textsuperscript{107}. 316 U.S. 101 (1942).
\textsuperscript{108}. Id. at 104-05.
\textsuperscript{109}. Rose v. Mitchell, 443 U.S. 545, 581 (1979) (Powell, J., concurring) (criticizing the current system of "nearly automatic federal habeas corpus review").
\textsuperscript{110}. Bator, supra note 18, at 500.
\textsuperscript{111}. Sunal v. Large, 332 U.S. 174, 190 (1947) (Rutledge, J., dissenting).
\textsuperscript{112}. See Bator, supra note 18, at 522-23 (contending that state judges and legislators will resent being "second-guessed" by federal courts).
sel, the defendant effectively forfeits his constitutional rights. This is especially true of the rigid "cause and prejudice" standard of Wainwright v. Sykes: even if the defendant shows the requisite prejudice to excuse his default, he may still be barred for failing to establish the conjunctive element of cause. Some would therefore eliminate the cause requirement.

Since a lawyer will usually be responsible for a default, an ineffective assistance of counsel argument is one way to show cause. This approach usually fails, binding the defendant to decisions in which he took no part, and further poisoning attorney-client relations. If one goal of finality is to reconcile the defendant to his condition, to get him to look forward instead of backward, then as Judge Lay of the Eighth Circuit said, "It is difficult to perceive that a prisoner who is procedurally barred from raising a constitutional right will consequently acknowledge that he is justly subject to sanction." The inmate will nurse his grudge and continue to blame his successive lawyers for his predicament.

From a practical standpoint, perhaps the best argument to make against procedural bars is that they are a monumental waste of time and effort. Forests have been devastated and lakes of ink drained in discussing these arcane concepts. Remands can turn a case into "a game of judicial ping-pong between the state and federal courts," further extending a process the Court itself decries as unconscionably lengthy. For example, Charles Townsend's case dragged on for more than twenty years. Henry Hawk died in the second decade of his postconviction litigation.

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114. See Guttenberg, supra note 8, at 673-74; Reitz, supra note 27, at 489-90.
116. See Murray, 477 U.S. at 492-95.
117. See id.; id. at 501-05 (Stevens, J., concurring); Guttenberg, supra note 8, at 702.
118. Murray, 477 U.S. at 488-89.
119. Guttenberg, supra note 8, at 707-08.
124. United States ex rel. Townsend v. Twomey, 322 F. Supp. 158, 160-61 (N.D. Ill.), rev'd, 452 F.2d 350 (7th Cir. 1971), cert. denied, 409 U.S. 854 (1972); United States ex rel. Townsend v. Twomey, 493 F.2d 1325 (7th Cir. 1974). This last decision involved the defendant's allegation that the state had failed to comply with the Seventh Circuit's mandate. Both the district court and the court of appeals remanded for (what else?) exhaustion of state remedies.
125. Reitz, supra note 27, at 466 n.30.
The Supreme Court justifies forfeitures on grounds of finality and comity, if neither of which has any place in habeas corpus. If verdicts were taken as absolutely final, then our law would be a "pretender to absolute truth." Postconviction relief assumes by its very existence that finality and comity will be set aside in the appropriate case. The goal is to identify that case, not to balance interests for the sake of achieving some politically expedient consensus. Taken to their logical conclusion, finality and comity would preclude postconviction relief altogether.

The Supreme Court's emphasis on these two principles has given the states carte blanche to enact their own systems of forfeitures. More and more states incorporate them explicitly into their PCR provisions. Some courts prefer to invoke procedural defaults even where a lower court has addressed the merits. In Missouri, when a judge has had the temerity to reach the merits of an untimely PCR, appellate courts have been known to adopt the bizarre expedient of teaching the judge a lesson by reversing a decision against the defendant with orders to dismiss the motion instead.

Try as they do, some courts cannot seem to help but double their pleasure by discussing both the procedural bar and the merits. And the fact remains that any time a court addresses the prejudice prong of cause and prejudice, it addresses the merits. The Gramley case may be read as an example of the absurd but inevitable consequence of the holding in Murray v. Carrier that in order to use ineffective assistance as cause to excuse a default, the issue must first "be presented to the state courts as an independent claim." The issue is at once substantive and procedural. The two aspects are confounded since prejudice is an element of ineffective assistance, although according to Murray the ineffectiveness claim goes only to the cause prong of Wainwright

129. Guttenberg, supra note 8, at 642.
130. I will not attempt to list them all but instead refer the reader to the statutes and rules cited in Wilkes, supra note 12, app. A (Survey of the States). See supra notes 41-43 for citations to applicable statutes and rules.
131. See, e.g., United States ex rel. Simmons v. Gramley, 915 F.2d 1128, 1132 (7th Cir. 1990) (discussing petitioner's failure to appeal in state court before addressing the merits); Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905 (9th Cir. 1986) (finding lack of "cause and prejudice" to petitioner's default, and thus not reaching merits, although lower court did address merits).
132. See, e.g., Staggs v. State, 785 S.W.2d 567 (Mo. Ct. App. 1990) (motion filed one day late).
133. See, e.g., Fairchild v. Lockhart, 900 F.2d 1292, 1295 (8th Cir. 1990) (addressing default and merits); Gramley, 915 F.2d at 1132-36, 1140 (same).
135. Id. at 488-89.
v. Sykes.\textsuperscript{137} Justices White and Stevens hit the nail on the head when they pointed out that in determining the issue of prejudice the Court necessarily reaches the merits of a case.\textsuperscript{138} Why not skip the procedural detours and get right to the heart of the matter?

V. LEVELS OF PREJUDICE

In his Rose v. Lundy dissent, one of the most sensible opinions on the subject, Justice Stevens listed four categories of constitutional claims, the first being that which discloses no error and the rest ascending by levels of prejudice.\textsuperscript{139}

The first level consists of errors that do not warrant reversal on direct appeal. Most constitutional errors can be harmless.\textsuperscript{140} The second category includes reversible errors that "do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment."\textsuperscript{141}

The third category, plain errors requiring reversal on direct appeal, is a subset of the previous category. The Supreme Court has held that plain error, without more, is not sufficient grounds for collateral relief.\textsuperscript{142} The fourth category contains the only errors that merit issuance of the writ, "those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained."\textsuperscript{143} Federal habeas is concerned with fundamental fairness, that is, with the Fourteenth Amendment's Due Process Clause.\textsuperscript{144} Due process "has never been, and perhaps can never be," more "precisely defined" than as fundamental fairness.\textsuperscript{145}

This is not all, as it turns out. The cause and prejudice test creates two additional levels of prejudice. The fifth is that which would excuse a procedural default but will not get the petitioner past the courthouse door if he fails to show cause as well. His burden is to prove "not merely that the errors at his

\textsuperscript{137} There is confusion over whether Strickland prejudice and Sykes prejudice are the same or different. Compare Rodriguez v. Young, 906 F.2d 1153, 1159 n.2 (7th Cir. 1990) (prejudice definition flexible), cert. denied, 111 S. Ct. 698 (1991) with Deutscher v. Whitley, 884 F.2d 1152, 1156 (9th Cir. 1989) (Strickland prejudice is sufficient), vacated, 111 S. Ct. 1678 (1991) and Maupin v. Smith, 785 F.2d 135, 139 (6th Cir. 1986) ("actual" prejudice is necessary).

\textsuperscript{138} Wainwright v. Sykes, 433 U.S. 72, 97-98 (1977) (White, J., concurring); Murray, 477 U.S. at 505 (Stevens, J., concurring).


\textsuperscript{140} See Arizona v. Fulminante, 111 S. Ct. 1246, 1263 (1991) (coerced confessions can be harmless error); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct jury on presumption of innocence); Chapman v. California, 386 U.S. 18 (1967) (prosecution's comments to jury on defendant's failure to testify).

\textsuperscript{141} Rose, 455 U.S. at 543 (Stevens, J., dissenting).


\textsuperscript{143} Rose, 455 U.S. at 544 (Stevens, J., dissenting).


trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension."

The sixth level is such prejudice that overcomes every default regardless of cause, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." This situation involves a "fundamental miscarriage of justice," which is not shown where "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones."

Terminology is a problem here. Plain error is customarily defined as a miscarriage of justice. While the courts insist that there is a difference between reversible error and plain error, I have never seen it satisfactorily explained. Even reversible error must have had some potential impact on the verdict; harmless error does not warrant reversal. Perhaps the main difference lies in the assumption that lawyers who preserve an error for review may be rewarded with a reversal that they would not otherwise get, or in the plausibility of strategically not objecting when they should have.

Plain error by definition means that reversal is required although the error was not preserved in the trial court. This makes it hard to distinguish higher levels of prejudice based on their ability to overcome procedural defaults. Even plain error assumes a default.

The two highest levels of prejudice emphasize "actual prejudice" and "actual innocence." This must mean that a court will eschew the usual effort to assess the probable effect of error on the trier of fact and any presumptions of prejudice, and look for a direct impact on the outcome. This is unlike the approach of an appellate court, which may reverse for reasons such as evidence of other crimes or inflammatory argument that prejudice the jury against the defendant although, or even because, it is not relevant to the charge for which he is on trial.

It is fruitless, not to say illusory, to try to distinguish between different degrees of miscarriage of justice. The problem for purposes of this Article is to

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149. Smith, 477 U.S. at 538.
151. See, e.g., Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
152. See Chapman v. California, 386 U.S. 18, 23 (1967) (assessing error's contribution to conviction); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 22-23 (1970) (advocating inspection of error's effect on judgment rather than "merely looking at result").
155. See, e.g., State v. Tiedt, 206 S.W.2d 524, 526-28 (Mo. 1947).
distinguish between plain error and fundamental (constitutional) unfairness. It seems that "fundamentally unfair" is the only available phrase. It is vague but carries the flavor of Fourteenth Amendment prejudice, and it is more amenable to some cognizable claims (such as discrimination in grand or petit jury selection) than outcome-determinative harmless error analysis.\textsuperscript{156}

Sometimes the Supreme Court uses the harmless constitutional error rule of \textit{Chapman v. California}.\textsuperscript{157} This confuses the issue still further because it is not even a test for plain error, let alone habeas error, but only for reversible or harmless error, unless it is assumed that constitutional error is by nature greater in magnitude than other kinds of error. \textit{Chapman} can be read to intimate this, but does not cite any constitutional underpinning for its standard of "harmless beyond a reasonable doubt,"\textsuperscript{158} relying instead on the Court's power to decide federal questions and its responsibility to protect constitutional rights in the absence of congressional action.\textsuperscript{159}

\textit{Chapman} places the burden on the beneficiary of error to prove harmless-ness.\textsuperscript{160} The lower federal courts generally, but not uniformly, shift the burden to the state once the defendant has made out a prima facie case.\textsuperscript{161} The Supreme Court seems not to have decided whether the harmless error doctrine should apply differently on a collateral attack than on a direct appeal.\textsuperscript{162} Justice Stevens broached the question in \textit{Greer v. Miller},\textsuperscript{163} but the majority did not reach it.\textsuperscript{164} \textit{Strickland v. Washington} says that no special standards will apply to ineffectiveness claims on habeas,\textsuperscript{165} but this is hardly a signal of uniformity. Prejudice is an element of ineffective assistance, so the burden of proof is clearly on the defendant.\textsuperscript{166} On the other hand, prejudice is not an element of a claim that the defendant was denied his right to consult with

\textsuperscript{156} See Hollis v. Davis, 912 F.2d 1343, 1350-54 (11th Cir. 1990).
\textsuperscript{158} Chapman, 386 U.S. at 24.
\textsuperscript{159} Id. at 21.
\textsuperscript{160} See id. at 24, 26.
\textsuperscript{161} See YACKLE, supra note 13, § 133, at 503. \textit{But see} Payne v. Smith, 667 F.2d 541, 545 (6th Cir. 1981) (holding that defendant failed to satisfy burden of showing prejudice when arguing that jury saw him in handcuffs during trial), cert. denied, 456 U.S. 932 (1982).
\textsuperscript{163} 483 U.S. 756, 767-69 (1987) (Stevens, J., concurring).
\textsuperscript{164} Id. at 765 n.6.
\textsuperscript{165} 466 U.S. 668, 697-98 (1984).
\textsuperscript{166} See id. at 694, 696.
counsel during trial.\textsuperscript{167} The burden could therefore be shifted or not, depending on the claim.

The Sixth Circuit recognizes two harmless error tests on habeas petitions.\textsuperscript{168} If constitutional error is clear, use the Chapman test.\textsuperscript{169} If the issue is whether error of a less specific kind rose to the level of a due process violation, apply a "totality of the circumstances" test derived from Kentucky v. Whorton.\textsuperscript{170}

Since the Supreme Court applies the Chapman test, albeit without reconciling it with the fundamental fairness inquiry on habeas corpus,\textsuperscript{171} the Court's recent decision in Arizona v. Fulminante\textsuperscript{172} could be important. Fulminante distinguishes "trial errors" from "structural defects." Trial errors are those arising during presentation of the case to the jury and are susceptible of harmless error analysis.\textsuperscript{173} "Structural defects," in light of which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence" (such as denial of counsel altogether, biased judge, grand jury discrimination, denial of a public trial or of the right to self-representation), however, can never be harmless.\textsuperscript{174} Structural defects could be those constitutional violations that entitle defendants to postconviction relief without further inquiry into prejudice or fundamental unfairness.

There is one more pertinent test for prejudice. In Strickland v. Washington, the Court set standards for claims of "actual" ineffective assistance of counsel, drawing them from cases in which the defense had been denied access to evidence.\textsuperscript{175} "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."\textsuperscript{176} Strickland is a Sixth Amendment case, but it is also a habeas case. The court may have been fudging, but in Part IV of its opinion it clearly equated the ineffective assistance test with

\begin{itemize}
\item \textsuperscript{167} Perry v. Leeke, 488 U.S. 272, 278-79 (1989).
\item \textsuperscript{168} See Payne v. Smith, 667 F.2d 541, 544 n.2 (6th Cir. 1981), cert. denied, 456 U.S. 932 (1982).
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. (citing Kentucky v. Whorton, 441 U.S. 786 (1979)).
\item \textsuperscript{171} In Whorton, the Supreme Court applied the "totality of circumstances" test in the context of a lower court's failure to instruct the jury on the presumption of the defendant's innocence, stating that the failure to give the instruction, by itself, was not unconstitutional, but the failure to instruct, in combination with other faulty jury instructions, certain arguments by counsel, and the weight of the evidence, reached the level of unconstituionality. Kentucky v. Whorton, 441 U.S. 786, 789 (1979).
\item \textsuperscript{172} See, e.g., Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S. 371 (1972).
\item \textsuperscript{173} Id. at 1246 (1991).
\item \textsuperscript{174} Id. at 1264-65 (quoting Rose, 478 U.S. at 577-78). I agree with Justice White that this facile distinction is mistaken, see id. at 1253-55, but it is the law now. Violations of the right to counsel may or may not be presumptively prejudicial. Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986). It is hard to divide these into trial and nontrial errors.
\item \textsuperscript{175} 466 U.S. 668, 694 (1984).
\item \textsuperscript{176} Id.
\end{itemize}
fundamental unfairness.\textsuperscript{177}

The next year, in \textit{United States v. Bagley},\textsuperscript{178} the Court adopted \textit{Strickland} as the test for materiality of favorable evidence the prosecution failed to disclose to the defense.\textsuperscript{179} The test applies whether the defense makes no request, a general request, or a specific request for the information, because due process is concerned with the effect of nondisclosure on the trial, not the culpability of the prosecutor.\textsuperscript{180} \textit{Bagley} viewed \textit{Strickland} as an illustration of "when evidence is not introduced because of the incompetence of counsel."\textsuperscript{181}

The \textit{Strickland} prejudice prong therefore recommends itself as a standard for the constitutional materiality of evidence not presented at trial. That is the inquiry on a PCR. At the risk of misreading the Court, the \textit{Strickland} test may be used to judge the prejudicial effect of constitutional errors, except as to "structural defects" that are presumptively prejudicial under \textit{Fulminante}. Alternatively, fundamental unfairness may do double duty as the test for both classes of error.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

If you wish to survey the fastest growing areas of law, I confidently suggest that you open any \textit{West's Digest} to the key number Criminal Law 641.13—ineffective assistance of counsel.

The right to effective assistance was one of the first rights incorporated through the Fourteenth Amendment's Due Process Clause so as to apply to the states, in the famous case of the Scottsboro boys.\textsuperscript{182} In the more legislative mode of constitutional adjudication now prevalent, it acquired a "two-pronged test" in \textit{Strickland v. Washington}: "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness"\textsuperscript{183} and that he suffered prejudice as defined above.\textsuperscript{184} Already in 1953 Justice Frankfurter noted a heavy preponderance of ineffective assistance claims.\textsuperscript{185} He hadn't seen anything yet.

\textit{Strickland} catalogued, while piously wishing away, some of the ills it would

\begin{itemize}
\item \textsuperscript{177} Id. at 696-98 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.").
\item \textsuperscript{178} 473 U.S. 667 (1985).
\item \textsuperscript{179} Id. at 681-82.
\item \textsuperscript{181} Bagley, 473 U.S. at 682.
\item \textsuperscript{182} See Powell v. Alabama, 287 U.S. 45, 71 (1932) ("[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.").
\item \textsuperscript{184} Id. \textsuperscript{at} 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." \textit{Id.} \textsuperscript{at} 694.
\item \textsuperscript{185} See Brown v. Allen, 344 U.S. 443, 520 (1953) (app. to concurring opinion of Frankfurter, J.).
\end{itemize}
Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.\textsuperscript{186}

Another problem with the ineffective counsel argument is that it tends to focus on what a savvy lawyer would do (on the adversarial process), rather than on an impartially fair result. It may be bad practice, and even un-American, for counsel to share information with the police,\textsuperscript{187} for instance, but, arguably, it could more fully develop the truth.

Much of the blame for the proliferation of ineffective assistance claims must be laid at the door of the courts.\textsuperscript{188} In my state, Missouri, nearly every constitutional claim can be dismissed as "mere trial error" not cognizable on a PCR, even if it is a classic example of a valid issue.\textsuperscript{189} "Ineffective assistance" is the shibboleth, the password, to postconviction litigation that everybody recognizes. There is no way around it.

For present purposes, there are two main objections to ineffective assistance as a postconviction theory. First, it functions as a sort of incorporation clause. Errors of state law that would otherwise not be cognizable become "federalized," transformed into Sixth Amendment issues.\textsuperscript{190} In \textit{Kimmelman v. Morrison},\textsuperscript{191} the Supreme Court, having barred the front door to Fourth Amendment claims in \textit{Stone v. Powell}, flung open the back door by permitting charges of incompetence in litigating search and seizure issues.\textsuperscript{192}

\begin{enumerate}
\item \textsuperscript{186} \textit{Strickland}, 466 U.S. at 690.
\item \textsuperscript{187} \textit{See In re Hall}, 637 P.2d 690, 699 (Cal. 1981) (criticizing defendant's attorney for giving the police an unsolicited list of potential defense witnesses and other information to further the police investigation of a crime allegedly committed by the defendant).
\item \textsuperscript{188} \textit{See} Johnson v. Kemp, 585 F. Supp. 1496, 1499 n.1 (S.D. Ga. 1984) (arguing that Supreme Court decisions that intended to limit habeas petitions questioning the validity of state procedures have led to petitioners reframing their appeals as ineffective assistance of counsel claims), aff'd in part, vacated in part, 759 F.2d 1503 (11th Cir. 1985).
\item \textsuperscript{190} \textit{See, e.g.}, Williamson v. State, 771 S.W.2d 601, 607-08 (Tex. Ct. App. 1989) (holding counsel incompetent for failing to object to closing argument that bolstered the credibility of police witnesses, which would have been \textit{reversible error} if preserved).
\item \textsuperscript{191} 477 U.S. 365 (1986).
\item \textsuperscript{192} \textit{See id.} at 382-83; \textit{see also} Jeffries & Stuntz, \textit{supra} note 83, at 687-88 (detailing how attorney errors in litigating Fourth Amendment violations permitted defendants to assert Sixth Amendment ineffective assistance of counsel claims).
\end{enumerate}
Second, the conjunctive test of Strickland, like the cause and prejudice test of Wainwright v. Sykes, allows a defendant who has been constitutionally prejudiced to be impaled on the other prong. Strickland is “highly deferential” to counsel, and a court may rule against the defendant by finding that counsel’s investigation, though limited, was reasonable, or that counsel pursued an alternative strategy that was objectively reasonable. If counsel has failed to present an adequate defense, then the courts should focus on the viability of that defense, not on the performance of counsel. Strickland deals with “actual ineffectiveness claims alleging a deficiency in attorney performance,” as distinct from the absolute or constructive denial of counsel altogether, as by a conflict of interest. The emphasis on ineffective assistance, both as a substantive claim and as an excuse for procedural defaults, sends the wrong message to defendants. It incongruously mingles the performance of defense lawyers, who usually see their goal as doing the utmost for their clients, with a less partisan notion of the correct result at trial. Claims of “actual” ineffectiveness should be banished to the nether regions whence they came.

VII. THE PRIMACY OF DIRECT APPEAL

Most states do not let a defendant bring a claim that was, or could have been, decided on direct appeal. This is an accepted procedural bar in federal court, subject always to the cause and prejudice test. Direct appeal is “the primary avenue for review,” and collateral attack must not “do service for an appeal.” Appellate courts have the tools to deal with any errors or defects apparent on record, including plain errors. If a state court reaches the merits under its plain error rule, the defendant has a ruling to take into federal court. Having exhausted the direct appeal, there is no need to pursue the same issues on a PCR. This means that the trial record is off limits as a source of issues. Some state PCRs expressly preclude direct appeal claims under the heading of procedural bars. I aim to put it directly into the statement of cognizable

194. Id. at 690-91.
195. Id. at 672-73, 699.
196. Id. at 692-93.
197. Berger, supra note 162, at 94-96.
198. See Dugger v. Adams, 489 U.S. 401, 408-09 (1989) (holding that respondent failed to show cause and prejudice when failing to object to judge’s objectionable remarks to prospective jurors).
203. See, e.g., IDAHO CODE § 19-4901(b) (Supp. 1991); ME. REV. STAT. ANN. tit. 15, § 2128
grounds, to give defendants better notice of what a PCR is all about.\textsuperscript{204}

The Uniform Post-Conviction Procedure Act lists among its grounds that "evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice."\textsuperscript{208} This is simpler and better than the traditional "newly discovered evidence" standards that, like the writ of error coram nobis,\textsuperscript{208} impose the additional obstacle of justifying the failure to discover evidence by showing lack of knowledge and due diligence.\textsuperscript{207}

A fuller, more workable definition comes from a California case, \textit{In re Branch}.\textsuperscript{208} The California Supreme Court was willing to grant habeas corpus relief for "new evidence" of actual innocence because "it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence."\textsuperscript{209} The court therefore distinguished new evidence from newly discovered evidence, holding new evidence "to include any evidence not presented to the trial court which is not merely cumulative in relation to evidence which was presented at trial."\textsuperscript{210} Defendant Branch lost his habeas corpus petition because of his own admissions of guilt and because the proffered testimony from fellow inmates was apparently perjured.\textsuperscript{211}

The defendant should not be required to construct an entire defense with evidence from outside the record. New facts may overlap with the evidence at trial, shed new light on that evidence, or substantially impeach a vital state's witness. If so, the evidence should be heard. The scope of postconviction remedies does not limit the facts to proof of innocence, as in \textit{Branch}. PCRs may be used to show other constitutional violations such as discrimination in grand or petit jury selection, denial of counsel at some critical stage of pretrial proceedings, or mitigation of a sentence of death.

The main problem is how to deal with cumulative evidence. New evidence may be so much more substantial in quantity that it raises a reasonable probability of a different result. Evidence is not merely cumulative as long as it is different in kind from other evidence. A disinterested witness is usually

\begin{itemize}
  \item \textsuperscript{204} See infra Part VIII; see also Friendly, supra note 3, at 159 n.87 (discussing ABA Post-conviction Standards); Mitchell, supra note 87, at 457-58 (quoting ABA Post-conviction Standards, in 4 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, cmt. at 22:18 (2d ed. 1980)).
  \item \textsuperscript{205} UNIF. POST-CONVICTION PROCEDURE ACT § 1(a)(5), 11 U.L.A. 248 (1991); WILKES, supra note 12, at app. B.
  \item \textsuperscript{206} See Decker, supra note 113, at 235-36, 248-49 (discussing coram nobis as a PCR); Yackle, supra note 29, at 365-66.
  \item \textsuperscript{207} In re Hall, 637 P.2d 690, 695 (Cal. 1981); 23A C.J.S. Criminal Law §§ 1448, 1449 (1989). But see State v. Fontaine, 559 A.2d 622 (R.I. 1989) (perverting the Uniform Act by assimilating it to the old newly discovered evidence rule).
  \item \textsuperscript{208} 449 P.2d 174 (Cal. 1969).
  \item \textsuperscript{209} Id. at 183-84.
  \item \textsuperscript{210} Id. at 184.
  \item \textsuperscript{211} Id. at 186.
more believable than the defendant\textsuperscript{212} or a close friend or relative.\textsuperscript{218} Documentary evidence in support of an alibi may be more convincing than the oral testimony of a number of witnesses.\textsuperscript{214} There is no neat and handy way to deal with the various shapes new evidence may take.

There will be claims defaulted on direct appeal, as before. If the state wants to take the first shot at making these defaults stick by creating a factual record that will stand up in federal court, it can be done under this scheme. The new evidence would concern ineffective assistance or whatever "objective factor external to the defense" is put forward to excuse the forfeiture.\textsuperscript{215}

If the "constitutional rights" formula is to be dispensed with in favor of a "new evidence" formula, as I suggest, then the defendant proceeding to federal court will generally have to show state action\textsuperscript{216} or ineffective assistance of counsel, which will be imputed to the state.\textsuperscript{217} The idea that the conviction itself is state action\textsuperscript{218} has not taken hold, and the Supreme Court usually requires a ruling by the judge upon objection\textsuperscript{219} or misconduct by the prosecution, police, or other state actor\textsuperscript{220} as a prerequisite to due process jurisdiction. Nevertheless, the Supreme Court seems willing to entertain claims of actual innocence without regard to state action, perhaps on an implicit theory that due process demands a remedy for such unjust incarceration, and lays less emphasis on the culpability of the prosecution when exculpatory evidence has been suppressed.\textsuperscript{221}

I am not greatly concerned that a state PCR have exactly the scope of federal habeas. New evidence certainly seems to include all constitutional issues. To ensure that state action is proved, however, the new formula can still coexist with the old one of constitutional rights.

\textbf{VIII. Proosals}

If I have read the cases correctly, then the narrower wording I am about to propose gives the state, when combined with direct appeal, all the coverage it

\begin{itemize}
\item \textsuperscript{212} See State v. Hayes, 785 S.W.2d 661, 663 (Mo. Ct. App. 1990).
\item \textsuperscript{213} See Skipper v. South Carolina, 476 U.S. 1, 7-8 (1986) (reversing death sentence when sentencing court excluded testimony from disinterested parties as cumulative of defendant's and defendant's wife's testimony).
\item \textsuperscript{214} State v. Harris, 64 S.W.2d 256, 258 (Mo. 1933).
\item \textsuperscript{216} See Colorado v. Connelly, 479 U.S. 157 (1986) (holding that state action is required before the Due Process Clause can be invoked).
\item \textsuperscript{217} See Murray, 477 U.S. at 488 ("[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduct[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" (citations omitted)).
\item \textsuperscript{218} See Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).
\item \textsuperscript{221} See United States v. Bagley, 473 U.S. 667, 682 (1985); Smith, 455 U.S. at 219-20.
\end{itemize}
may desire as a forum for the exhaustion of remedies. There are several possible ways to do this, leaving challenges to the voluntariness of guilty pleas aside for simplicity's sake. The idea that PCRs should be restricted to those rights that tend, more or less strongly, to vindicate the innocent has been rejected as too narrow, not to say unworkable. It would be a different matter, of course, if Congress adopted this view. Here goes:

A person convicted under the laws of this state may seek relief in the sentencing court on the grounds that there is evidence not apparent from the trial record that:

(a) creates a reasonable probability that had it been heard at trial the defendant would have been acquitted, or been convicted of a lesser offense, or would not have received the death sentence; or

(b) establishes a violation of a constitutional right that is presumptively prejudicial.

This proposal excludes direct appeal issues by its terms. Subparagraph (a) adopts the Strickland test for the prejudicial effect of evidence on issues of "trial error" while (b) covers those "structural defects in the constitution of the trial mechanism" that make the trial fundamentally unfair and are not susceptible of harmless error analysis.

Lesser included offenses will arise mainly in homicide cases. The death penalty must be provided for because of the complex and specialized nature of penalty phase litigation. The capital sentencing proceeding is virtually a trial in itself.

An alternate proposal:

A person convicted under the laws of this state may seek relief in the sentencing court on the grounds that there is evidence not previously presented or heard that shows a violation of a constitutional right such that the trial or other proceeding in question was fundamentally unfair.

This proposal takes Strickland at its word when that case says that "fundamental fairness is the central concern of the writ of habeas corpus," and

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223. See Note, supra note 17 at 404-05 (pointing out that constitutional doubts about the feasibility of this approach are waning).

224. Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991) (holding that use of coerced confessions at trial was harmless error). Presumably, certain constitutional issues not mentioned in Fulminante would also fit into the category of presumptive prejudice, such as double jeopardy, ex post facto laws, and the trial of a mentally incompetent individual.

225. See, e.g., Reed v. Ross, 468 U.S. 1 (1984); Jeffries & Stuntz, supra note 83, at 691 (arguing to limit habeas relief to cases of unjust conviction or a sentence of death).


228. Strickland, 466 U.S. at 697.
assumes that the remedy will cover all constitutional issues. The phrase "or other proceeding" is meant to encompass procedures apart from the trial that may come under scrutiny, such as those in the grand jury.

The distinction between evidence presented and heard can be significant. Evidence might have been presented at trial in the form of an offer of proof, but not heard or considered by the trier of fact, in which case the issue is one for direct appeal, not a PCR.

The next version throws in a few more variables and requires the defendant to raise constitutional issues in all cases:

A person [convicted [of a felony]] [in custody] under the laws of this state may seek relief in the sentencing court on the grounds that there is evidence not [apparent from the trial record] [previously presented or heard] that establishes a violation of the person's constitutional rights that:

(a) creates a reasonable probability that had it been heard the defendant would have been acquitted, or convicted of a lesser offense, or would not have been sentenced to death; or
(b) is presumptively prejudicial.

Whether the test for prejudice is a reasonable probability of a different outcome or fundamental unfairness, the court will perform what is in essence a harmless error analysis. Accepting the alleged facts as true, it will weigh them together with the evidence at trial favorable to the defense and against the relative strength of the state's case. Cumulative evidence is inherently part of this analysis. Nevertheless, if only to make it clear that similar evidence at trial does not necessarily defeat a claim, the problem could be dealt with expressly. The language would read:

The evidence alleged to be true must be substantial and not merely cumulative to evidence of [equal or] greater reliability, in quantity or in kind, that was presented or heard at trial.

or:

If the court finds [by a preponderance of the evidence] [beyond a reasonable doubt] that the evidence alleged is cumulative [in quantity or in kind] to evidence [on the same issue] that was presented or heard at trial, and that taken together with the latter it would not have had the effect contended for, then it shall dismiss the [motion] [petition].

**CONCLUSION**

The proposals just given are not meant to exclude other possible grounds for relief, such as lack of jurisdiction or excessive sentence, but only to rectify the problem of constitutional rights. It is also beyond the scope of this Article to deal with procedural matters that are capable of many different solutions, such as statutes of limitations, provisions for counsel and for successive motions, and processes for screening out frivolous petitions.

The system of postconviction remedies, both state and federal, is sick. I may
not be the best doctor, but I wanted to write a prescription instead of just another diagnosis. I will be grateful to anyone who can improve upon what I have done.