# Too Late Not to Die: An Empirical Review of Procedural Default in Capital Habeas Cases, 2017–2021

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## INTRODUCTION

What happens when a criminal defendant fails to raise a federal claim in the manner required by state procedure? In 1963, the Supreme Court made a holding on that question that has endured for more than sixty years. In such situations, the Court held, the defendant has forfeited a state remedy but has not necessarily

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waived a federal right.[1] For that reason, a defendant who has procedurally defaulted a meritorious federal claim in state court is still "in custody in violation of the Constitution or laws or treaties of the United States"—and therefore is still among the class of people for whom Congress has chosen to provide a federal remedy in the form of a writ of habeas corpus.[2]

Much about the law of federal habeas corpus has changed since the Court decided that case, *Fay v. Noia*. But neither the Court nor Congress has ever overruled *Fay*'s holding that procedural default does not deprive a federal court of jurisdiction under the habeas statute.[3] Nevertheless, beginning in the late 1970s, the Court decided, based on its own policy judgment, that procedural default should be strictly enforced against criminal defendants in all but the rarest of federal habeas cases—an approach Congress has never codified.[4] Decades of experience and the findings of this Note demonstrate that, at least in the death penalty context, a new approach is needed.

This Note presents the results of an empirical review of the federal habeas cases of every person executed by a state in the five years between 2017 and 2021. During that time, at least twenty-six people were executed after a federal court declined to consider the merits of at least one claim that had been procedurally defaulted—30.6% of all people executed in those years. At the same time, this Note encouragingly finds that courts routinely consider the merits of defaulted claims notwithstanding unexcused default. In 93.2% of cases involving defaulted claims, the court made clear that at least one such claim was (in its view) meritless. And in a substantial majority of cases (62.2%), the court considered, in one way or another, the merits of all defaulted claims.

Based on these findings, this Note proposes two changes to the procedural default regime as applied to capital cases. First, either the Supreme Court or Congress should alter the doctrine to command lower courts to deny baseless claims on the merits regardless of default. This would better vindicate the values of federalism that drove the Court to create the doctrine in the first place. Second, petitioners[5] should be able use the standard of review contained in 28 U.S.C. § 2254(d)(1) as a sword to excuse default. That is, when a defaulted claim is

1. *See* Fay v. Noia, 372 U.S. 391, 427–28 (1963).

2. 28 U.S.C. § 2254(a).

3. *See, e.g.*, Trest v. Cain, 522 U.S. 87, 89 (1997); *see also* BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9B:3, Westlaw (database updated May 2023) (explaining that Congress "did not change the application of . . . procedural default principles" when it last significantly revised the federal habeas statute in 1996). *See generally* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, tit. I, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

4. Although it is tempting to view Congress's inaction as an endorsement of the current default rules, the Court has repeatedly adhered to a presumption against "draw[ing] inferences from Congress' failure to act"—a presumption it has applied to the federal habeas statute itself. *See* Brecht v. Abrahamson, 507 U.S. 619, 632 (1993) (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988)); *cf.* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186 (1994) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation." (alteration in original) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989))).

5. This Note refers to state prisoners seeking federal habeas relief as "petitioners."

meritorious "beyond any possibility for fairminded disagreement,"[6] a court should excuse default to avoid a fundamental miscarriage of justice.

This is not the first study of state procedural default in capital habeas cases. A 2007 study reviewed 368 such cases filed between 2000 and 2002 in the thirteen federal districts that handled the highest volume of death penalty petitions at the time.[7] The review found that petitioners procedurally defaulted at least one claim in at least 42.2% of those cases.[8] The study did not distinguish between defaulted claims that were and were not considered on the merits. Furthermore, in thirty-three of the cases studied (12.4% of the total that reached judgment without transfer), the district court awarded habeas relief.[9]

This Note expands on the existing research in important ways. First, its findings are two decades more current. Second, and more significantly, this Note details not only how often habeas petitioners defaulted claims but also how often federal courts failed to consider the merits of those defaulted claims. These findings provide more detailed insight into the operation of procedural default in state capital cases than the previous study.

Part I explains when, why, and how the Supreme Court created the doctrine of procedural default that now applies to federal habeas review of state criminal judgments. Part II presents quantitative and qualitative findings, including the observation that federal courts sometimes misstate the relationship between procedural default and exhaustion of state remedies under § 2254(b). Part III argues that the Note's empirical findings compel two changes to the procedural default doctrine.

## I. FEDERAL HABEAS CORPUS AND STATE PROCEDURAL DEFAULT

Appreciating this Note's empirical findings and policy recommendations first requires an understanding of the procedural default doctrine: how it came to be and how it works today. Section I.A explains the Court's three most relevant precedents in this area of law, and Section I.B. describes how the regime works in practice.

### A. FROM *FAY* TO *COLEMAN*

The Supreme Court's seminal cases on the modern procedural default doctrine are *Fay v. Noia*,[10] *Wainwright v. Sykes*,[11] and *Coleman v. Thompson*.[12] Together, *Sykes* and *Coleman* abrogated the approach to enforcement of state procedural default adopted in *Fay*. But *Fay* remains relevant in at least two important respects.

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6. Harrington v. Richter, 562 U.S. 86, 103 (2011).

7. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 16–17 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/7823-3MUA].

8. *Id.* at 48.

9. *Id.* at 51.

10. 372 U.S. 391 (1963).

11. 433 U.S. 72 (1977).

12. 501 U.S. 722 (1991).

In *Fay*, Charles Noia failed to timely appeal his murder conviction, which was based on a confession that, by the time the case reached the Supreme Court, all parties agreed was involuntarily obtained in violation of the Due Process Clause.[13] The state courts denied relief on procedural grounds (the failure to appeal on time), even though Noia's two codefendants had successfully overturned their convictions based on the same involuntary confession.[14] The *Fay* Court answered three critical questions relevant to this Note, two of which remain good law.[15]

First, the *Fay* Court held that the state court's refusal to consider the merits of Noia's claim because of procedural default did not defeat federal jurisdiction.[16] In so holding, the Court explained that the default of a state *remedy* was not automatically equivalent to the default of a federal *right*;[17] therefore, a petitioner with a procedurally defaulted claim is still in custody "in violation of" federal law under § 2254. For that reason, the Court held that the "adequate and independent [state] ground" doctrine, which constrains the Court's jurisdiction on direct review, does not strip a court of jurisdiction in the habeas context.[18] Thus, an "allegation of an unconstitutional restraint" triggers jurisdiction under § 2254—and that jurisdiction "is not defeated" by procedural default.[19] This portion of the opinion remains good law.[20]

Second, the *Fay* Court held that § 2254 requires a petitioner to exhaust only those remedies "still open to the habeas applicant at the time he files his application in federal court."[21] Because Noia had procedurally defaulted his claim in state courts, he had satisfied the statute's exhaustion requirement notwithstanding his failure to obtain a state court merits ruling on the claim.[22] This holding also remains good law.[23]

Third, the *Fay* Court held that a habeas court should deny relief to a petitioner who "deliberately by-passed the orderly procedure of the state courts," but

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13. 372 U.S. at 394–96.

14. *Id.* at 395.

15. A fourth holding of *Fay* related to procedural default is also worth briefly noting: A petitioner need not seek a writ of certiorari from the Supreme Court to subsequently obtain federal habeas relief. *Id.* at 435–36. This remains true today. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1351 (7th ed. 2015).

16. *See Fay*, 372 U.S. at 426–34.

17. *See id.* at 427–28.

18. *Id.* at 434. Interestingly, while the *Fay* Court said that no prior habeas decision had "expressly" applied the independent and adequate state ground doctrine to habeas review, *see id.* at 429 n.39, the *Sykes* Court suggested that *Brown v. Allen* had in fact rested one of its holdings on the doctrine, *see* Wainwright v. Sykes, 433 U.S. 72, 82 (1977) (citing Brown v. Allen, 344 U.S. 443, 486–87 (1953)).

19. *Fay*, 372 U.S. at 426.

20. *See, e.g.*, Trest v. Cain, 522 U.S. 87, 89 (1997) (9–0 decision) (holding that federal habeas courts need not raise procedural default sua sponte, and noting that "this Court has made clear that in the habeas context, a procedural default . . . is not a jurisdictional matter").

21. *Fay*, 372 U.S. at 435.

22. *See id.* at 434–35.

23. *See infra* notes 89–102 and accompanying text.

otherwise overlook procedural default.[24] Lower courts were to assess deliberate bypass by the standard for finding waiver of a constitutional right—analyzing whether petitioner's conduct amounted to "an intentional relinquishment or abandonment of a known right or privilege."[25] The Court found Noia had not deliberately bypassed state procedures because his decision not to appeal could not "realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."[26] Rather, the Court found Noia forwent his direct appeal to avoid the risk of being retried and sentenced to death.[27]

This third holding from *Fay* didn't last as long.[28] In *Wainwright v. Sykes*, the Court limited *Fay* "to the facts there confronting the Court" and applied a different standard to situations in which a defendant's procedural default resulted from the failure to object at trial.[29] The *Sykes* Court held that federal courts should deny habeas relief on claims that were procedurally defaulted in state court because of noncompliance with a contemporaneous-objection rule—unless the defendant demonstrated "cause" and "prejudice" to overcome the default.[30] It was not the first time the Court had substituted the cause-and-prejudice test for the deliberate-bypass test,[31] but the decision was the first to include an explicit repudiation of *Fay*.[32] The *Sykes* Court argued that enforcement of contemporaneous-objection rules on habeas would promote judicial efficiency, discourage "sandbagging" by defense counsel, and boost the perception that the defendant's state criminal trial was "a decisive and portentous event."[33]

The *Sykes* Court also implied that the state procedural rule that gave rise to default must provide an independent and adequate ground on which to detain the petitioner, borrowing from the standard applicable on direct review.[34] Subsequent decisions have confirmed that federal habeas courts may disregard procedural

24. *Fay*, 372 U.S. at 438.

25. *Id.* at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

26. *Id.* at 440.

27. *See id.*

28. For a thorough recounting of how the Court's jurisprudence in this area evolved between *Fay* and *Sykes*, see generally Yale L. Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 360–93 (1978).

29. 433 U.S. 72, 87–88, 88 n.12 (1977).

30. *Id.* at 87.

31. The Court had applied the cause-and-prejudice test to habeas review of state criminal convictions one year prior, but its decision was limited to defaulted claims that a grand jury was improperly composed. *See* Francis v. Henderson, 425 U.S. 536, 542 (1976); *see also* Davis v. United States, 411 U.S. 233, 242 (1973) (applying the same rule to collateral review of federal criminal convictions).

32. *See Sykes*, 433 U.S. at 87–88 ("It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.").

33. *Id.* at 88–90. For a critique of the argument that enforcing contemporaneous-objection rules in federal habeas cases discourages "sandbagging," see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 1029 (8th ed. 2021) ("[I]f the objection is sandbagged for the habeas petition, the defendant is giving up use of the objection at trial and on appeal for no apparent gain. . . . [I]t is hard to imagine attorneys strategically choosing to wait and take a chance on a possible later reversal.").

34. *See Sykes*, 433 U.S. at 86–87.

rules that are not adequate[35] or independent.[36] When a state procedural rule is independent and adequate, federal courts still have the *power* to grant habeas relief; the procedural default doctrine simply commands that they decline to exercise it.[37]

Fourteen years later, *Coleman v. Thompson* put *Fay*'s approach to procedural default to rest for good. Whereas *Sykes* had limited *Fay* to its facts,[38] and subsequent decisions had expanded the scenarios in which the *Sykes* approach applied,[39] *Coleman* finally overruled *Fay* by declining to apply the deliberate-bypass test to the very scenario in which it arose: the forfeiture of an entire appeal.[40] The *Coleman* Court said that *Fay* "undervalued the importance of state procedural rules," the disregard of which causes "significant harm to the States" by upsetting the "finality" of criminal judgments.[41] Like *Sykes* before it, *Coleman* did not retreat from *Fay*'s holding that a habeas court *could* award relief despite the presence of an independent and adequate state procedural ground.[42] Rather, the Court ruled that it *should* decline to do so because Roger Coleman's lawyer had failed to file a "purely ministerial" notice of appeal on time.[43]

### B. WHERE WE ARE TODAY

A claim can become procedurally defaulted for the purposes of federal habeas review in one of two ways: (1) the petitioner fails to "fairly present" the claim all the way to the highest court of the state eligible to hear such a claim, and by the time the federal petition is filed, the state courts would decline to consider the claim on the merits because of a procedural bar;[44] or (2) the state courts apply a

35. *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 381 (2002).

36. *See, e.g.*, Harris v. Reed, 489 U.S. 255, 266 (1989).

37. *See, e.g.*, Francis v. Henderson, 425 U.S. 536, 538 (1976) ("There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case [of procedural default]." (citing 28 U.S.C. §§ 2241, 2254)).

38. *Sykes*, 433 U.S. at 88 n.12.

39. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 129 (1982) (reaffirming *Sykes*'s application to *all* cases in which a prisoner raises constitutional claims in federal courts after a state procedural default, not just those where "the constitutional error did not affect the truthfinding function of the trial"); Murray v. Carrier, 477 U.S. 478, 492 (1986) (applying *Sykes* where "counsel's failure to raise a *particular* claim on appeal . . . is treated as a procedural default").

40. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991).

41. *Id.*

42. *See id.* at 729–31.

43. *Id.* at 742.

44. *See, e.g.*, O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). There is some tension in the Court's caselaw regarding claims that would be futile to raise in state court. *See* FALLON, JR. ET AL., *supra* note 15, at 1345 n.18. In *Lynce v. Mathis*, the Court found a claim exhausted because presenting it to the state courts would have been futile in the face of indistinguishable state supreme court precedent. 519 U.S. 433, 436 n.4 (1997). But the Court had earlier held that the futility of raising a claim in state court cannot excuse procedural default. *See* Smith v. Murray, 477 U.S. 527, 534–35 (1986); *Engle*, 456 U.S. at 130. If, as *Lynce* holds, the habeas statute does not require a petitioner to raise a futile claim in state court to begin with, it's hard to understand why a state rule requiring the petitioner to raise the claim at trial, *Engle*, 456 U.S. at 125, or on appeal, *Smith*, 477 U.S. at 531–32, would preclude habeas relief. Implicit in a court's holding that exhaustion is excused through futility is that Congress does not care if that claim is presented to a state court before a federal habeas court acts. To empower states to remove such

procedural bar to preclude relief on the claim.[45] The test for excusing default is the same regardless, but notice that under method one the court must predict that a state procedural bar would apply,[46] whereas under method two the state court has already answered that question.

Once the claim has been defaulted, a petitioner must either demonstrate cause and prejudice for the default or satisfy the fundamental miscarriage-of-justice test. To demonstrate cause, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[47] Ineffective assistance of counsel at a proceeding in which one enjoys a constitutional right to counsel can serve as cause, although the ineffective-assistance claim must have itself been properly preserved.[48] As to prejudice, a petitioner bears "the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[49]

The fundamental miscarriage-of-justice exception takes two forms in the death penalty context. A petitioner can prove he or she is "probably . . . actually innocent" of the crime.[50] Or the petitioner can show that "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[51] Like with cause and prejudice, this exception merely excuses procedural default—a miscarriage-of-justice finding does not itself warrant relief.

If the default is excused, the court will review the claim under the standards contained in the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,[52] codified at 28 U.S.C. § 2254. If the state court adjudicated the merits of the defaulted claim, the standard of review contained in § 2254(d) will apply.[53] In

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claims from federal cognizance takes the procedural default doctrine far beyond any arguable statutory basis.

45. *See, e.g.*, *Coleman*, 501 U.S. at 750.

46. *See, e.g.*, Davila v. Davis, 582 U.S. 521, 527 n.1 (2017). This prediction is necessary because, if the state would still consider the claim on the merits, then it is unexhausted under § 2254(b), but it is not procedurally defaulted. *See infra* Section II.C.2. The court could nevertheless deny relief on the merits in such a case. *See* § 2254(b)(2).

47. Murray v. Carrier, 477 U.S. 478, 488 (1986).

48. *Id.* at 488–89 ("Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine . . . generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.").

49. United States v. Frady, 456 U.S. 152, 170 (1982).

50. Smith v. Murray, 477 U.S. 527, 537 (1986) (quoting *Carrier*, 477 U.S. at 496).

51. Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (limiting the exception to cases in which the petitioner can negate an aggravating circumstance).

52. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19.

53. Notice the counterintuitive results that AEDPA produces. *See* Cullen v. Pinholster, 563 U.S. 170, 215 (2011) (Sotomayor, J., dissenting) ("The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence."). After default is excused, a petitioner

these cases, the petitioner will be limited to making an argument based on the law and the evidence that was before the state court at the time of its decision.[54] As to legal errors, the petitioner will need to show the state'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."[55]

If no state court adjudicated the defaulted claim on the merits, the federal court will review the claim de novo.[56] Under AEDPA, a petitioner will sometimes be barred from introducing new evidence in support of the claim for which default was excused, although in many cases a valid cause for default will also excuse compliance with the evidentiary limitations of 28 U.S.C. § 2254(e)(2).[57] Thus, a petitioner who had good reason for not presenting a claim to the state courts is arguably in the most advantageous position of all habeas petitioners.

## II. EMPIRICAL FINDINGS

Before proceeding, a brief roadmap: Section II.A describes the Note's methodology; Section II.B details its empirical findings; and Section II.C makes two observations regarding the way courts adjudicated the habeas cases that formed the basis of this study.

### A. METHODOLOGY

This Note presents findings from a review of the federal habeas cases of every person executed by a state in the five years between 2017 and 2021. I chose to focus on the cases of people who were ultimately executed to identify how often people were being put to death without a federal habeas court considering the merits of all their federal claims. I worked from a database of executions maintained by the Death Penalty Information Center[58] and used commercial and public electronic databases to locate the decisions that disposed of their federal cases.

I reviewed only claims that were involuntarily dismissed by a federal court after that court determined that a procedural bar applied. The petitioners in this study may have had additional claims subject to a procedural bar that they chose

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who never raised a claim in the state courts at all can obtain de novo review and potentially introduce new evidence. But a petitioner who obtained a merits ruling in state court will have to overcome the heightened standard of § 2254(d)(1), which considers only the clearly established law and evidence before the court at the time of its decision. Aside from rewarding those who seemingly showed *less* respect for the state courts, it would also seem unfair to deny a petitioner the benefit of law that became clearly established sometime between the state court's merits ruling and the final state disposition on the matter, especially in situations where that final disposition would have included a merits determination but for an *excused* default. *Cf.* FALLON, JR. ET AL., *supra* note 15, at 1317.

54. *See* Greene v. Fisher, 565 U.S. 34, 38 (2011); *Cullen*, 563 U.S. at 181–82.

55. § 2254(d)(1). For further discussion of AEDPA's standard of review, see *infra* Section III.B.

56. *See, e.g.*, Cone v. Bell, 556 U.S. 449, 472 (2009); Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 534 (2003).

57. *See* Williams v. Taylor (*Michael Williams*), 529 U.S. 420, 432 (2000) (holding that petitioner may avoid § 2254(e)(2)'s bar on evidentiary hearings by demonstrating they were not "at fault" for lack of evidence in state court record).

58. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database [https://perma.cc/2QSW-SKE4] (last visited Feb. 13, 2024).

not to raise in federal court. And federal courts sometimes addressed the merits of a claim without resolving whether the claim was defaulted. Courts also at times cited a claim's procedurally defaulted status as grounds for denying leave to amend a petition or for denying funding under 18 U.S.C. § 3599(f). All of those scenarios are beyond the scope of this study, which focused on decisions dismissing a petitioner's claims as procedurally defaulted and/or unmeritorious in the alternative.

In conducting this review, I tracked how often courts considered the merits of defaulted claims. Usually, courts considered the merits of defaulted claims by simply stating that a claim would not entitle the petitioner to relief if default were excused. I counted the claim as having been considered on the merits regardless of whether a court formally rejected the claim through a holding in the alternative or briefly discounted the claim in passing dicta. Importantly, I also treated a court as having considered the merits when it did so indirectly by, for example, considering whether ineffective assistance of counsel could excuse default or by considering whether a petitioner could show "prejudice" to excuse default. Often, a court's analysis of those questions hinged on whether the defaulted claims had merit. Therefore, when the court's analysis of a collateral issue clearly indicated a defaulted claim was (in the court's view) without merit, I labeled it as such.

My findings come with caveats. I only reviewed the cases of people who were executed—in other words, the cases of people whose appeals were ultimately unsuccessful. For that reason, these people may have procedurally defaulted claims at a higher rate than death row prisoners overall (given that procedurally defaulting a claim makes it harder to win a habeas case). Similarly, these people may have been less likely than other death row prisoners to convince a court to excuse their procedural defaults (again, because they ultimately lost their cases). Therefore, the percentages discussed in Section II.B may not be representative of all death row habeas cases.

### B. QUANTITATIVE FINDINGS

In the five years between 2017 and 2021, at least twenty-six people were executed after a federal court declined to consider the merits of at least one claim that the state putting them to death had violated their rights.[59] Those twenty-six people accounted for 30.6% of all state prisoners executed during that time.

States executed eighty-five people between 2017 and 2021.[60] A federal court found that seventy-four of them had at least one claim that had been defaulted for the purposes of habeas review.[61] Excluding four people who did not have a habeas petition decided on the merits,[62] 91.4% of all petitioners defaulted at least one claim. Federal habeas courts nevertheless considered the merits of all

59. *See* Jonathan Dame, *Too Late Not to Die: An Empirical Review of Procedural Default in Capital Habeas Cases, 2017–2021*, 112 GEO. L.J. 673 app. (2024), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2024/03/Dame_Too-Late-Not-to-Die_Appendix.pdf. [https://perma.cc/3SQB-3NRP] This number may be even higher as some relevant records were not electronically available.

60. DEATH PENALTY INFO. CTR., *supra* note 58.

61. *See* Dame, *supra* note 59.

62. Two people's cases were dismissed as untimely, and two other people apparently did not file federal habeas petitions. *See id.*

defaulted claims in at least forty-six (62.2%) of those cases.[63] In twenty-six other cases—representing 35.1% of all cases in which at least one claim was procedurally defaulted—the court denied habeas relief without considering the merits of at least one defaulted claim.[64] Because courts sometimes considered the merits of some but not all defaulted claims, the merits of at least one defaulted claim were considered in 93.2% of cases with default present.[65]

Defendants procedurally defaulted claims of virtually every kind. Broadly, the claims never considered on the merits were based on the Fifth, Sixth, Eighth, and Fourteenth Amendments. Specifically, those claims alleged, among other things, that trial and appellate counsel were constitutionally ineffective and conflicted;[66] that government officials engaged in misconduct in violation of due process;[67] that juries were not fair and impartial[68] or received erroneous instructions;[69] and that state courts improperly excluded evidence[70] or imposed death sentences using procedures that violated the Eighth Amendment.[71]

To be clear, this Note does not find that any petitioner was executed despite the presence of a *meritorious* defaulted claim. Whether any defaulted claims not considered on the merits would have, if not defaulted, entitled the petitioner to relief is beyond the scope of this study. This Note's only finding on this point is that twenty-six people (1) had at least one defaulted claim (2) that no federal court considered (directly or indirectly) on the merits before their execution.

As already mentioned, courts considered the merits of at least one defaulted claim in 93.2% of cases with default present. In no case, however, did a court excuse default based on the cause-and-prejudice or miscarriage-of-justice exceptions. Rather, courts passed on the merits of defaulted claims even though they had been defaulted. Most of the time, courts addressed the merits through dicta or alternative holdings.[72] In a significant minority of cases, courts reached the merits

63. This number may be even higher as some relevant records were not electronically available.

64. *See* Dame, *supra* note 59. Two cases are not included in the breakdown of these categories because available records are insufficient to determine whether their procedurally defaulted claims were considered on the merits.

65. This number may be even higher as some relevant records were not electronically available.

66. *See, e.g.*, Jones v. Norris, No. 00CV00401, slip op. at 2–3 (E.D. Ark. Apr. 13, 2006), ECF No. 56-2 (rejecting claim that petitioner's attorneys were unfamiliar with sentencing-state mitigation and failed to investigate and present evidence that petitioner had serious mental health problems); West v. Bell, No. 01-cv-91, 2004 WL 7340413, at *92 (E.D. Tenn. Sept. 30, 2004) (rejecting claim that petitioner's trial attorney was conflicted).

67. *See, e.g.*, King v. Schriro, 537 F.3d 1062, 1075 n.41 (9th Cir. 2008) (alleging law enforcement officer did not preserve handwritten notes from interview with petitioner); Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337, 1343 (11th Cir. 2007) (alleging prosecutor failed to disclose sources of information, withheld evidence, and presented misleading evidence).

68. *See, e.g.*, Moody v. Thomas, 89 F. Supp. 3d 1167, 1230–31 (N.D. Ala. 2015).

69. *See, e.g.*, Zagorski v. Bell, No. 99-1193, 2006 WL 8455679, at *9 (M.D. Tenn. Mar. 31, 2006) (arguing jury instruction failed to properly state "reasonable doubt" standard).

70. *See, e.g.*, Swearingen v. Dretke, Civ. Action No. 04-2058, 2005 BL 28613, at *4–5 (S.D. Tex. Sept. 09, 2005).

71. *See, e.g.*, Williams v. Norris, No. 02-cv-00450, 2006 WL 1699835, at *11 (E.D. Ark. June 19, 2006) (objecting to sentencing jury's consideration of petitioner's felony conviction at age fifteen as aggravating factor).

72. *See, e.g.*, *Swearingen*, 2005 BL 28613, at *8.

indirectly, by reasoning that the petitioner could not demonstrate "prejudice" because the claim was baseless,[73] for example, or by holding that the petitioner could not meet the exception of *Martinez v. Ryan* because their trial-ineffectiveness claims had no merit.[74]

### C. QUALITATIVE FINDINGS

This Section makes two observations about how federal courts adjudicate habeas petitions. Section II.C.1 discusses how courts routinely consider the merits of defaulted claims in the alternative. Section II.C.2 demonstrates that courts consistently misstate the relationship between exhaustion of remedies and procedural default.

#### 1. The Benefits and Limitations of Alternative Merits Holdings

Federal habeas courts routinely consider the merits of death penalty petitioners' defaulted claims in the alternative. Although this Note finds that a significant number of petitioners were executed without merits consideration of at least one claim, it also finds that, in most cases with default present (62.2%), federal courts addressed (in one way or another) the merits of every single defaulted claim. Anecdotally, the petitioners in this study often presented many claims, including some that plainly appeared foreclosed by precedent or unsupported by

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73. *See, e.g.*, Jimenez v. Crosby, No. 04-cv-20132, slip op. at 23 (S.D. Fla. Jan. 30, 2006), ECF No. 73.

74. *Martinez* allows the ineffectiveness of postconviction counsel to serve as cause and prejudice for the default of substantial claims of the ineffective assistance of trial counsel when the state effectively requires such trial-ineffectiveness claims to be brought on state collateral review. *See* Martinez v. Ryan, 566 U.S. 1, 17–18 (2012). In *Shinn v. Ramirez*, the Court held that the ineffectiveness of postconviction counsel cannot serve as cause to excuse compliance with 28 U.S.C. § 2254(e)(2), which prohibits introducing evidence not contained in the state court record. 598 U.S. 366, 382–85 (2022). As a consequence, many petitioners may now be unable to prove their trial-ineffectiveness claims even if the *Martinez* exception applies because they will be unable to introduce evidence necessary to prevail.

But this Note finds *Martinez* may continue to serve another purpose: The exception often provides a gateway through which courts consider the merits of defaulted claims. Because the exception only applies to "substantial" ineffective assistance of trial counsel claims, courts often conduct the *Martinez* analysis by considering whether the defaulted trial-counsel claim has "some merit." *Martinez*, 566 U.S. at 14; *see, e.g.*, Wilkins v. Thaler, No. 12-cv-270-A, 2013 WL 335998, at *10–16 (N.D. Tex. Jan. 29, 2013). These courts thus indirectly consider the merits of those defaulted trial-counsel claims. If the ineffectiveness of a petitioner's trial counsel caused the default *of other claims*, a court might indirectly consider the merits of those other claims too, because the merits of the trial-counsel claim will depend on the merits of the claims the attorney caused the petitioner to forfeit.

Compare cases decided before and after *Martinez*. Jack Harold Jones, Jr. argued on federal habeas that he was represented at trial by "inexperienced attorneys with only a vague idea of what mitigation was." Supplement or Amendment to Petition for Writ of Habeas Corpus at 4, Jones v. Norris, No. 00CV00401 (E.D. Ark. Sept. 14, 2005), ECF No. 40. These trial attorneys allegedly failed to investigate and present evidence that Jones had serious mental health problems. *See id.* at 4–5. The district court, in a decision predating *Martinez*, rejected Jones' Sixth Amendment claim (which had been procedurally defaulted) without considering its merit because "ineffective assistance of postconviction counsel is not recognized as a ground for excusing the procedural default." Jones v. Norris, No. 00CV00401, slip op. at 3 (E.D. Ark. Apr. 13, 2006), ECF No. 56-2. In contrast, the district court in Christopher Wilkins's case—decided after *Martinez*—devoted more than 3,000 words to analyzing the merits of his defaulted trial-ineffectiveness claim to decide whether it had some merit under *Martinez*. *See Wilkins*, 2013 WL 335998, at *10–16.

facts in the record. Some of the claims *not* considered on the merits surely suffered from one of the two same infirmities (the problem is no federal court has ever said so). Thankfully, many courts in this study did pass on petitioners' defaulted claims, and the full benefits of that practice are discussed in Section III.A, *infra*.

Two aspects of this practice of alternative merits holdings are problematic.[75] First, even though courts considered the merits of at least one defaulted claim in 93.2% of cases with default present, these alternative merits holdings were often insulated from appellate review. This means that petitioners with defaulted claims considered on the merits were nevertheless deprived of procedural rights available to other petitioners. Second, courts often devoted a significant amount of time to analyzing default even when they ruled against the petitioner on the merits, including in cases in which the petitioners' claims were nearly frivolous. This is inefficient and unnecessary.

As to the first point, even when a district court considers the merits of a claim in the alternative, the court will often deny a certificate of appealability (COA) under 28 U.S.C. § 2253 based on its procedural holding.[76] Section 2253 prohibits the appeal by the petitioner of an adverse habeas judgment unless the petitioner has made "a substantial showing of the denial of a constitutional right," which means that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[77] Because reasonable jurists could rarely debate the accuracy of a court's finding of procedural default, that procedural holding is usually sufficient to preclude the issuance of a COA. Appellate courts will similarly often consider only the accuracy of the district court's procedural holding in considering COA requests,[78] or in evaluating a claim for which the district court granted a COA based on the procedural holding.[79] As a result, even when a lower court considers the merits of a defaulted claim, the petitioner is often unable to obtain circuit or Supreme Court review of that merits analysis.

As to the second problem with alternative merits holdings, determining whether a claim has been defaulted isn't always easy. Courts sometimes must

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75. For further discussion of the benefits of reaching the merits of a claim even if only to deny relief, see *infra* Section III.A.

76. *See, e.g.*, Otte v. Houk, No. 06CV1698, 2008 WL 408525, at *50–51 (N.D. Ohio Feb. 12, 2008), *aff'd*, 654 F.3d 594 (6th Cir. 2011); *see also* Ruiz v. Dretke, No. Civ. SA03CA303, 2005 WL 3271652, at *2 (W.D. Tex. Nov. 17, 2005) ("While this Court has taken great pains in its previous Orders to explain that reasonable minds could disagree over whether petitioner's ineffective assistance claims possess merit, there is no arguable legal basis for the conclusion that any room for reasonable disagreement exists with regard to the reality of petitioner's procedural default on his unexhausted ineffective assistance claims.").

77. Slack v. McDaniel, 529 U.S. 473, 483–84 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

78. *See, e.g.*, Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337, 1343–45 (11th Cir. 2007); Garcia v. Davis, 704 F. App'x 316, 322–23 (5th Cir. 2017); Acker v. Davis, 693 F. App'x 384, 397–99 (5th Cir. 2017); Bigby v. Stephens, 595 F. App'x 350, 354 (5th Cir. 2014).

79. *See* Soliz v. Davis, 750 F. App'x 282, 293 (5th Cir. 2018) ("We do not consider the merits of Claim 20 here, as we affirm the district court's denial of habeas relief on the basis that Claim 20 is procedurally defaulted.").

devote substantial analysis to considering whether the state's procedural holding was independent and adequate or whether the petitioner "fairly presented" the claim to the state courts. Even when a claim is unquestionably defaulted, courts sometimes still spend pages analyzing whether a petitioner has demonstrated cause and prejudice or has shown that a fundamental miscarriage of justice would result from enforcing default.

The upshot is that valuable judicial resources are wasted considering a procedural question that, by the court's own analysis of the merits, is irrelevant. The district court in Gustavo Garcia's case[80] wrote a 60,000-word opinion addressing more than sixty-five claims for relief.[81] Despite repeatedly admonishing Garcia's counsel for how frivolous some of the claims were,[82] the court nevertheless studiously considered whether and why each defaulted claim was defaulted before considering the merits in the alternative.[83] Other courts have spent pages and pages discussing why a claim had been defaulted—or why it had not been—only to reject the same claim on the merits anyway.[84]

District courts are not necessarily wrong to write their opinions in this way given the current legal landscape. The Supreme Court has said that the question of procedural default should "ordinarily" be considered before considering whether a rule applies retroactively, which in turn should be considered before adjudicating the merits.[85] Plus, the procedural default question is often relevant to whether a COA is warranted (and it may affect the quality of the court's merits analysis).[86] But the phenomenon highlights how an alternative approach to procedural default could make life easier for lower courts, which in turn could speed up the process for petitioners and government defendants.[87]

2. The (Misunderstood) Relationship Between Exhaustion and Procedural Default

Numerous federal habeas courts failed to properly explain the relationship between exhaustion under § 2254(b) and procedural default. As a result, these courts sometimes described the statute's exhaustion requirement in a way that

80. Garcia was executed in 2016, outside of this study's range, but his case is highly illustrative of this point. *See* Jolie McCullough, *Inmate Executed After 24 Years on Death Row*, TEX. TRIB. (Feb. 16, 2016, 6:00 AM), https://www.texastribune.org/2016/02/16/execution-set-man-involved-death-row-escape [https://perma.cc/PC7A-C9C5].

81. *See* Garcia v. Dir., TDCJ–CID, 73 F. Supp. 3d 693, 708 (E.D. Tex. 2014).

82. *See id.* at 771 ("Counsel improvidently included the claim in the present petition with the knowledge that it lacks merit."); *id.* at 773 ("Counsel was clearly aware that the claim lacked merit when he included it in the present petition.").

83. *See, e.g.*, *id.* at 769 (discussing procedural default before concluding that the claims at issue were "devoid of merit").

84. *Compare* Preyor v. Thaler, No. SA-10-CA-857, slip op. at 35–45 (W.D. Tex. June 15, 2012), ECF No. 21 (finding claims to have been defaulted, but denying relief on the merits in the alterative), *with* Lambrix v. Dugger, No. 88-12107-CIV, slip op. at 4–14, 71 (S.D. Fla. May 12, 1992) (finding claims not to have been adequately defaulted, but denying relief on the merits).

85. *See* Lambrix v. Singletary, 520 U.S. 518, 525 (1997).

86. *See, e.g.*, Irick v. Bell, No. 98-cv-666, 2001 WL 37115951, at *32 n.27, *39 n.37 (E.D. Tenn. Mar. 30, 2001) (addressing the merits of defaulted claims in brief footnotes).

87. *See infra* Section III.A.

made it seem like Congress—rather than the judge-made rules concerning procedural default—was responsible for the court declining to reach the merits of a defaulted claim. It is important for federal habeas courts to properly understand the relationship between these two doctrines lest they unfairly prejudice habeas petitioners or fail to properly enforce Congress's exhaustion bar.

First, an explanation of how the Supreme Court has interpreted § 2254(b).[88] Section 2254(b) prohibits courts from granting habeas relief unless a petitioner has exhausted the "remedies *available* in the courts of the State."[89] By its plain terms, this provision "refers only to remedies still available at the time of the federal petition."[90] The Supreme Court has repeatedly held that if the state courts would find a previously unraised claim to be procedurally defaulted in subsequent litigation, the claim is exhausted for the purposes of § 2254(b) because state remedies are no longer "available."[91] In other words, procedurally defaulted claims are, by definition, statutorily "exhausted."

The Court has held that claims that were not "properly exhausted" in state court—that is, as a general rule, claims that a petitioner did not fairly present to the highest court of the state eligible to hear them—are procedurally defaulted.[92] In that way, the Court considers procedural default an important "corollary" to the exhaustion requirement,[93] and for that reason, it's not unreasonable to refer to previously unraised claims as being, colloquially speaking, "unexhausted." But to say that § 2254(b) bars review of procedurally defaulted claims misstates the law, which is that procedurally defaulted claims are statutorily exhausted.[94]

That procedurally defaulted claims are statutorily "exhausted" under § 2254(b) makes sense when one considers the policy behind the exhaustion rule that Congress codified in that provision.[95] The Court first articulated a prudential rule of exhaustion in 1886 in *Ex parte Royall*, when the Court (despite recognizing its power to do so) declined to award habeas relief to petitioners who were being held on bail before trial.[96] The petitioners had challenged the constitutionality of the charges against them, but the Court explained that a federal court should not

88. Although subsections (b) and (c) of § 2254 both pertain to the exhaustion of remedies, for simplicity, I refer to § 2254(b) throughout.

89. 28 U.S.C. § 2254(b)(1)(A) (emphasis added); *see also* § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies *available* in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any *available* procedure, the question presented." (emphases added)).

90. Engle v. Isaac, 456 U.S. 107, 126 n.28 (1982) (first citing Humphrey v. Cady, 405 U.S. 504, 516 (1972); and then citing Fay v. Noia, 372 U.S. 391, 435 (1963)).

91. *See, e.g.*, *Fay*, 372 U.S. at 435; *Engle*, 456 U.S. at 125 n.28; Teague v. Lane, 489 U.S. 288, 297–98 (1989); Gray v. Netherland, 518 U.S. 152, 161 (1996); *see also* Picard v. Connor, 404 U.S. 270, 272 n.3 (1971); Harris v. Reed, 489 U.S. 255, 263 n.9 (1989); Castille v. Peoples, 489 U.S. 346, 351–52 (1989); O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999); Coleman v. Thompson, 501 U.S. 722, 732 (1991); Shinn v. Ramirez, 596 U.S. 366, 378–79 (2022).

92. *See O'Sullivan*, 526 U.S. at 848.

93. Davila v. Davis, 582 U.S. 521, 527 (2017).

94. *See Shinn*, 596 U.S. at 377–78.

95. *See Ex parte* Royall, 117 U.S. 241, 251 (1886).

96. *See id.* at 254.

"presume that the decision of the State court would be otherwise than is required by the fundamental law of the land."[97] In other words, the petitioners still had the opportunity to contest the merits of their claims in state court. Once a claim has been procedurally defaulted, the presumption underlying *Ex parte Royall*—that a state court might still vindicate a petitioner's rights—disappears.

If a federal habeas court concludes that a particular claim has not been "fairly presented" to the state courts,[98] the federal court must then determine whether a state court would still review the claim on the merits.[99] *Teague v. Lane* is illustrative. Frank Teague's § 2254 petition included a claim that the prosecutor in his case violated the Equal Protection Clause by excluding Black jurors.[100] Because Teague had never raised the exact claim with enough specificity on direct review, the plurality considered whether Illinois courts would consider the claims on the merits in a new state collateral proceeding. After finding that Teague would not qualify for a "fundamental fairness" exception to the usual procedural bar that would apply under state law, the plurality held that the claim was exhausted for § 2254(b) purposes (because it was procedurally defaulted).[101] But Justice Stevens disagreed. In concurrence, he wrote that he was "by no means convinced" Illinois would bar review of the claim, making it unexhausted (but not defaulted).[102]

The federal courts that reviewed the habeas petitions of the people included in this study did not always correctly state the law as outlined above. Consider the case of Rolando Ruiz. In his § 2254 petition, Ruiz raised an ineffective assistance of counsel claim and a claim that the trial court had denied him due process by instructing the jury to disregard a particular mitigating argument made by defense counsel.[103] Because Ruiz had never raised these claims on state direct or collateral review, the district court held that the claims were "unexhausted" under § 2254(b).[104] This conclusion would have been true if a state remedy were still "available."[105] Yet in the next section of the opinion, the court concluded that Texas procedural law would bar review of these claims if Ruiz returned to state court.[106] That means the claims *were* exhausted within the meaning of § 2254(b).[107] Despite this, the court said that it was "*statutorily* precluded" from considering the merits of the claims under § 2254(b).[108] Similarly, the court in Eric King's case said

97. *Id.* at 252.

98. *See* Picard v. Connor, 404 U.S. 270, 275 (1971).

99. *See, e.g.*, Davila v. Davis, 582 U.S. 521, 527 n.1 (2017).

100. Teague v. Lane, 489 U.S. 288, 297 (1989).

101. *Id.* at 297–98.

102. *Id.* at 325–26 (Stevens, J., concurring in part and in judgment).

103. Ruiz v. Dretke, No. SA-03-CA-303, 2005 WL 2146119, at *9 (W.D. Tex. Aug. 29, 2005), *aff'd sub nom.* Ruiz v. Quarterman, 460 F.3d 638 (5th Cir. 2006).

104. *Id.* at *12.

105. *See id.*

106. *See id.* at *13; *see also* Ruiz v. Dretke, No. SA-03-CA-303, 2005 WL 2402669, at *2 (W.D. Tex. Sept. 15, 2005) ("Texas law precludes petitioner from obtaining a ruling on the merits of his currently unexhausted claims herein in a successive state habeas corpus application.").

107. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982).

108. *Ruiz*, 2005 WL 2146119, at *12 (emphasis added).

that § 2254 was "controlling" and required the court to reject a procedurally defaulted claim that had not been fairly presented to the state courts.[109]

In other cases, federal habeas courts cited § 2254(b)(2) when reaching the merits of a petitioner's "unexhausted" claims, even though the claims were, in fact, exhausted for the purposes of § 2254(b).[110] Under § 2254(b)(2), a court may reject an unexhausted claim on the merits, but it is statutorily barred from granting relief for such claims.[111] In the case of Alvin Avon Braziel, Jr., the court explained that § 2254(b)(1)(A) would prevent it from granting relief on unexhausted claims but noted that it would be permitted to deny relief on the merits under § 2254(b)(2).[112] It then went on to reject Braziel's ineffective assistance of counsel claims as "unexhausted and procedurally barred" (under § 2254(b), only the latter was precisely true) and as unmeritorious in the alternative.[113] Although a "cf." citation to § 2254(b)(2) would be appropriate in these circumstances,[114] implying that the statute bars relief is misleading.

In still other cases, federal habeas courts apparently failed to consider whether the state courts would still hear a claim raised for the first time in a § 2254 petition. In the case of Robert Jennings, for example, the Fifth Circuit held that Jennings had not fairly presented a certain claim to the state courts.[115] "As a result," the court concluded, "Jennings is barred from asserting this claim in his federal habeas petition."[116] The court then misleadingly cited § 2254(b)(1).[117] But the Fifth Circuit skipped a step. After concluding the claim had not been fairly presented to the state courts, the court should have considered whether Texas courts would still hear the claim on the merits;[118] only after answering that question could the court decide whether the claim was exhausted under § 2254(b). The Fifth Circuit

109. *See* King v. Stewart, No. CV-98-1277, slip op. at 11 (D. Ariz. Sept. 26, 2000), ECF No. 46 (first citing 28 U.S.C. § 2254(b)(1)(A); and then citing Coleman v. Thompson, 501 U.S. 722, 731 (1991)).

110. *See, e.g.*, Preyor v. Thaler, No. SA-10-CA-857, slip op. at 43 (W.D. Tex. June 15, 2012), ECF No. 21 ("[T]his Court will nonetheless address the merits of all of petitioner's complaints herein of ineffective assistance by his trial counsel, in accordance with Title 28 U.S.C. § 2254(b)(2) . . . ."); Swearingen v. Dretke, Civ. Action No. 04-2058, 2005 BL 28613, at *8 (S.D. Tex. Sept. 9, 2005) ("Alternatively, the Court will briefly review the merits of Swearingen's unexhausted [procedurally defaulted] federal constitutional claims." (citing § 2254 (b)(2))); Hall v. Thaler, No. EP-10-CV-135, 2011 WL 13185739, at *36 (W.D. Tex. Dec. 20, 2011) ("Out of an abundance of caution, however, this Court will address the merits of [the defaulted claim], in accordance with § 2254(b)(2), which empowers a federal habeas court to deny an exhausted claim on the merits."); Davila v. Stephens, No. 13-CV-506, 2015 WL 1808689, at *20 (N.D. Tex. Apr. 21, 2015) ("Assuming, however, that Davila can avoid procedural default, the claim against Thornton is denied on the merits for the reasons discussed below." (citing § 2254(b)(2))).

111. § 2254(b)(2).

112. *See* Braziel v. Stephens, No. 09-CV-1591, 2015 WL 3454115, at *2 (N.D. Tex. May 28, 2015).

113. *See id.* at *22.

114. *See, e.g.*, Lambrix v. Singletary, 520 U.S. 518, 525 (1997).

115. Jennings v. Stephens, 537 F. App'x 326, 336–37 (5th Cir. 2013) (per curiam), *rev'd on other grounds*, 574 U.S. 271 (2015).

116. *Id.* at 337.

117. *See id.*

118. *See, e.g.*, Davila v. Davis, 582 U.S. 521, 527 n.1 (2017).

did not even attempt to answer that question (and neither had the district court before it).[119]

When courts misstate or, worse, misunderstand the law of exhaustion, defendants may be unfairly prejudiced. Federal habeas courts have some discretion to stay consideration of § 2254 petitions that include both exhausted and unexhausted claims, giving the petitioner time to exhaust the unexhausted claims in the state courts.[120] Exercising that discretion requires identifying when a claim is unexhausted, which *Teague v. Lane* demonstrates is not always an undisputed question.[121] The district court in Charles Rhines's case, for example, correctly recognized that several of his claims were unexhausted but not defaulted,[122] and therefore granted a stay that allowed Rhines to eventually obtain both state and federal merits rulings on the claims.[123] If a court, incorrectly believing a claim to be procedurally defaulted, denies relief without considering whether to stay proceedings, the petitioner will have to overcome the strictures of Rule 60(b)[124] or 28 U.S.C. § 2244 to subsequently obtain a review of a state court's merits ruling on that claim.[125]

By failing to consider whether state remedies are still "available," courts also run the risk of failing to give effect to the statutory bar Congress chose to enact. In his § 2254 petition, J.W. Ledford presented a previously unraised claim that Georgia's lethal injection protocol would subject him to cruel and unusual punishment.[126] The district court held that the claim fell "within an exception to the exhaustion doctrine because the factual basis for the claim was not available to petitioner at the time of his state court proceedings."[127] It therefore vowed to consider the claim on the merits in the future. But if the factual predicate for the claim was previously unavailable, perhaps Georgia *would have* considered the merits of the claim were Ledford to have returned to state court, making the claims statutorily

119. *See* Jennings v. Thaler, No. 09-219, 2012 WL 1440387, at *7 & n.6 (S.D. Tex. Apr. 23, 2012).

120. *See* Rhines v. Weber, 544 U.S. 269, 277–79 (2005).

121. *Compare* Teague v. Lane, 489 U.S. 288, 297–98 (1989) (holding that a claim was exhausted), *with id.* at 325–26 (Stevens, J., concurring in part and in judgment) (reaching the opposite conclusion).

122. *See* Rhines v. Weber, 408 F. Supp. 2d 844, 853 (D.S.D. 2005).

123. *See* Rhines v. Young, No. 00-CV-05020, 2016 WL 614665 (D.S.D. Feb. 16, 2016).

124. FED. R. CIV. P. 60(b).

125. *See, e.g.*, Ruiz v. Quarterman, No. SA-03-CA-303, 2007 WL 2437401, at *4–5 (W.D. Tex. July 10, 2007) (denying a Rule 60(b) motion by petitioner whose claims were previously rejected as procedurally defaulted), *rev'd*, 504 F.3d 523 (5th Cir. 2007); *see also In re* Wardlow, 819 F. App'x 234, 236–37 (5th Cir. 2020) (per curiam) (denying Rule 60(b) motion after state litigation subsequent to denial of federal habeas removed procedural bar to claims the federal court had found defaulted, because the federal habeas court had made alternative merits holdings).

126. *See* Ledford v. Head, No. 02-CV-1515, slip op. at 17 (N.D. Ga. July 18, 2008), ECF No. 99.

127. *Id.* The *Ledford* court cited *Slutzker v. Johnson* as an example of a court that "consider[ed] the merits of an unexhausted claim where the legal basis of the claim was unavailable at the time of petitioner's state proceedings." *Id.* (citing Slutzker v. Johnson, 393 F.3d 373, 385 (3d Cir. 2004)). On the contrary, the Third Circuit in *Slutzker* found that § 2254(b) did not bar review of a *Brady* claim because the Pennsylvania courts would no longer consider the claim. *See Slutzger*, 393 F.3d at 380. The *Slutzker* court then considered whether cause and prejudice existed to overcome default (answering affirmatively). *See id.* at 390. This is the kind of analysis the *Ledford* court should have engaged in but did not.

unexhausted.[128] The court may have circumvented the spirit of § 2254(b) by allowing consideration of the claim on the merits, even though relief was eventually denied.[129]

Beyond the possible prejudicing of defendants or Congress, to discuss exhaustion and procedural default in a way that elides the two issues—one statutory, one prudential[130]—is to allow the judiciary to skirt responsibility for its own policy choices. This blame-shifting language is even more problematic when a court makes clear that the defaulted claims are potentially meritorious.[131] I did not encounter any cases in which a court's discussion of exhaustion seemed to ultimately affect the outcome of a case. But courts ought to get the law right, especially when doing so would clarify the constitutional actor truly responsible for the case's outcome.

## III. A PATH FORWARD

The Supreme Court or Congress should reform the doctrine of procedural default in the following ways. In death penalty cases, before considering whether a state procedural bar applies, a federal habeas court should first decide whether a defaulted claim has some merit. If the claim is so lacking in merit that a certificate of appealability (COA) would not be warranted, habeas relief can be denied (and procedural default should not be discussed). If the claim has arguable merit, the court should consider the claim using 28 U.S.C. § 2254(d)(1)'s deferential standard; if the claim is meritorious beyond any reasonable debate, the court should excuse default and provide relief if otherwise warranted. Thus, procedural default should be considered only in cases in which the claim is arguably, but not indisputably, meritorious. In such cases, the current regime should apply.

This proposal would not require a drastic change. Dismissing claims obviously lacking merit would provide more closure to all involved without offending the independence of state courts. The only difference in terms of outcomes from the current regime would be the granting of a writ, regardless of default, in cases where a claim is meritorious under § 2254(d)(1)'s standard of review. But how could federalism require allowing the execution of someone whose rights were violated "beyond any possibility for fairminded disagreement"?[132]

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128. *See* GA. CODE ANN. § 9-14-51 (2015) (providing that a judge may entertain a subsequent habeas petition if the grounds for relief "could not reasonably have been raised" in a previous petition).

129. Six years later, the district court (with a different judge sitting) denied relief on the ground that such a method-of-execution claim was not cognizable under § 2254 (and should instead be brought under 42 U.S.C. § 1983). *See* Ledford v. Head, No. 02-CV-1515, slip op. at 67 (N.D. Ga. Aug. 29, 2014), ECF No. 138.

130. *See* Dretke v. Haley, 541 U.S. 386, 392–93 (2004); Shinn v. Ramirez, 596 U.S. 366, 384–85 (2022).

131. The court in Ruiz's case said the ineffective-assistance claim was supported by "compelling evidence and legal authority," and that the jury instruction that formed the basis of the due process claim was "arguably erroneous." Ruiz v. Dretke, No. SA-03-CA-303, 2005 WL 2146119, at *9, *14 (W.D. Tex. Aug. 29, 2005). Following a bizarre series of events in Ruiz's case, the district court ultimately did reach the merits of the ineffective assistance of counsel claim—but not of the due process claim. *See* Ruiz v. Thaler, 783 F. Supp. 2d 905, 910 (W.D. Tex. 2011).

132. Harrington v. Richter, 562 U.S. 86, 103 (2011).

Section III.A explains why Congress or the Supreme Court should instruct lower courts to deny relief on the merits—rather than on procedural grounds—whenever a petitioner's claims are frivolous. Section III.B then argues in support of allowing death penalty petitioners to use § 2254(d)(1) as a sword to overcome default and obtain a habeas remedy—an expansion of the fundamental miscarriage-of-justice exception.

### A. DENYING RELIEF ON THE MERITS WHENEVER POSSIBLE

Courts already routinely consider the merits of defaulted claims in the alternative.[133] In state death penalty cases, the order of battle of enforcing procedural default should simply require all courts to conduct a merits analysis whenever the denial of a claim would not be entitled to a COA on its merits. This approach would be better than the current regime for all involved—petitioners, states, and the public (including victims' families). In fact, reaching the merits of a baseless claim vindicates the values of federalism behind the default doctrine more effectively than simply enforcing default.

For petitioners, the difference between obtaining a denial on the merits and obtaining a denial on procedural grounds may seem meaningless. But when a court plainly tells a petitioner that their claims are meritless, the petitioner can at least be satisfied that they received a trial deemed fair by current standards. It seems unusually cruel to force someone to wonder whether they are being put to death only because of the errors of their attorney.[134] It would also seem to promote the goals of punishment to unequivocally tell a petitioner that they alone are to blame for their fate. In addition, the petitioner will be able to obtain appellate review of the lower court's merits analysis through requesting a COA.

Merits rulings also vindicate states by declaring that state procedures complied with federal law. Much of the Supreme Court's federalism jurisprudence is premised on the notion that "state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'"[135] When a federal court dismisses a petitioner's claim as unmeritorious, it confirms that the state lived up to its responsibility to protect the petitioner's federal rights. Surely that is better than leaving some doubt as to whether the state's procedures were constitutional.

Finally, as to the public and victims' families, a merits ruling provides closure. It helps those directly affected by the crime rest assured that the convicted person is guilty. Although that won't always be true, a person should be more likely to be guilty if the process through which they were convicted complied with the Constitution.[136] Moreover, a merits ruling also makes clear that their loved one's

133. *See supra* Section II.C.1.

134. *Cf.* Coleman v. Thompson, 501 U.S. 722, 727, 742 (1991) (declining to consider merits of federal claim because petitioner's attorney filed "purely ministerial" notice three days late).

135. Steffel v. Thompson, 415 U.S. 452, 460–61 (1974) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

136. *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (noting that constitutional protections afforded to criminal defendants "have the effect of ensuring against the risk of convicting an innocent person").

killer is not locked up on a technicality. That is important not just for victims but for society at large. As the Supreme Court has explained, criminal proceedings "must not only be fair, they must 'appear fair to all who observe them.'"[137] It's hard to imagine a rule that would seem less fair to a lay person than one requiring the execution of a person whose attorney filed paperwork barely late.

This change could also improve judicial economy. As Section II.C.1 demonstrates, courts sometimes devote significant judicial resources to analyzing both procedural default and a claim's merits. This Note's approach would eliminate time spent on the former. Admittedly, there would be times when an appellate court disagrees with a lower court's merits ruling, causing a time-consuming reversal. But even if the judicial-resources trade-off was a wash, the other benefits of adjudicating the merits of federal claims would still justify the approach.

And one final note: this approach would not run afoul of principles of constitutional avoidance.[138] The Supreme Court has long held that courts should "avoid reaching constitutional questions if a dispositive nonconstitutional ground is available."[139] But the argument advanced here is that either Congress or the Supreme Court should change the judge-made rule of procedural default so that it applies only to arguably meritorious claims. In other words, after this doctrinal change, a "dispositive nonconstitutional ground" would no longer be available to habeas courts in cases where petitioners raise frivolous constitutional claims.[140]

### B. USING § 2254(D)(1) TO EXCUSE DEFAULT

In death penalty cases, procedural default should not be enforced with "pointless severity."[141] When a court can determine that a claim is objectively meritorious based on the evidence in the state court record, default should be excused to avoid a fundamental miscarriage of justice.

The standard of review set out by AEDPA applies to claims adjudicated on the merits in state court. As relevant here, § 2254(d)(1) provides that a court shall not grant relief unless the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

137. Indiana v. Edwards, 554 U.S. 164, 177 (2008) (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).

138. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (describing various rules created by the Supreme Court under the doctrine of constitutional avoidance).

139. Hutchinson v. Proxmire, 433 U.S. 111, 122 (1979); *see, e.g.*, Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909); *see also* Gutierrez v. Immigr. & Naturalization Serv., 745 F.2d 548, 550 (9th Cir. 1984) (Kennedy, J.) (collecting cases).

140. To object to this Note's proposal on constitutional-avoidance grounds, one would have to argue the doctrine obliges the Court to invent judge-made rules in order to prospectively reduce the number of constitutional questions federal courts decide. *Cf.* Monroe v. Pape, 365 U.S. 167, 240–41 (1961) (Frankfurter, J., dissenting). By that logic, the Court would be obliged do away with the current exceptions to the enforcement of procedural default, as fewer exceptions to procedural default equal fewer constitutional adjudications. As quickly becomes clear, however, any version of constitutional avoidance that places an affirmative duty on federal courts to manufacture dispositive judge-made rules knows no bounds—and is a far cry from the settled principle that courts should favor a nonconstitutional ground over a constitutional one when the former is "available." *See Hutchinson*, 433 U.S. at 122.

141. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964).

the Supreme Court of the United States."[142] A state court's decision is "contrary to" clearly established law if the court applies the wrong rule or reaches a result different from one reached by the Supreme Court in a case with "materially indistinguishable" facts.[143] A decision involves "an unreasonable application" of clearly established law if, applying the correct rule to a novel set of facts, the court reaches a result so wrong that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."[144]

In *Harrington v. Richter*, the Court confronted how to apply § 2254(d)(1) when a state court adjudicates the merits of a claim without articulating its reasoning.[145] The Court effectively held that reviewing courts should simply decide whether the *outcome* violates § 2254(d)(1)'s standard of review.[146] In other words, a federal habeas court must consider "what arguments or theories supported or . . . could have supported" the court's denial of relief.[147] Because most defaulted claims were never adjudicated on the merits, this mode of analysis provides a helpful framework for using § 2254(d)(1) to excuse default.

With these principles in mind, here is how this Note's approach would work. If the defaulted claim was adjudicated on the merits in state court at some point, the federal court would apply § 2254(d)(1) to the reasoning in the last state court decision to adjudicate the claim. If the claim was never adjudicated on the merits in state court, the federal court would conduct a review using the principles articulated in *Harrington*.[148] That is, the federal court would consider whether any not-unreasonable line of reasoning based on clearly established law at the time of trial (with one exception) could support a ruling against the petitioner. Freezing the law as of the time of trial appropriately accommodates the state's interest in finality. The one exception would be when a petitioner seeks relief under a new substantive rule applicable on collateral review under *Teague v. Lane*.[149]

When applying § 2254(d)(1) in this context, courts would generally look only to evidence in the state court record.[150] For one thing, AEDPA bars the introduction of

142. 28 U.S.C. § 2254(d)(1). Section 2254(d)(2) separately allows for relief in cases in which the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." This Note focuses on the use of § 2254(d)(1) to excuse default because defaulted claims turn on questions of law far more often than they turn on questions of fact. It may also be appropriate, however, to allow petitioners to avoid enforcement of procedural default based on satisfying § 2254(d)(2)'s standard of review.

143. *See* Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 406 (2000).

144. Harrington v. Richter, 562 U.S. 86, 102 (2011).

145. *See id.* at 92, 98.

146. *See id.* at 102.

147. *Id.* This mode of review is as petitioner-unfriendly as it gets. If the state court's reasoning is what matters, a petitioner can satisfy § 2254(d)(1)—and therefore obtain de novo review—by showing that the court bungled its analysis. But if the outcome is what matters, a petitioner effectively never can obtain de novo review, because satisfying § 2254(d)(1) already requires demonstrating the claim itself is objectively meritorious.

148. *See id.*

149. 489 U.S. 288, 307 (1989) (plurality opinion).

150. *See* 28 U.S.C. § 2254(e)(2) (prohibiting a habeas court from considering evidence not in the state record if the petitioner "failed" to develop the record, unless an exception applies).

new evidence if the petitioner was "at fault" for its omission in state court, unless the petitioner can meet one of two narrow exceptions.[151] Petitioners are considered to be "at fault" for their attorney's negligence, unless it rises to the level of ineffective assistance of counsel.[152] Moreover, AEDPA aside, the Supreme Court has held that application of § 2254(d)(1) necessarily involves consideration of only the evidence before the state court at the relevant time.[153] So if a state court adjudicated the merits of the defaulted claim, the federal court would consider the evidence that was actually before that state court.

Because § 2254(d)(1) sets a high bar, this Note's rule would likely interfere only slightly with the states' interests in finality (and would do so only in the face of egregious errors of the state's own making). Moreover, excusing default is only step one. Petitioners still need to demonstrate that they are otherwise deserving of habeas relief.[154]

This approach is responsive to this Note's empirical findings because it would ensure that no person is executed solely because of procedural default. Perhaps none of the twenty-six people denied full consideration of their rights in those five years had any meritorious claims. But if courts had conducted a review of their defaulted claims under § 2254(d)(1), we would at least know that a statutory limit on the scope of habeas passed by Congress was to blame for their failure to obtain relief. Thus, the approach would also have the added benefit of bringing the operation of AEDPA into sharper public focus. The Constitution's rules of criminal procedure guard against "the risk of convicting an innocent person."[155] When the stakes are as high as life and death, a federal court ought to intervene when there is no question that one of those procedural rules was broken.

This Note's approach also avoids giving petitioners any unfair advantage. The Court has stressed that procedural default must be enforced to avoid "sandbagging" by petitioners.[156] It seems unlikely that a petitioner would forego presentation of a viable claim in state court just to obtain a more favorable standard of review in federal court *after* being convicted.[157] But to the extent the Court is concerned that petitioners will strategically withhold claims to avoid application of § 2254(d),[158] this Note's approach absolves that worry: petitioners would obtain relief only by satisfying § 2254(d).

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151. *See* Williams v. Taylor (*Michael Williams*), 529 U.S. 420, 432 (2000).

152. *See* Shinn v. Ramirez, 596 U.S. 366, 382–84 (2022).

153. *See* Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011).

154. *See* Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993); Brown v. Davenport, 596 U.S. 118, 134 (2022) ("So even a petitioner who prevails under AEDPA must still today persuade a federal habeas court that 'law and justice require' [habeas] relief." (quoting 28 U.S.C. § 2243)).

155. Herrera v. Collins, 506 U.S. 390, 398–99 (1993).

156. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

157. *See* CHEMERINSKY, *supra* note 33, at 1029.

158. *See, e.g.*, Shinn v. Ramirez, 596 U.S. 366, 391 (2022) ("State prisoners already have a strong incentive to save claims for federal habeas proceedings in order to avoid the highly deferential standard of review that applies to claims properly raised in state court.").

The Supreme Court did reject the view that procedural default should be excused for clear violations of law in *Engle v. Isaac*, in which the petitioner argued Rule 52(b) plain-error review should apply to defaulted claims.[159] But there are good reasons for revisiting *Engle* to the extent its spirit conflicts with the approach advocated above. First, the § 2254(d)(1) standard did not exist at the time *Engle* was decided. Second, this Note's findings show that the current approach to procedural default has caused a significant number of people to be executed without a federal court considering whether a state violated their rights. Third, scientific advances in the twenty-first century have exposed wrongful convictions as all too common,[160] giving even greater force to the Court's common refrain: "death is different."[161]

The *Engle* Court argued that applying plain-error review to defaulted claims would implicate "finality problems and special comity concerns" and said that habeas petitioners should bear a heavier burden than defendants on direct review.[162] The § 2254(d)(1) approach addresses both concerns. In *Engle*, the petitioner would have had the Court transplant a standard of review from the direct review context to the habeas context, without direction from Congress. In contrast, Congress designed § 2254(d)(1) as "part of the basic structure of federal habeas jurisdiction."[163] The standard "reflects [Congress's] view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems.'"[164] Although excusing default will always implicate finality and comity concerns, a habeas court would do so under this Note's approach only after finding the petitioner surpassed a bar Congress designed to balance those concerns against the vindication of constitutional rights. Moreover, the § 2254(d)(1) standard is harder to meet than the plain-error standard. The latter merely requires the error to be "clear" or "obvious" to the reviewing court,[165] while the former demands that, referring exclusively to law clearly established by the Supreme Court, the error be "well understood and comprehended . . . beyond any possibility for fairminded disagreement."[166] And on top of it all, this Note's approach would only apply in death penalty cases, a narrow class of cases in which petitioners have the most at stake.

The *Engle* Court also argued plain error review for defaulted claims was "unnecessary."[167] While correctly recognizing that concerns about federalism

159. 456 U.S. 107, 134–35 (1982); *see also* FED. R. CRIM. P. 52(b).

160. *See Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/N5FL-AQPE] (last visited Mar. 18, 2024).

161. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

162. *See Engle*, 456 U.S. at 134–35.

163. Harrington v. Richter, 562 U.S. 86, 103 (2011).

164. *Id.* at 102 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). *But see* Carlos M. Vázquez, *AEDPA as Forum Allocation: The Textual and Structural Case for Overruling* Williams v. Taylor, 56 AM. CRIM. L. REV. 1, 12–30 (2019) (arguing the Court misinterpreted § 2254(d)(1) and created a standard of review more stringent than Congress intended).

165. *See* United States v. Olano, 507 U.S. 725, 734 (1993).

166. *Harrington*, 562 U.S. at 103.

167. *Engle*, 456 U.S. at 135.

and comity must sometimes "yield to the imperative of correcting a fundamentally unjust incarceration," the Court said it was "confident" the cause-and-prejudice test would excuse default in such circumstances.[168] The Court's later cases addressed the need to avoid "fundamentally unjust incarceration" by developing the actual-innocence gateway to excusing procedural default.[169]

But the actual-innocence gateway requires a petitioner to produce new evidence not presented at trial.[170] As such, it does not account for situations in which no new evidence is available, but in which the original adjudication of guilt is no longer reliable because the state failed to comply with federal constitutional rules designed to ensure the accuracy of convictions.[171]

This is where the second and third reasons for revisiting *Engle* align. On the one hand, for twenty-six out of eighty-five people in a five-year period, a federal habeas court declined to consider the merits of at least one defaulted claim.[172] If that rate (30.6%) has remained constant, then an estimated 477 people executed by a state since the year *Engle* was decided were denied full consideration of their federal claims on habeas review.[173] On the other hand, advances in technology have taught us that many innocent people have been sentenced to death. Since 1973, at least 197 people given the death penalty have been exonerated.[174] The Supreme Court should not continue enforcing its procedural default rule without change when we now know that people are wrongly convicted as often as they are, especially given that lower courts declined to consider the merits of at least one defaulted claim in nearly one-third of recent death penalty cases.

A majority of Justices on the Supreme Court have recently expressed skepticism about the scope of federal habeas review. Most starkly, the Court in *Jones v. Hendrix* implied that Congress need not provide a federal habeas remedy *at all* to state prisoners held pursuant to the judgment of "a court of competent jurisdiction."[175] Although the actual holding of *Jones* was much narrower, it rested on the legal premise that the Suspension Clause only guarantees access to the writ as it existed "when the Constitution was drafted and ratified"—and on the factual premise that at the Founding, habeas did not encompass collateral attacks on sentences imposed by courts with "general criminal jurisdiction."[176] Meanwhile, on the statutory-interpretation front, the Court in *Shinn v. Ramirez* reaffirmed a

168. *Id.*

169. *See* Smith v. Murray, 477 U.S. 527, 537–38 (1986); Murray v. Carrier, 477 U.S. 478, 495–96 (1986); Schlup v. Delo, 513 U.S. 298, 320–21 (1995); House v. Bell, 547 U.S. 518, 536, 554 (2006).

170. *See Schlup*, 513 U.S. at 324; *see also, e.g.*, Barton v. Stange, 959 F.3d 867, 872 (8th Cir. 2020).

171. *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (noting that constitutional rules of criminal procedure "have the effect of ensuring against the risk of convicting an innocent person").

172. *See supra* Section II.B.

173. States executed 1,560 people between 1983 and 2023. *See* DEATH PENALTY INFO. CTR., *supra* note 58.

174. DEATH PENALTY INFO. CTR., *supra* note 160.

175. 599 U.S. 465, 483 (2023) (quoting Brown v. Davenport, 596 U.S. 118, 128 (2022)).

176. *Id.* at 482–83 (quoting DHS v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020)). Arguably, the Court's holding rested on only the narrower factual premise that substantive errors of statutory law (the kind of error raised by the petitioner in *Jones*) were not cognizable on habeas at the Founding, *see id.*,

petitioner-unfriendly interpretation of § 2254(e) even though the reading undermined an avenue to relief the Court itself had opened to petitioners just a decade prior.[177]

Admittedly, the spirit of these decisions conflicts with the spirit of this Note. It's worth noting, still, that nothing in the holdings of those cases contradicts the reforms this Note endorses. *Jones* articulated an extremely narrow view of the constitutional right to habeas relief, but this Note does not argue that its reforms are constitutionally required. Furthermore, the outcome in *Shinn* was unfavorable to petitioners, but the case was merely an act of statutory interpretation.[178] The Court believed, however rightly or wrongly, that Congress itself had "foreclosed" the reading urged by the petitioners there.[179] In contrast, exceptions to procedural default are "judge-made rules"[180] that the Court may modify when necessary based on its "equitable judgment."[181] The Court (or Congress) can and should use that judgment to adopt this Note's modest proposals, which would change outcomes only in the face of egregious legal errors.

## CONCLUSION

Law, famously, is as much about "experience" as it is about logic.[182] The Court developed its procedural default doctrine in the 1970s and '80s. Forty years of experience since that time has demonstrated that, at least in the death penalty context, the doctrine operates in a way that is far from fair to all who observe our criminal justice system.[183] After detailing new empirical findings, this Note proposes two changes to the doctrine that would make it fairer. Neither would offend Our Federalism.[184] Because what *legitimate* interest could a state have in executing a person whose constitutional rights were denied beyond any reasonable debate?[185]

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but the Court seemingly left little doubt about how it would rule were a case to squarely present the broader question.

177. 596 U.S. 366, 384–87 (2022) (holding AEDPA "foreclosed" allowing equitable judgment to excuse procedural default, as it did in *Martinez*).

178. *See id.* at 385 (noting § 2254(e) "is a statute that we have no authority to amend").

179. *Id.* at 384.

180. *Id.* at 385 (quoting Dretke v. Haley, 541 U.S. 386, 394 (2004)).

181. *Id.* at 386 (quoting Martinez v. Ryan, 566 U.S. 1, 13 (2012)).

182. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881).

183. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("[P]roceedings must not only be fair, they must 'appear fair to all who observe them.'" (quoting Wheat v. United States, 486 U.S. 153, 160 (1988))).

184. *Cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (explaining the "underlying reason for restraining courts of equity from interfering with criminal prosecutions" is a system "referred to by many as 'Our Federalism,'" which represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments").

185. *Cf.* Johnson v. Missouri, 143 S. Ct. 417, 418 (2022) (Jackson, J., dissenting from denial of application for stay) ("[A] state has no legitimate interest in carrying out an execution contrary to [state law] or due process.").