

Reconsidering *Ross*: The Interplay of AEDPA, Criminal Appeals, and The Right to Counsel

BY KIMBERLY THOMAS*

I.	INTRODUCTION.....	422
II.	THE DEVELOPMENT OF THE RIGHT TO COUNSEL ON APPEAL..	424
	A. <i>The Constitutional right to counsel on appeal ends after the first appeal</i>	424
	1. Before <i>Ross</i>	424
	2. <i>Ross v. Moffitt</i>	426
	3. Staying power of the <i>Ross</i> distinction	428
	B. <i>The lack of a right to an appeal may constrain the right to counsel on direct appeal.</i>	429
III.	THE IMPORTANCE OF A LAWYER ON DISCRETIONARY REVIEW	432
	A. <i>How common are direct appeals, including discretionary review in criminal cases?</i>	433
	B. <i>Who gets counsel, even if not constitutionally required, on discretionary appeal?</i>	435
	C. <i>How common are errors found on appeal?</i>	438
IV.	THE INTERPLAY OF AEDPA AND THE RIGHT TO COUNSEL: SHIFTING DECISIONS AND DOCTRINE TO THE DIRECT APPEAL	440
	A. <i>Federal Deference to the State Court Direct Appeal</i>	440
	B. <i>AEDPA’s Impact on Doctrinal Development: Stunted criminal law after AEDPA—Lack of substantive review and constitutional development post-AEDPA</i>	442
V.	SPACE TO RECONSIDER <i>ROSS</i>	445
VI.	CONCLUSION	448

* University of Michigan Law School, Clinical Professor of Law. My tremendous thanks to Josephine Ross for her insightful comments on an early draft of this work and to Amanda Blau and Veronica Portillo-Heap for excellent research assistance.

I. INTRODUCTION

We should reconsider *Ross*.¹ In *Ross v. Moffitt*, over 45 years ago, the U.S. Supreme Court held that convicted defendants are not constitutionally entitled to counsel on direct appeal for discretionary appeals to the state supreme court or U.S. Supreme Court.² There are reasons that show, at this moment, we should question *Ross* anew.

An important part of the impetus for this re-examination of the right to counsel on direct appeal comes from an understanding of the shifts, since *Ross*, in post-conviction law. Underlying the U.S. Supreme Court's habeas decisions, the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),³ and the Court's interpretation of AEDPA has been a singular focus on the importance of the state court proceedings and faith in the ability of state courts to adjudicate constitutional questions.⁴

This article is situated within those critiquing AEDPA and the Court's habeas jurisprudence. At the time of *Ross*, the habeas landscape was different in a way that did, or should, change the way we think about counsel on direct appeal. At the time of *Ross*, litigants could relatively easily pursue federal habeas remedies.⁵ This meant

1. *Ross v. Moffitt*, 417 U.S. 600 (1974).

2. *Id.* at 610, 617.

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

4. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion), *overruled in part by* *Edwards v. Vannoy*, 141 S. Ct. 1547, 1561 (2021) (“The Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.’ Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review.” (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion))).

5. *See* CHARLES DOYLE, CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 19 (2006) (explaining that before AEDPA, a “state defendant convicted of a capital offense and sentenced to death could take advantage of three successive procedures to challenge constitutional defects in his or her conviction or sentence”); Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 119 n.144 (“[B]etween 1976 and 1985, the overall success rate for death penalty petitioners in habeas was 49 percent.” (citing JAMES S.

that the failure to file well-pled constitutional claims with the state supreme court and the U.S. Supreme Court held less procedural and substantive penalty. Previously, the questions could be filed and fleshed out in federal court without our current timing⁶ and exhaustion requirements, which places additional emphasis on the quality of the pleadings on direct appeal. Additionally, the federal courts, including the U.S. Supreme Court in post-conviction, could review de novo and decide on the merits of the constitutional claim. This is not the case under AEDPA.⁷

Further, this Article takes the Court's habeas doctrine at its word—major motivating forces behind the efforts to close the federal habeas courthouse doors to state prisoners are a concern for federalism, state courts should be the central locus of constitutional decision-making, and the federal courts should not open their doors to state cases that have already been fully litigated once on direct appeal, a finality concern.⁸ Given the critique of habeas and given the Court's goals in

LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 36.7(e) (3d ed. 1988)).

6. Thomas C. O'Bryant stated as follows:

For the pro se indigent prisoner, seeking federal habeas corpus relief prior to AEDPA was already an extremely daunting task that was rarely achieved. The pro se prisoner had to teach himself complex criminal procedure, legal reasoning, legal doctrines, how to research claims, and how to write legal briefs and motions; only then could he actually initiate a proceeding. In the post-AEDPA world, the pro se prisoner must still learn the same procedures, doctrines, and skills, but now must do so within an unrealistic and unreasonable one-year time period.

Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 306 (2006).

7. Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 226 (2002).

8. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (asserting that the Supreme Court's interpretation of AEDPA has "[e]xalt[ed] notions of comity and finality above all else" which has

narrowing access to the federal courthouse, taking the Court seriously means a re-examination of the rights available on direct appeal.

Specifically, this piece highlights features of our current law that converge to say that we should reconsider *Ross*: (1) the utility of counsel on discretionary review, which has been underexplored, both before and after *Ross*; (2) the increased importance, in modern criminal law, of direct appeals; and relatedly, the U.S. Supreme Court's interpretation of AEDPA that has moved most of the significant windows for substantive criminal law change into the direct appeal; and, finally, (3) perhaps an increased sliver of doctrinal sunlight in which to think about chipping away at *Ross*. Given the first two developments, the possible window to think of shifting the doctrine comes at an opportune time. This article first provides the background on *Ross* and the law of appellate right to counsel, then explores each of these in turn.

As the Court emphasized years ago in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”⁹ Given the importance of the entire direct appeal—including applications for review in the state’s highest court and the U.S. Supreme Court—*Ross* should be reconsidered and reversed.

I. THE DEVELOPMENT OF THE RIGHT TO COUNSEL ON APPEAL

A. The Constitutional right to counsel on appeal ends after the first appeal.

1. Before *Ross*

In *Gideon*, probably the Court’s most famous right to counsel case, the Court, under the Fourteenth Amendment’s Due Process Clause, incorporated the right to counsel against the states.¹⁰ Due to the adversarial nature of the criminal process, the Court emphasized

“render[ed] constitutional rulings by state courts nearly unreviewable by the federal judiciary”).

9. 463 U.S. 880, 887 (1983).

10. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

that “lawyers in criminal courts are necessities, not luxuries.”¹¹ The Sixth Amendment, which confers upon a defendant the right to “Assistance of Counsel for his defense,” has been interpreted over the years to require appointment of counsel to indigent criminal defendants in a range of circumstances.¹²

On the same day that *Gideon* was announced, the Court delivered an opinion in a second indigent defense case, *Douglas v. California*, which addressed the right to appointed counsel on appeal.¹³ In *Douglas*, petitioners had been denied court-appointed counsel for their appeals as of right because the state appellate court believed it would do “no good whatever”¹⁴ The Court found that the Fourteenth Amendment required that if a state guarantees appellate review, then it must also provide counsel for those proceedings.¹⁵ The majority stated, in an often repeated phrase, that there could “be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’”¹⁶

The language and reasoning in *Douglas* followed from the Court’s earlier decision in *Griffin v. Illinois*.¹⁷ In *Griffin*, a state statute mandated that defendants pursuing a direct appeal provide the appellate court with a report of the trial proceedings.¹⁸ This often required access to a trial transcript.¹⁹ The Supreme Court held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment required that the State could not refuse an indigent appellant the trial transcript he

11. *Id.* at 344.

12. U.S. CONST. amend. VI; *see, e.g.*, *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (explaining that the right to counsel encompasses the right “to have counsel present at all critical stages of [a] criminal proceeding” including “postindictment interrogations, postindictment [corporeal] lineups, and the entry of a guilty plea”).

13. 372 U.S. 353, 354 (1963).

14. *Id.* at 354–55.

15. *Id.* at 357 (“[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel . . . an unconstitutional line has been drawn between rich and poor.”).

16. *Id.* at 355 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)); *see also* *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (quoting *Griffin*, 351 U.S. at 19).

17. 351 U.S. at 19.

18. *Id.* at 13.

19. *Id.* at 13–14.

needed for review of his conviction.²⁰ Even though the transcript fee applied equally to all defendants, and although the State was not constitutionally obligated to provide criminal appeals at all, the Court reasoned that if the state offers appeals, it then is required to do so in a way that does not discriminate based on wealth.²¹

The Court has subsequently declined to extend an indigent's right to appellate counsel beyond the intermediate appeal—notwithstanding the rule against wealth discrimination as announced in *Griffin* and statements in support of the right to counsel for indigent defendants in an adversarial system, which could be used to support wider protections.²²

2. *Ross v. Moffitt*

In 1974, in *Ross v. Moffitt*, a divided Court held that North Carolina was not required to appoint counsel for an indigent defendant pursuing a discretionary appeal to the state supreme court or certiorari review from the U.S. Supreme Court.²³ Ross had two separate forgery cases: one in which he was denied appointment of counsel for the discretionary review in the North Carolina Supreme Court; one in which he continued to be represented by his public defender through the state courts but was denied appointment of counsel to file a petition for certiorari in the U.S. Supreme Court.²⁴ Ross ultimately filed federal habeas petitions on both cases and the Fourth Circuit held that Ross was entitled to court-appointed counsel in both proceedings.²⁵

The U.S. Supreme Court reversed.²⁶ “The decision rested on two premises—that an indigent appellant already had the benefit of a lawyer's assistance in pursuing his first appeal and that, unlike the

20. *Id.* at 18–19.

21. *Id.* at 18.

22. Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585, 1590 (2007) (“Treating equality as a component of due process has, perhaps ironically, also allowed the Court to limit the *Griffin-Douglas* principle and avoid a general requirement that all criminal defendants have equal resources in the criminal justice system.”).

23. 417 U.S. 600, 612 (1974) (Rehnquist, J., writing for a 6-3 Court).

24. *Id.* at 603–04.

25. *Id.* at 604–05.

26. *Id.* at 605; see also *Evitts v. Lucey*, 469 U.S. 387, 401–02 (1985) (relying on the *Ross* line between discretionary appeals and appeals as of right to find a right to effective assistance of counsel on appeals as of right).

function of a first appeal, the function of discretionary review is not merely to correct an erroneous decision.”²⁷ On the equal protection strain, the Court emphasized “there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decision of this Court. The Fourteenth Amendment ‘does not require absolute equality or precisely equal advantages,’ nor does it require the state to ‘equalize economic conditions.’”²⁸

The Supreme Court distinguished *Ross* from *Griffin*, *Douglas*, and *Gideon* by noting that at the trial stage, a defendant needs an attorney to act as a “shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence” whereas on appeal, a defense attorney acts “as a sword to upset the prior determination of guilt.”²⁹ The Court further distinguished *Ross* by arguing that states are not constitutionally required to provide any appellate process to criminal defendants.³⁰

Some offered criticism of *Ross*;³¹ suggesting, for example, that including a case challenging the lack of counsel for a petition for

27. James J. Tomkovicz, *An Introduction to Fifty Years of Gideon*, 99 IOWA L. REV. 1875, 1881 (2014).

28. *Ross*, 417 U.S. at 612 (citations omitted); see also *id.* at 616 (“The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.”); David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 480 (1992) (describing *Ross* as a case in “which the Court expressly limited the equality principle”); *id.* at 481 (“[A]fter *Ross*, the equality principle becomes nothing more than a thinly disguised form of due process analysis. *Ross* thus set the stage for the full ascendancy of the Harlan position that came eleven years later in *Ake v. Oklahoma*.”).

29. *Ross*, 417 U.S. at 610–11.

30. *Id.* at 611; see also *id.* at 616 (explaining that equal protection in a criminal proceeding requires “an adequate opportunity to present [one’s] claims fairly . . .”).

31. See, e.g., *Constitutional Law—Equal Protection—Failure to Appoint Counsel on Discretionary Appeals Held Not Violative of Fourteenth Amendment*, 9 U. RICH. L. REV. 369, 374 (1975) (criticizing *Ross*, and stating that “the Court in *Ross* failed to adequately explain why the concepts of fairness and equality, which demand appointed counsel on appeals of right, do not require counsel on subsequent discretionary appeals”); *No Right to Counsel for Indigent Criminal Defendants on Subsequent Discretionary Appellate Review: Due Process or Unequal Protection*, 35

certiorari to the U.S. Supreme Court may have secured the outcome of the state court right, as the Supreme Court may have been unwilling to find its own practice unconstitutional.³²

3. Staying power of the *Ross* distinction

After *Ross*, the Court held the line at providing counsel to indigent individuals only at the first, intermediate court appeal. The Court rejected arguments for a right to counsel in post-conviction proceedings,³³ even for individuals sentenced to death.³⁴

Read together, *Douglas* and *Ross* stood for the proposition that indigent defendants are entitled to counsel on initial appeals of right, but not on subsequent discretionary appeals. The case of *Halbert v. Michigan* presented the Court with the question of what to do with situations that fall somewhere between *Douglas* and *Ross*.³⁵ In *Halbert*, the Supreme Court reviewed a Michigan rule that made appeals to the intermediate Court of Appeals discretionary for defendants convicted

MD. L. REV. 134, 134–35 (1975) (stating that *Ross* “delineates what might be termed the ‘upper limit’ of the right to counsel” and arguing that these cases should be analyzed under the Due Process Clause and not the Equal Protection Clause); *see also* Erwin Chemerinsky, *The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 935 (2013) (citing *Ross* for the proposition that “[t]he assurances of freedom and equality in the Constitution are not absolute”).

32. *See* William E. Brew, *Ross v. Moffitt: The End of the Griffin-Douglas Line*, 24 CATH. U. L. REV. 314, 323–24 (1975).

33. *Pennsylvania v. Finley*, 481 U.S. 551, 555–57 (1987) (finding no Due Process or Equal Protection right to appointed counsel in state post-conviction proceedings and that, if a state does establish such a right, it need not comply with federal constitutional procedures for withdrawal of appointed counsel—“procedures which were designed solely to protect [an] underlying constitutional right”); *cf.* *Bounds v. Smith*, 430 U.S. 817, 823, 828 (1977), *abrogated in part by* *Lewis v. Casey*, 518 U.S. 343 (1996) (rejecting the argument that a prisoner’s constitutional right of access to the courts means only that the government cannot deny or obstruct a prisoner’s access, or that it “merely obliges States to allow inmate ‘writ writers’ to function.” Rather, *Bounds* held that the right to access “requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law”).

34. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (finding no Due Process or Eighth Amendment right to counsel in state post-conviction proceedings for indigent death row inmate).

35. *See Halbert v. Michigan*, 545 U.S. 605 (2005).

on pleas of guilty or no contest.³⁶ Given that these appeals were discretionary, Michigan argued that the courts could deny defendants appointed counsel under the Supreme Court's holding in *Ross*. However, in *Halbert*, the Court held that this system violated the equal protection and due process clauses of the Fourteenth Amendment.³⁷ Writing for the Court, Justice Ginsburg accepted the *Douglas-Ross* framework applied, but found *Douglas* to be controlling over *Ross*.³⁸ The Court refused to allow the discretionary nature of the Michigan Court of Appeals jurisdiction to shift control from *Douglas*, which provided for counsel in the intermediate appellate court, to *Ross*.³⁹ *Halbert* is an important appellate right to counsel decision and yet, nothing in *Halbert* drew *Ross* into question. The circuit courts have reaffirmed *Ross*.⁴⁰

B. The lack of a right to an appeal may constrain the right to counsel on direct appeal.

36. *Id.* at 617.

37. *Id.* at 610.

38. *Id.* at 616–17.

39. *Id.* at 618–19.

40. *See, e.g.*, *Pena v. United States*, 534 F.3d 92, 94–96 (2d Cir. 2008) (discussing defendant's allegation that his retained appellate counsel was ineffective for failing to notify of his right to file for certiorari; the court, noting because there was no right to counsel for a certiorari petition, stated that the defendant had no right to effective assistance of counsel at that stage). The *Pena* Court stated that it was following the Supreme Court's lead in looking to consideration of the harm to the defendant of the lack of counsel on discretionary review as opposed to first-tier review. *Id.* at 95 (“[P]ointing out that the harm done by a certiorari petition drafted without the aid of an effective lawyer is unlikely to resemble the prejudice that might ensue from an improperly pursued initial appeal.”); *see also* *United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (“[T]here is no constitutional right to counsel beyond the direct appeal of a criminal conviction.” (quoting *Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008)); *Nichols v. United States*, 563 F.3d 240, 249–50 (6th Cir. 2009) (right to counsel does not extend to filing of petition for certiorari); *Wyatt v. United States*, 574 F.3d 455, 459 (7th Cir. 2009) (right to counsel does not extend to filing of petition for certiorari); *United States v. Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (right to counsel does not extend to sentence modification proceedings); *United States v. Harrington*, 410 F.3d 598, 600 (9th Cir. 2005) (right to counsel does not extend to motion for a new trial made after conclusion of direct appeal); *United States v. Taylor*, 414 F.3d 528, 530, 536 (4th Cir. 2005) (right to counsel does not extend to post-direct appeal motion by government to reduce sentence).

The U.S. Supreme Court has stated for over 120 years that there is no constitutional right to a criminal appeal.⁴¹ While some scholars have suggested that the denial of a constitutional right to appeal is contrary to the historical access to review⁴² or that a right to appeal should be granted,⁴³ the Court's assertion that there is no right has had staying power, coming as recently as *Davila*.⁴⁴ A number of scholars, such as Harlon Leigh Dalton and Cassandra Burke Johnson, have highlighted the widespread granting of the right to appeal by states.⁴⁵ Even though there is no constitutional right to an appeal, the right to direct appeal is granted by statute or state constitution in nearly every state.⁴⁶ In

41. *McKane v. Durston*, 153 U.S. 684, 687 (1894) (stating, in a case involving right to appellate bail, that appellate review was not “a necessary element of due process of law”).

42. Mark M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 504 (1992).

43. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1221–24 (2013) (arguing for a due process right to appeal based on doctrinal consistency, the limitations of other procedural safeguards, and practical reliance on the availability of appeal).

44. *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (“The Constitution . . . does not guarantee [a] right to [a criminal] appeal at all.”); *see also, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.”); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Ross v. Moffitt*, 417 U.S. 600, 606 (1974); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Cobbleddick v. United States*, 309 U.S. 323, 325 (1940) (“[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice”); *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 165–66 (2000) (Scalia, J., concurring) (“Since a State could . . . subject its trial-court determinations to no review whatever, it could *a fortiori* subject them to review which consists of a nonadversarial reexamination of convictions by a panel of government experts.”).

45. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985) (“The right to appeal at least once without obtaining prior court approval is nearly universal Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct.”); Robertson, *supra* note 43, at 1222; *see also* Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMPAR. & INT’L L. 1, 32–34 (2011).

46. Compare Robertson, *supra* note 43, at 1222 n.8 (noting that only New Hampshire, West Virginia, and Virginia have no statutory or constitutional provision granting an appeal as of right to criminal defendants), and Arkin, *supra* note 42, at 513–14, with Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal*

addition to finding no constitutional right to a direct appeal, the Court has also said that there is no right to post-conviction review of a criminal conviction.⁴⁷

The inference—sometimes stated, sometimes unstated—is that because there is no constitutional right to appeal, then convicted persons are not constitutionally entitled to a lawyer to help them effectuate an “optional” proceeding.⁴⁸ In *Wainwright v. Torna*, a defendant filed a federal habeas claim asserting that he had been denied effective assistance of counsel when his attorney failed to file a timely petition for discretionary leave to appeal in the state supreme court.⁴⁹ The Court, relying on *Ross*, stated that “[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel’s failure to file the application timely.”⁵⁰

In *Pennsylvania v. Finley*, the Court built on the premise that there is no underlying constitutional right to appointed counsel in state post-conviction proceedings. The Court found that if a state does establish such a right, it need not comply with federal constitutional procedures for withdrawal of appointed counsel—“procedures which were designed solely to protect [an] underlying constitutional right.”⁵¹ In *Murray v. Giarratano*, a U.S. district court in Virginia ruled that the constitutional right of access to the courts calls for the appointment of counsel for death row inmates seeking habeas corpus relief.⁵² The U.S.

Appeals Revealed, 70 VAND. L. REV. 1939, 1940 (2017) (“Every state provides appellate review of criminal judgments . . .”).

47. See, e.g., *Davila*, 137 S. Ct. at 2062; *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). See also *Finley*, 481 U.S. at 555–56, which reasoned that the lack of a constitutional right to a criminal appeal precluded a right to state post-conviction remedies and, consequently, established that neither due process nor equal protection obligated the states to provide counsel in post-conviction proceedings.

48. See, e.g., *Finley*, 481 U.S. at 558 (“[T]he substantive holding of *Evitts*—that the State may not cut off a right to appeal because of a lawyer’s ineffectiveness—depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings.”).

49. 455 U.S. 586, 586–87 (1982) (per curiam).

50. *Id.* at 587–88; see also *id.* at 588 n.4 (“Respondent was not denied due process of law . . . Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State.”).

51. *Finley*, 481 U.S. at 557.

52. *Murray v. Giarrantano*, 492 U.S. 1, 4–6 (1989).

Court of Appeals for the Fourth Circuit affirmed and the Supreme Court reversed.⁵³ The Supreme Court held that neither the Eighth Amendment nor the Due Process Clause requires states to appoint counsel for death row inmates looking for relief.⁵⁴ States are not constitutionally obligated to provide relief post-conviction because the Constitution assures the right to counsel for an initial appeal from the judgment of the trial court.⁵⁵

The Court's reasoning is not preordained. The lack of a constitutional basis for the procedures has not been necessary to the Court's analysis of the extent of due process rights in some other areas. For example, in the context of parole, where the Court has not seen a constitutional entitlement to the procedure, if the state provides an entitled person to parole release, then the constitutional protections of due process are implicated.⁵⁶

II. THE IMPORTANCE OF A LAWYER ON DISCRETIONARY REVIEW

It would be a reasonable question to ask, when considering whether counsel should be provided on direct discretionary appeal, how many criminal appellants are (or are not) represented by counsel, do these attorneys make a difference, and is that difference “worth it.” Additionally, we might want to compare the benefits against the financial and court filing costs, as we must assume that providing an attorney at no cost gives a convicted person an incentive to file an appeal—regardless of the appeal's merit.⁵⁷ If so, then providing counsel at the

53. *Id.* at 6–7.

54. *Id.* at 10.

55. *Id.* at 7–8. The Court also rejected the argument that capital cases require more legal assistance at collateral proceedings than non-capital cases. *Id.* at 11–12.

56. See generally Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protections for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213 (2017). This leaves aside, of course, what process is due. In the context of the right to state supreme court and U.S. Supreme Court leave applications, certainly there are procedural rights possessed by the convicted person.

57. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 96–97, 118 (1996) (discussing increased access to counsel and increased appeals over time and stating that “[g]iven a free lawyer, the cost of appealing falls to zero, and the defendant will have no reason not to appeal even if the chances of winning are slight—as they are.”).

discretionary stage would increase the number of discretionary appeals filed.⁵⁸ The short answer is that it is hard to know the answer from the available data. I lay out the available information and the conclusion that provision of counsel has an impact. I take a closer look at the available information regarding discretionary appeals by asking and answering several relevant questions. These questions lead me to conclude that the provision of counsel has an impact on discretionary review.

A. *How common are direct appeals, including discretionary review in criminal cases?*

Appeals by some types of criminal defendants are common. For example, “in some jurisdictions, as many as [ninety] percent of the defendants who were convicted after trial and sentenced to prison will appeal their convictions.”⁵⁹ Alternately, appeals are less typical in misdemeanor cases.⁶⁰ Further, in cases in which the defendant is given

58. Although direct data is hard to come by, available information suggests that the provision of counsel post-*Halbert* may have increased appellate filings and increased finding of reversible error. On the number of filings in Michigan, before *Halbert*, 4,400 plea appeals were filed per year. See *Council Comments: No. 1033, Statewide Ballot Proposals – III, Proposal B: Criminal Appeals as a Matter of Right*, CITIZENS RSCH. COUNCIL OF MICH. (1994), <https://crcmich.org/PUBLICAT/1990s/1994/cc1033.pdf>. In Michigan in 1992, less than one percent of guilty cases tracked were reversed (twelve out of 1,629) and 9.5 percent were remanded for further sentencing actions. Omari O. Jackson, Note, *Halbert v. Michigan: The Application of the Douglas-Ross Dichotomy in Constitutionalizing Indigency in States’ Appellate Court Processes* 2 n.4 (bepress Legal Repository, bepress Legal Series Working Paper No. 1060, 2006), <https://law.bepress.com/expresso/eps/1060>. Post-*Halbert*, in 2010, state courts of last resort found reversible error in 6.7 percent of criminal appeals, and intermediate appellate courts found reversible error in 13.9 percent of criminal appeals. U.S. DEP’T OF JUST., CRIMINAL APPEALS IN STATE COURTS 4–5 (Sept. 2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf>.

59. PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* (4th ed. 2016); see also Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 489 (2004) (discussing the prevalence of criminal appeals).

60. See Alisa Smith, *Misdemeanors Lack Appeal*, 45 AM. J. CRIM. L. 305, 337–38 (2019) (finding a .005 percent misdemeanor appeal rate in a Florida county). See generally Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV.

a probationary, or even a jail sentence, appeals are less frequent.⁶¹ Undoubtedly, the lower appeal rate for less serious cases or cases with shorter sentences is, in part, a function of the time it takes to litigate an appeal.⁶² A defendant serving a three-month sentence may not be interested in embarking upon a lengthy process that will take much longer than the actual sentence he is serving.⁶³

A 2010 analysis of the state appellate court docket showed that it was relatively stable over the period of a few years examined and that a perceptible decrease was due to a drop in cases in the court of last resort and not the intermediate appellate courts.⁶⁴ In 2010, criminal appeals by permission were seventy-eight percent of the caseload of the four reporting courts of last resort and “[fifty-one] percent of the intermediate appellate caseload in the five reporting courts.”⁶⁵

According to the Bureau of Justice Statistics, in 2010, approximately twenty-nine percent of intermediate appellate court criminal litigants sought review in the state’s highest court.⁶⁶ About two percent of intermediate appellate cases were actually reviewed by the state court of last resort.⁶⁷

1933 (2019) (finding appellate courts review no more than eight in 10,000 misdemeanor convictions and disturb only one out of every 10,000 or .0001 percent).

61. See King & Heise, *supra* note 60, at 1941, 1946 (comparing misdemeanor and felony appeal rates and explaining that most people convicted of misdemeanors are released upon sentencing).

62. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337–40 (2011) (discussing structural obstacles).

63. See *id.*

64. ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND, & KATHRYN A. HOLT, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 38 (2012), http://www.courtstatistics.org/_data/assets/pdf_file/0024/23838/csp_dec.pdf.

65. *Id.* at 46.

66. U.S. DEP’T OF JUST., *supra* note 58, at 5.

67. *Id.* at 1; see also *Caseloads of the Courts of Washington: Supreme Court Court Activity, Cases from Court of Appeals—2020 Annual Report*, WASH. CTS., https://www.courts.wa.gov/caseload/?fa=caseload.show-Report&level=a&freq=a&tab=supreme&fileID=tt3_actcoa (last visited Dec. 29, 2021) (showing 361 criminal petitions for review filed of about 1,050 total requests); Daniel U. Smith & Valerie T. McGinty, *Obtaining California Supreme Court Review*, PLAINTIFF MAG. (Dec. 2012),

Giovanna Shay and Christopher Lasch analyzed the U.S. Supreme Court over a dozen years and determined that *federal* prisoners' direct appeals accounted for more certiorari petitions *filed* than those of state direct appeal cases or state prisoners' habeas filings. Yet by the end of the time studied, the greatest number of certiorari grants occurred in habeas cases, then state prisoner direct appeals, then federal prisoner direct appeals.⁶⁸ "Petitions from state prisoners' direct appeals appear to be grossly underrepresented, considering that state prosecutions far outpace federal prosecutions. Petitions from state prisoners' state postconviction proceedings are a relatively small category of filings."⁶⁹

B. Who gets counsel, even if not constitutionally required, on discretionary appeal?

In the federal system, the Criminal Justice Act Guidelines explicitly consider certiorari petitions, suggesting that the court-appointed attorneys be compensated when a cert petition is filed. The Guidelines provide that "[c]ounsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered as applicable to the case before the U.S. court of appeals, and should be included on the voucher for services performed in that court."⁷⁰

In state court, the practice—and the payment of attorneys—varies by jurisdiction and is harder to determine. In some states, or some appellate attorney offices in some states, the practice appears to be to review the case to determine if there is a meritorious appeal to the state high court and, if there is, to file the request for review.⁷¹ It would seem

issues/item/obtaining-california-supreme-court-review (explaining that the California Supreme Court grants review in less than five percent of cases).

68. Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 216, 237–41 (2008).

69. *Id.* at 216.

70. U.S. CRIM. JUST. ACT GUIDELINES § 230.70 (U.S. SENTENCING COMM'N 2021), http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_70.

71. *See, e.g., Frequently Asked Questions—All FAQs*, WASH. STATE OFF. OF PUB. DEF., <http://www.opd.wa.gov/index.php/frequently-asked-questions> (posing the question of whether the defendant can appeal to the Washington Supreme Court and

that most of these petitions are filed not because the offices are being compensated for it, but because the attorneys or the office believes that it is the correct thing to do.⁷² Some states provide counsel in state post-conviction.⁷³

Unlike the run of the mill criminal case, counsel for indigent defendants is frequently provided—both on discretionary direct appeal and in post-conviction—for individuals who have been sentenced to death.⁷⁴ In hindsight, it bears observing that *Ross* was decided in

answering that “OPD’s contract attorneys are not required to file petitions for Supreme Court review at the client’s request. It is up to their professional judgment whether such a petition is warranted. If your appellate attorney does not file a petition for Supreme Court review, you will need to hire a private attorney or file the petition yourself”).

72. See, e.g., WASH. REV. CODE. §§ 10.73.150 (6)–(7) (2021) (indicating that in Washington, counsel is provided on discretionary appeal if the state supreme court grants review).

73. Cf. Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2442–46 (2013) (describing the practices of appointing counsel for state post-conviction petitions and noting that, while there are certainly important exceptions, “[m]ost states authorize the appointment of counsel for noncapital petitioners only if a judge first decides the case has merit or orders a hearing or discovery. In such states, only a small portion of petitioners appear to receive counsel”). King also notes that in states where there is sometimes counsel on post-conviction, the presence of counsel seems to be correlated with the likelihood of having a live testimony hearing. *Id.* at 2445; see also Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 14 n.106 (2002) (“The states that explicitly guarantee indigent inmates counsel from the very beginning of their first post-conviction proceedings are Alaska, California, Connecticut, Indiana, Iowa, Maine, Maryland, Missouri, New Jersey, Oregon, Pennsylvania, Rhode Island, and Vermont. In some states, an inmate may become entitled to the appointment of counsel once he files a non-frivolous post-conviction petition (Colorado, Hawaii, Illinois, Kansas, Kentucky, New Mexico, South Carolina, Tennessee, and West Virginia) or demonstrates a need for a hearing (Louisiana, Michigan, Montana), but he must prepare the initial post-conviction petition without a right to appointed counsel.” (citations omitted)).

74. Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006); see also Hammel, *supra* note 73, at 14. Professor Hammel writes:

The law, therefore, places an overwhelming premium on quality of state post-conviction representation. State habeas counsel—or the prisoner himself, if the state does not provide counsel—must investigate and litigate every possible claim in the first post-

1974—between the U.S. Supreme Court’s 1972 decision in *Furman v. Georgia*⁷⁵ striking down the death penalty and its 1976 decision in *Gregg v. Georgia* and companion cases,⁷⁶ which cleared the way for the reimposition of capital punishment.

Defendants sentenced to death also have counsel provided in state post-conviction,⁷⁷ in contrast to defendants with other sentences who do not receive post-conviction counsel in thirty-four states.⁷⁸ The

conviction petition. The inmate is litigating without a net. If he or his counsel omits a legal theory or limits investigation, any claim that does not establish his likely innocence is generally gone forever. Further, this thorough job must be done within the state’s statute of limitations period, and within the new one-year federal limitations period, which begins running when the inmate’s conviction becomes final and which is not tolled during the preparation of the state writ.

Hammel, *supra* note 73, at 14.

75. 408 U.S. 238 (1972).

76. *Gregg v. Georgia*, 428 U.S. 153 (1976); *see also* *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (holding that imposition of the death penalty is not per se cruel and unusual); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that jury sentencing is not required in capital cases and that a trial judge may decide whether the death penalty will be imposed). *But see* *Roberts v. Louisiana*, 431 U.S. 633 (1977) (finding that a mandatory death sentence for murder of a police officer without consideration of particularized mitigating factors violates the Eighth and Fourteenth Amendments); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character . . . of the individual offender and the circumstances of the particular offense”).

77. Freedman, *supra* note 74, at 1086 (explaining that eighty-nine percent of death penalty states automatically appoint defense counsel in capital state postconviction proceedings); Ty Alper, *Toward A Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 845 (2013) (“[C]apital defendants . . . typically are provided counsel for state and federal collateral proceedings.”); *see* *Maples v. Thomas*, 565 U.S. 266, 272 (2012) (noting that Alabama is “nearly alone among the States” in failing to guarantee post-conviction counsel to indigent capital defendants).

78. Hammel, *supra* note 73, at 14 (“Inmates with lawyers (virtually all death-sentenced inmates) are totally dependent on their post-conviction counsel to do a thorough job. The situation for non-capital inmates is more dire. They are generally too poor to pay for lawyers, and in thirty-seven states they are not automatically entitled to appointed counsel to prepare and present petitions for state post-conviction relief.”); *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (identifying three additional states that

provision of counsel at post-conviction for those on death row has increased over time—at the time of *Murray v. Giarrantaro*, where the U.S. Supreme Court found no right to post-conviction counsel for death row prisoners, “only eighteen of the thirty-seven states with the death penalty automatically appointed defense counsel in capital postconviction proceedings.”⁷⁹ As of 2006, “thirty-three of the thirty-seven death penalty states do so.”⁸⁰

C. *How common are errors found on appeal?*

In those cases in which appeals are taken, are there errors in the plea, trial, or sentencing that warrant reversal? The reversal rates in state court varies,⁸¹ but available studies and summaries point to a reversal rate—including corrections in sentencing—of minimally ten percent to upwards of thirty percent.⁸² In the federal system, where

appoint counsel in the first collateral proceeding: Arizona, North Carolina, and Tennessee).

79. Freedman, *supra* note 74, at 1086.

80. *Id.*; see also Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 35 (noting that in the six years prior to 2003, “as many as twenty of the thirty-eight death penalty states have addressed issues relating to postconviction counsel. Ten such states amended their rules to provide a mandatory right to counsel for capital defendants at the state postconviction stage, elevating to thirty-two the total number of death states providing a mandatory right to counsel for capital defendants at this stage”).

81. One article highlights a year in which the West Virginia Supreme Court of Appeals took review in a low 6.75 percent of criminal cases and reversed none of these cases; the previous year in which the court reversed no criminal cases was 1876. See George Castelle, *Reversals, Per Curiam, and the Common Law: A Survey of the Opinions of the West Virginia Supreme Court of Appeals, 1997*, 11 W. VA. LAW. 16, 16 (1998).

82. See Timothy Davis Fox, *Right Back “In Facie Curiae”—A Statistical Analysis of Appellate Affirmance Rates in Court-Initiated Attorney-Contempt Proceedings*, 38 U. MEM. L. REV. 1, 29–31 (2007) (discussing the reversal rate in criminal cases in a study of state supreme court cases from 1940–1970 at 33.9 percent (citing Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 148 (1977); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L. J. 1191, 1209 (1978) (discussing a second report of a 35.6 percent reversal rate)); Arkin, *supra* note 42, at 516 (describing a New York study with a twenty-three percent reversal or sentence modification rate for defendants represented by Legal Aid

data is collected annually by the U.S. Sentencing Commission, a 2018 study showed an affirmance rate of 93.4 percent.⁸³ The error correction rates, and the error correction function, might only show the importance of counsel in the intermediate appellate court, where defendants *are* already entitled to counsel.⁸⁴

In death penalty cases, appellate lawyers raise and litigate reversible error. In Liebman's study of death penalty case errors, "during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was [sixty-eight percent]. In other words, courts found serious, reversible error in nearly [seven] of every [ten] of the thousands of capital sentences that were fully reviewed during the period."⁸⁵ This error was caught in state appeal and in post-conviction, with state courts of last resorts playing a significant role.⁸⁶ Liebman's study points out the potential for state high courts to examine and correct error, as well as develop important criminal law doctrines on direct appeal. Of the death sentences in the study, seventy-

attorneys on appeal and a California study where he concluded, "one criminal conviction in five was modified by the appellate process," noting that one intermediate appellate court had a reversal or sentence modification rate as low as 13.8 percent).

83. Barry C. Edwards, *Why Appeal Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019) (analyzing data from the Administrative Office of the U.S. Courts and finding a 6.6 percent reversal rate in criminal appeals over a twelve-month period ending June 30, 2018); *see also* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825, 829, 833 (2009) (finding a 68.5 percent affirmance rate looking to data collected by the U.S. Sentencing Commission and urging caution in the interpretation of federal criminal appeal data). Heise compares the federal rate to studies of five states in the 1980s, which showed affirmance rates ranging from 70.8 percent to 81.7 percent. Heise, *supra* at 830 (citing JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE CTS., UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 35 tbl.3 (1989)).

84. *See supra* notes 22–31 and accompanying text; *see also* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 379 (1995).

85. James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases 1973–1995* i (Columbia L. Sch., Pub. L. & Legal Theory Working Paper Grp., Paper No. 15, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712 (emphasis omitted).

86. *Id.* at 9 ("[S]tate judges are the first and most important line of defense against erroneous death sentences. They found serious error and reversed [ninety percent] (2,133 of the 2,370) capital sentences that were overturned during the study period.") (emphasis omitted).

nine percent were reviewed on direct appeal by the state's highest court and, of those reviewed, over forty percent "were thrown out because of 'serious error,' i.e., error that the reviewing court concludes has seriously undermined the reliability of the outcome or otherwise 'harmed' the defendant."⁸⁷

One hypothesis is that the prevalence of errors is not necessarily greater in capital cases, but that the provision of counsel means that more of the errors are uncovered on appeal.⁸⁸

In sum, errors occur at trial and, from the data above, it appears as if counsel on discretionary appeals makes a difference. It is, nonetheless, hard to quantify definitively how many people receive this counsel now, or exactly the impact that it has either in individual cases or systemically because of differences in the rate of appeals, the extent of work done by appellate counsel, and the uneven scrutiny given to different types of cases. The next section examines the shifts in law that have made direct appeals, including discretionary appeals, more important over time for both individual litigants and for the development of substantive criminal law.

IV. THE INTERPLAY OF AEDPA AND THE RIGHT TO COUNSEL: SHIFTING DECISIONS AND DOCTRINE TO THE DIRECT APPEAL

One important reason to reconsider *Ross* is the passage of AEDPA and the caselaw developed around AEDPA, which has functionally increased the importance of the state court direct appeal. This Section explores these developments.

A. Federal Deference to the State Court Direct Appeal

One of the key changes of AEDPA, the 1996 law governing federal post-conviction review of state court criminal cases, was a new "deferential" standard of review for cases.⁸⁹ A habeas petitioner was

87. *Id.* at 4.

88. *Cf.* U.S. DEP'T OF JUST., *supra* note 58, at 9 (indicating that fifty percent of death penalty appeals were resolved in 2.4 years, compared to 1.2 years for fifty percent of nondeath felony appeals).

89. *Dodson*, *supra* note 7, at 226. 28 U.S.C. § 2254(d)(1) provides that the Petitioner is entitled to habeas relief if the state court's adjudication "resulted in a

only entitled to relief if the state court adjudication was “contrary to, or an unreasonable application of” U.S. Supreme Court law.⁹⁰ The Court initially defined the standard to mean that the state court’s decision is an “unreasonable application of” clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.”⁹¹

What may have been meant as strict in language has become nearly fatal in fact under the Court’s subsequent narrowing interpretation. The Court has defined “unreasonable” to give wide latitude to state court substantive error, finding that “a state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fair-minded jurists could disagree’ on the correctness of the state court’s decision.”⁹² Also in *Harrington v. Richter*, the Court explicitly rejected habeas as serving an error correction function.⁹³

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”

90. See 28 U.S.C. § 2254(d)(1).

91. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (“[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.”).

92. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court emphasized “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

93. *Id.* at 102–03 (“Section 2254(d) reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” (citing *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment))). In embracing a narrow version of substantive review, the Court pointed to “familiar” reasons—respect for state court’s “sovereign power to punish offenders and their good-faith attempts to honor constitutional rights,” and “the State’s significant interest in repose for concluded litigation.” *Id.* at 103 (citations omitted); see also *Dodson*, *supra* note 7, at 227–28, 241 (listing circuit court cases disagreeing on the meaning of adjudication and later proposing that AEDPA deference be conditioned on an expressed federal rationale citing federal law); *Richter*, 562 U.S. at 104–06 (describing the “unreasonable application” avenue for federal habeas relief as the method pursued by the federal circuit court before overturning the circuit court opinion). The Court asserted that deferential substantive review complemented the procedural default doctrine and kept state courts as the “principal forum for asserting constitutional challenges to state convictions.” *Id.* at 103–04.

Simultaneous with its tightening of the standard for habeas relief on cases that were adjudicated on the merits in state court, the Court also made it easier to deem a case to have been decided “on the merits” by a state court without actually issuing a reasoned opinion or addressing the federal constitutional claims raised in state court. In *Harrington v. Richter*, the state court did not—at any point—give a reason for its decision. The Court found that in this situation “a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision,” and evaluate whether “fair-minded jurists could disagree” with these hypothetical reasons.⁹⁴ This imputation of reasoning is limited to cases in which the federal court has no lower court decision which to “look through” the unreasoned subsequent decision.⁹⁵

A consistent rationale for the Court’s constriction of habeas review and permissive interpretation of an “adjudication on the merits” involves the Court’s concern with federalism.⁹⁶ This manifests itself in a concern that the state courts are the “principal forum for asserting constitutional challenges.”⁹⁷ If we are serious about directing the consideration of tough constitutional questions to the state courts, instead of the federal habeas courts, then state courts must provide a robust forum for these claims and litigants need to be able to preserve and effectively argue these claims with the help of counsel. Reconsidering *Ross* would be a step toward making the state courts a viable avenue for litigating constitutional claims.

B. AEDPA’s Impact on Doctrinal Development: Stunted criminal law after AEDPA—Lack of substantive review and constitutional development post-AEDPA

94. *Richter*, 562 U.S. at 101–02; *see also* *Parker v. Matthews*, 567 U.S. 37, 42–44 (2012) (deferring to the unexplained decision of the Kentucky state court on the federal question). Subsequently, in *Johnson v. Williams*, the Court held that the state court was entitled to a rebuttable presumption that claims were “adjudicated on the merits”—and subject to Section 2254(d)’s deferential review—even where the state court decided other claims but did not explicitly address the relevant federal claim. 568 U.S. 289, 301 (2013).

95. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

96. *See Williams*, 529 U.S. at 412–13.

97. *Richter*, 562 U.S. at 103.

The shifts in federal habeas law in the last few decades interact with the lack of counsel on discretionary direct appeals. The post-AEDPA elimination of de novo substantive review of federal constitutional claims means that, largely, the only avenue to develop new constitutional criminal law and procedure is through direct review petitions to the U.S. Supreme Court. The state courts would be—under the federalist vision of the Court—the locus of interpretation of constitutional criminal law—however, this law is largely created by the state appellate courts and unchecked by the state supreme courts or U.S. Supreme Court.

Prior to AEDPA and the limiting construction of AEDPA by the courts, constitutional criminal law was made in post-conviction cases. As the U.S. Supreme Court could review de novo mixed questions of fact and law, and questions of constitutional law, habeas litigants could raise—and have answered—issues of constitutional criminal procedure and law on habeas.⁹⁸ After AEDPA's passage and the Court's subsequent constricting interpretation of AEDPA, the U.S. Supreme Court is hard-pressed to reach the merits of a constitutional issue on habeas if the state courts have arguably reached the merits.⁹⁹ Instead, as described above, the Court—as the lower habeas courts—applies a deferential standard of review, which neither corrects errors nor develops and clarifies constitutional law.

A relatively recent example is *Virginia v. LeBlanc*.¹⁰⁰ In *LeBlanc*, the Court was faced with a case arriving by way of a habeas corpus petition that posed the question of whether Virginia's "geriatric release" law complied with *Graham v. Florida*'s requirement that juveniles have a "meaningful opportunity" for release "based on

98. See, e.g., *Schiro v. Farley*, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict, however, is a question of federal law which we must review de novo."); *Ashe v. Swenson*, 397 U.S. 436, 442–43 (1970) (explaining that the question of whether collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy "is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide through an examination of the entire record").

99. See, e.g., *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam))).

100. 137 S. Ct. 1726 (2017) (per curiam).

demonstrated maturity and rehabilitation.”¹⁰¹ Instead of answering the (important) question, the Court’s per curiam opinion decided the case on habeas grounds—finding that the state appellate court’s decision that the law did not violate *Graham* was not an “unreasonable application” of the U.S. Supreme Court’s prior caselaw.¹⁰² An example of an iconic criminal procedure case which, under AEDPA, would never have been heard, is *McCleskey v. Kemp*.¹⁰³ While many commentators have rightly critiqued the court’s substantive analysis of the constitutional claim(s) raised in *McCleskey*,¹⁰⁴ it is an interesting prospect to think that the Court would have either denied certiorari or asserted that the state court decision was not “unreasonable,” but said no more.

U.S. Court of Appeals Judge Reinhardt, in a law review article, remarked on the Court’s increased tendency to decide cases in a per curiam opinion based on “deferential” habeas grounds.¹⁰⁵ He writes: “From October Term 2007 through March 2015, I count *fifteen* instances in which the Court has written a per curiam reversal of a federal appellate court’s grant of habeas relief on the ground that a state court adjudication, whether correct or not, was not unreasonable under AEDPA.”¹⁰⁶ He also notes the increased lack of dissent in these cases where the Court is denying habeas relief based on the Court’s constrictive interpretation of AEDPA’s standard.¹⁰⁷

Giovanna Shay and Christopher Lasch highlighted the pressure that this lack of habeas decision-making places on raising and litigating questions of constitutional criminal law on direct appeal in petition for

101. *Id.* at 1727 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

102. *Id.* at 1727–28.

103. 481 U.S. 279 (1987) (upholding the constitutionality of the death penalty despite evidence that it is imposed significantly more frequently on black defendants).

104. *See, e.g.*, Bryan Stevenson, *Keynote Address by Mr. Bryan Stevenson*, 53 DEPAUL L. REV. 1699, 1707 (2004) (describing *McCleskey* as “the *Dred Scott* decision of our generation”).

105. Reinhardt, *supra* note 8, at 1240–42.

106. *Id.* at 1241–42.

107. *Id.* at 1241 (“[T]he Supreme Court issued five 5-4 decisions regarding whether a state court adjudication on the merits was contrary to or an unreasonable application of clearly established federal law, and in three of those cases the Court found that AEDPA did not bar relief. However, from October Term 2007 to October Term 2013, the Court decided (on my count, at least) twenty-eight such cases; it denied relief in all but two of them”) (internal citations omitted).

certiorari to the U.S. Supreme Court.¹⁰⁸ Without an outlet in habeas, constitutional criminal law must be decided on direct appeal.

In sum, both individual litigants and the development of substantive criminal constitutional law has been increasingly funneled into the state direct review process. Observing this shift calls into question the inability of convicted persons to effectively raise and litigate new constitutional questions to their state supreme court or to the U.S. Supreme Court, because of the lack of a constitutional requirement for defendants to be represented by counsel at this increasingly critical appellate stage.

V. SPACE TO RECONSIDER *ROSS*

If the appointment of counsel on discretionary review matters either to individual litigants or to the development of substantive criminal law, there is more doctrinal space now than ever before to reconsider *Ross*. The right to counsel has more recently been before the Court in the context of state post-conviction. While the Court has stopped far short of extending the constitutional right to counsel, the Court's cases, at a minimum, acknowledge the importance of counsel and suggest cracks in the armor. This section specifically examines three cases that test the limits of the right to counsel: *Martinez v. Ryan*, 566 U.S. 1 (2012), *Trevino v. Thaler*, 569 U.S. 413 (2013), and *Davila v. Davis*, 137 S. Ct. 2058 (2017).

The post-conviction counsel story starts prior to AEDPA. In 1991, the Court was faced with the situation in which Coleman, through his post-conviction counsel, failed to file a timely notice of appeal of

108. Shay & Lasch, *supra* note 68, at 215 (“Because AEDPA limits the Court’s ability to ‘break [] new ground’ in cases arising from federal habeas petitions, cutting edge questions must be presented in petitions for a writ of certiorari from the judgments of state courts if federal constitutional law is to continue to develop in state criminal proceedings.”); *see id.* (“[F]our justices of the Supreme Court recognized this new reality in their dissent in *Lawrence v. Florida*. They wrote that the pre-AEDPA sentiment that ‘federal habeas proceedings were generally the more appropriate avenue for our consideration of federal constitutional claims’ was no longer true in light of AEDPA’s ‘as determined by the Supreme Court’ provision. ‘Since AEDPA,’ they explained, ‘our consideration of state habeas petitions has become more pressing.’” (quoting *Lawrence v. Florida*, 549 U.S. 327, 337–38 (2007) (Ginsburg, J., dissenting))).

the denial of his post-conviction petition.¹⁰⁹ The Court held, in *Coleman v. Thompson*, that a petitioner needed “cause” and “prejudice” to overcome a procedural default of his federal claim.¹¹⁰ In that case, the attorney error was not “cause” for a procedural default.¹¹¹ As Coleman had no constitutional entitlement to effective counsel, he bore the risk of any attorney error.¹¹²

Twenty years later, cracks started appearing in *Coleman*’s seemingly impenetrable holding. In *Martinez v. Ryan* in 2012,¹¹³ Martinez wanted to challenge the effectiveness of his trial counsel in a state where the first opportunity to raise that claim was in state post-conviction.¹¹⁴ Martinez, however, failed to raise his ineffective assistance of trial counsel claim until his second state post-conviction petition, despite having counsel for his first post-conviction petition.¹¹⁵ The Court did not find a constitutional right to counsel in state post-conviction.¹¹⁶ The Court did, however, find that Martinez could raise the ineffectiveness of his state post-conviction counsel as a means to excuse in federal habeas proceedings the procedural default in state court.¹¹⁷

Subsequently, the Court seemed poised to follow *Martinez v. Ryan* to its logical conclusion. In *Trevino v. Thaler* in 2013,¹¹⁸ the state court didn’t *require* ineffective assistance of trial counsel to be raised

109. *Coleman v. Thompson*, 501 U.S. 722, 727 (1991).

110. *Id.* at 750 (also recognizing the exception of a “fundamental miscarriage of justice”).

111. *Id.* at 753–54 (“Attorney ignorance or inadvertence is not ‘cause’ because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation . . .”).

112. *Id.* at 752–53 (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and other cases for the lack of constitutional entitlement to post-conviction counsel and lack of a constitutional right to effective assistance of counsel in postconviction proceedings).

113. 566 U.S. 1 (2012).

114. *Id.* at 4–5.

115. *Id.* at 5.

116. *Id.* at 8–9 (stating that this is not the case to resolve whether the Constitution requires States to provide counsel in initial-review collateral proceedings when state collateral review is a prisoner’s first opportunity to present an ineffective-assistance of counsel claim).

117. *Id.* at 9.

118. 569 U.S. 413 (2013).

in the first post-conviction motion as a matter of law.¹¹⁹ However, the Court found that where as a matter of operation and design of procedural framework a defendant was unlikely to have a meaningful ability to raise ineffectiveness of trial counsel on direct appeal, then ineffective assistance of counsel in the first post-conviction will provide cause to excuse procedural default of the claim.¹²⁰

In *Davila*, the Court held that ineffective assistance of postconviction counsel could not serve as cause to excuse procedural default of an ineffective assistance of appellate counsel claim.¹²¹ The Court based this decision in significant part on the fact that there is no constitutional right to effective assistance of postconviction counsel.¹²² In doing so, the Court signaled an effort to prevent the expansion of *Martinez* and *Trevino v. Thaler*, which had allowed ineffective assistance of postconviction counsel to overcome default of an ineffective assistance of trial counsel claim.¹²³

In so deciding, the Court emphasized, as is common in habeas procedural cases, the importance of state court exhaustion of federal claims and the inability of federal courts to review claims that were procedurally defaulted, absent demonstrable cause and prejudice.¹²⁴ More importantly for purposes of this paper, the Court made two points defending its decision. First, the Court focused on the distinction between criminal trials and appeals, emphasizing trials as the “‘main event’” and the explicit constitutional protection for a criminal trial.¹²⁵ The Court, as such, deemphasized the importance of the appeal and competent appellate counsel, despite their constitutional protection. Second, the Court asserted that this case was unlike *Martinez*, which

119. *Id.* at 423 (“Texas law on its face appears to permit (but not require) the defendant to raise the claim on *direct appeal*.”).

120. *Id.* at 428–29 (“[T]he Texas procedural system . . . does not offer most defendants a meaningful opportunity to present a claim on ineffective assistance of trial counsel on direct appeal. What the Arizona law [in *Martinez*] prohibited by explicit terms, Texas law precludes as a matter of course.”).

121. *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017).

122. *Id.*

123. *Id.* at 2065–66 (“*Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims.”).

124. *Id.* at 2064, 2070 (“The procedural default doctrine . . . advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine.”).

125. *Id.* at 2066.

relied in part on the inability of any court—state or federal—to review ineffective assistance of trial counsel claims. Here, the Court reasoned, if appellate counsel fails to raise an error, it is less likely to be consequential. That is because if an error was preserved at trial, it would have been ruled on by the trial court or, if unpreserved, it is unlikely to provide grounds for reversal or, if the error is so egregious, it would provide grounds for ineffective failure to preserve it.¹²⁶

In sum, the doctrinal cracks in *Coleman* are thin, and the Court in *Davila* attempted to minimize them, but the past ten years have opened more doctrinal space than before for reconsidering at what stages we recognize the importance of counsel's effective assistance.

VI. CONCLUSION

There are reasons to think reconsidering *Ross* would not be worth it. For one thing, like the U.S. Supreme Court, state supreme courts grant very few petitions each year.¹²⁷ Even fewer of these are criminal cases.¹²⁸ Additionally, good lawyers are needed in other parts of the system; if we divert lawyers to discretionary direct appeals, then we are taking them from other important criminal (and civil) cases.

Some might view a reversal of *Ross* as not meaningful—or at least less meaningful than alternative proceedings where the right to counsel could be expanded, such as an entitlement to counsel in state post-conviction. I do not dispute the importance of counsel at these other stages at which defendants are currently unrepresented and, in particular, agree that counsel at post-conviction is invaluable.¹²⁹ The

126. *Id.* at 2067 (“A claim of appellate ineffectiveness premised on a preserved trial error . . . does not present the same concern that animated the *Martinez* exception because at least ‘one court’ will have considered the claim on the merits.”).

127. *See supra* notes 64–67 and accompanying text.

128. *See, e.g.*, JUD. COUNCIL OF CAL., 2017 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS: 2006–2007 THROUGH 2015–2016 33 (2017), <https://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> (showing that the California Supreme Court granted six percent of civil petitions for review but three percent of criminal petitions).

129. *See, e.g.*, Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443 (2018) (discussing the emergence of state postconviction proceedings as the “Last Man Standing” to enforce federal law); Martha A. Field, *Celebrating the Right to Counsel—and Extending It*, 32 LAW & INEQ.: A J. THEORY & PRAC. 287, 295–98 (2014) (“Prisoners are not equipped to handle the procedural

point of this piece is not to say that the claim to the right to counsel at discretionary review is *more* critical. Good arguments have, and will be, made for the importance of the provision of counsel at other stages.¹³⁰

Reconsidering *Ross* is not a panacea for atrophied federal habeas or a guaranteed stimulus to the development of state and federal constitutional criminal law. It would be, however, a modest step in the right direction. A move away from *Ross* could involve either extending the constitutional right to counsel, most likely as a due process matter as alleged in *Ross* itself,¹³¹ or could pursue the less direct path charted by the Court in *Ryan* and *Trevino*; a sort of “no harm, no foul” theory of entitlement to counsel.¹³²

complexities on their own; when they try, they manage to forfeit even the best of claims.”); Alper, *supra* note 77 (arguing for a postconviction right to counsel for ineffective assistance claims); Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 791 (2009) (arguing for a shift in resources towards improved state postconviction counsel because state postconviction proceedings “can deter and correct constitutional error more effectively than any amount of habeas litigation”).

130. See, e.g., Steven J. Mulroy, *The Bright Line’s Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213, 213 (2017) (pre-charge plea negotiations, subpoenaed grand jury testimony, and pretrial depositions); Field, *supra* note 129, at 295–98 (habeas review of federal and state convictions) John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 1 (misdemeanor prosecutions that do not result in incarceration) (2013); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1513 (2013) (bail hearings).

131. *Ross v. Moffitt*, 417 U.S. 600, 609–611 (1974). An alternative, but likely weaker, constitutional theory could be under equal protection. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (explaining that over the past several decades, “the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under . . . due process guarantees . . .”).

132. Compare *Martinez v. Ryan*, 566 U.S. 1, 11 (recognizing the difficulty of litigating pro se when a prisoner “cannot rely on a court opinion”), with *JUD. COUNCIL OF CAL.*, *supra* note 128, at 57 (indicating that California disposes of thousands of criminal appeals without opinion every year), and Merritt E. McAllister, “*Downright Indifference*”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020) (explaining that most federal court of appeals decisions are “short, perfunctory, unsigned opinions” and “not safe for human consumption”).

The provision of counsel on discretionary appeal could have benefits for individual litigants. An effective brief to a state supreme court, requesting hearing because of the state-wide significance of the question presented is different in fundamental ways from a court of appeals brief on the merits on the individual case. Lawyers, with access to electronic databases of cases and prior knowledge of case trends, are better situated to be able to highlight the broader legal impact of any given case. The dissent in *Ross* discussed the expertise needed for state and federal supreme court litigation.¹³³ This is truer now than it was decades ago.¹³⁴ For individual litigants, representation by counsel would increase the likelihood of correctly exhausting claims for federal habeas. Additionally, the right to counsel would increase consistency across defendants.¹³⁵ Now, a patchwork of defendants—those who can pay, those with appellate lawyers who go above and beyond, and those lucky enough to be in systems that provide counsel—can present their claims to the state court of last resort.

Provision of counsel at the discretionary review stage would have systemic benefits as well. State high courts would be better able to appreciate questions before them embedded in a case, and better develop state criminal common law. Even in a world where leave is denied on most cases, the court would better understand the issues that are repeatedly coming up. At the state, and especially at the U.S. Supreme Court level, under the current system, only cases that are well teed-up and litigated by counsel familiar with cert petitions are granted.¹³⁶ Reconsidering *Ross* would be a starting point for addressing the reality of current appellate and post-conviction practice.

133. *Ross*, 417 U.S. at 621 (Douglas, J., dissenting).

134. *See generally* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARNETT, & DAN HIMMELFARB, *SUPREME COURT PRACTICE* (11th ed. 2019).

135. *See* McAllister, *supra* note 132, at 536 (arguing that “an inferior appellate justice system” operates for pro se litigants as judges focus on “complex and well-lawyered disputes”).

136. *Cf.* Jeremy Pilaar, *The Making of the Supreme Court Bar: How Business Created a Solicitor General for the Private Sector*, 117 MICH. L. REV. ONLINE 75, 75 (2018) (explaining that the top sixty-six Supreme Court litigators had their cases heard six times more often than competitors).