COMMENTS

REWARDING BAD BEHAVIOR IN INITIAL-REVIEW COLLATERAL PROCEEDINGS: *TEAGUE* SAYS YES, DUE PROCESS SAYS NO

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For centuries, criminal defendants have had the opportunity to challenge their convictions with a writ of habeas corpus. The Founding Fathers described the writ as a path to liberation for those imprisoned without sufficient cause. It is a critical safeguard of individual freedom against lawless state action in criminal proceedings. However, with every safeguard comes a loophole.

The finality of state court decisions is revered in the American criminal justice system. It is no surprise, then, that the Supreme Court has approached the issue of whether to retroactively apply new laws to cases already finalized on direct review with trepidation. In Teague v. Lane*, the Court established a strict nonretroactivity doctrine that prohibits the application of new laws to decisions already made final on direct review unless the new rules fall within two extremely narrow exceptions.* Teague *drastically limited the scope of habeas review as a potential remedy for the most egregious state action—even if the defendant only failed to raise a claim on direct appeal because the prosecution concealed the evidence that could have altered the outcome of his trial.*

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The Due Process Clause unquestionably provides criminal defendants a constitutional right to have their claims fully and fairly litigated. However, how can the Due Process Clause do so for defendants who have been robbed of that right due to extra-record impediments beyond the defendants' control? As it currently stands, prosecutors who behave unethically at trial are able to invoke Teague *and other state-equivalent retroactivity doctrines as a bar to relief for criminal defendants who have procedurally defaulted claims by no fault of their own. This opportunity, shield, and reward for bad behavior alone merits certiorari review. As this Comment argues, when prosecutorial misconduct prevents a defendant from raising a claim that the defendant would have otherwise raised on direct appeal, the Due Process Clause compels the court to treat the habeas proceeding as if the defendant raised the claim on direct—as an "initial-review collateral proceeding." When this occurs, courts should set aside retroactivity doctrines to honor every criminal defendant's constitutional right to due process.*

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INTRODUCTION

Convicted of capital murder and condemned to life in prison, Edward McGregor sat in a cell for six years before a habeas evidentiary hearing revealed the truth.[1] Elizabeth Shipley, the lead prosecutor in his case, admitted that she had struck a deal with three inmates in exchange for their testimonies that McGregor had confessed to them while incarcerated awaiting trial.[2] The witnesses denied making such agreements at trial, and Shipley did not attempt to correct their false testimonies.[3] She watched her key witnesses lie under oath, and she watched as McGregor was convicted and sentenced to life in prison without parole.

Years later, when McGregor learned about the secret deals and false testimonies, he took his first opportunity to raise a prosecutorial misconduct claim in a state collateral review proceeding, which is a state court's "reexamination of a judgment or claim . . . outside of the direct review process."[4] According to the materiality standard established

1. Reply Brief for the Petitioner at 1, McGregor v. Texas, No. 19-685, 2020 WL 2575731 (May 2020); Petition for a Writ of Certiorari at 7–8, McGregor v. Texas, No. 19-685, 2019 WL 6465288 (Nov. 25, 2019).
2. Reply Brief for the Petitioner, *supra* note 1, at 1.
3. *Id.*
4. Wall v. Kholi, 562 U.S. 545, 553 (2011).

in *Napue v. Illinois*,[5] McGregor argued that by concealing evidence that could have impeached key witnesses and failing to correct false testimony by those witnesses, the prosecution violated his constitutional right to due process; therefore, his case demanded review.[6] The trial court agreed and recommended relief, acknowledging that the concealed evidence could have materially altered the outcome of McGregor's case.[7] Texas's highest criminal court, the Texas Court of Criminal Appeals (TCCA), disregarded the lower court's recommendation, unanimously holding that the false testimony was immaterial, and the court denied McGregor's petition for habeas review.[8]

Persistent, McGregor submitted a petition for certiorari to the Supreme Court, and the State raised *Teague v. Lane*[9] for the first time—unprompted—in response.[10] Under *Teague*, the Supreme Court held that there can be no retroactive application of new rules in federal habeas proceedings unless the new rule falls under two very narrow exceptions.[11] While *Teague* is generally only binding in federal habeas

5. 360 U.S. 264 (1959).

6. *See* Reply Brief for the Petitioner, *supra* note 1, at 4 ("McGregor has always contended that the State's knowing use of and failure to correct false, material testimony violated due process."); *Napue*, 360 U.S. at 269, 271 (reasoning that a State's use of false testimony violates a criminal defendant's due process rights when that testimony could "in any reasonable likelihood" have affected the jury's judgment).

7. Reply Brief for the Petitioner, *supra* note 1, at 1; *see Napue*, 360 U.S. at 269 (explaining that the Fourteenth Amendment's prohibition on a prosecutor knowingly presenting false evidence or failing to correct false testimony to obtain a "tainted conviction" also applies to false evidence or testimony that only affects the "credibility of witnesses"); *Ex parte* McGregor, No. WR-85,833-01, 2019 WL 2439453, at *2 (Tex. Crim. App. June 12, 2019) (citing Giglio v. United States, 405 U.S. 150, 155 (1972)) ("Due process is violated by the State's use of material false evidence to secure a conviction."), *cert. denied*, 141 S. Ct. 84 (2020).

8. Reply Brief for the Petitioner, *supra* note 1, at 1–2, 4 (communicating that the TCCA found that the concealed evidence was immaterial to the conviction based on an unprecedented interpretation of the *Napue* materiality standard and relying on counterfactual assumptions about how the jury would have responded had they been made aware of the prosecutor's deceit).

9. 489 U.S. 288 (1989).

10. Reply Brief for the Petitioner, *supra* note 1, at 1–2.

11. *Teague*, 489 U.S. at 307, 310. Teague's exceptions are discussed at greater length in Part I.A.2. *See infra* notes 71–78. Significantly, in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA markedly limited the scope of *Teague*'s impact on cases seeking federal habeas review of state claims. *See* Kendall Turner, Note, *A New Approach to the* Teague *Doctrine*, 66 STAN. L. REV. 1159, 1162, 1170 (2014) ("[C]ommentators largely agree that AEDPA frequently supersedes *Teague* in the prototypical *Teague* situation . . . .").

proceedings,[12] the Supreme Court has recently clarified that state courts must also follow *Teague* and apply new rules retroactively when they meet one of *Teague*'s exceptions in collateral proceedings, where defendants must be awarded the retroactive benefit of new rules.[13] In McGregor's case, the State raised *Teague*'s retroactivity doctrine as a matter of state law[14] and argued that McGregor's novel interpretation of *Napue* presented a new rule barred from application under *Teague*.[15]

But the State had unclean hands.[16] A prosecution that either knowingly suppresses material evidence favorable to the defense or allows materially false testimony into the record without correction violates a defendant's due process rights.[17] For McGregor, learning of Shipley's misconduct for the first time at his state habeas evidentiary hearing meant that his first opportunity to raise the claim—to have his

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Under AEDPA, a state prisoner seeking federal habeas review will be denied relief if his claim was already adjudicated on the merits in state court unless the adjudication of the claim resulted in a conviction that is "contrary to, or involved an unreasonable application of" Supreme Court precedent or resulted in a conviction "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Since this Comment's primary focus is on situations where the state court failed to address the defendant's claim on the merits, AEDPA does not apply and will not receive further analysis.

12. *See* Danforth v. Minnesota, 552 U.S. 264, 278–79 (2008) ("*Teague* is based on statutory authority that extends only to federal courts" and "cannot be read as imposing a binding obligation on state courts.").

13. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) (holding that the Constitution requires states to retroactively apply a new rule of constitutional law to a case already final on direct when the new rule is outcome-determinative because "*Teague*[] . . . is best understood as resting upon constitutional premises").

14. *See generally Danforth*, 552 U.S. at 282 (explaining that although *Teague* limited the kinds of cases that could lead to relief under federal habeas, it did not bind *state* courts to the retroactivity principle).

15. Reply Brief for the Petitioner, *supra* note 1, at 1–2 (arguing that McGregor aimed to establish a new rule that would not be retroactive under *Teague*).

16. *See* Henderson v. United States, 135 S. Ct. 1780, 1783 n.1 (2015) (quoting Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933)) (explaining that the unclean hands doctrine prohibits equitable relief when a party's misbehavior is closely related to the equitable remedy that he wants).

17. *See generally* Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)) (requiring a new trial if the false testimony of a state witness could "in any reasonable likelihood have affected the judgment of the jury"); Brady v. Maryland, 373 U.S. 83, 86 (1963) (establishing the constitutional framework for addressing improperly withheld exculpatory evidence); Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 337 (2011) (expanding on the framework established in *Brady*).

life-sentence reviewed and possibly have his conviction overturned—was in a petition for collateral review.[18] Consequently, the state collateral proceeding was functionally equivalent to an initial-review proceeding to which retroactivity rules should not have applied.[19] Although the State did not raise *Teague* as a bar to relief in McGregor's state collateral proceeding—giving him the opportunity to contest the materiality of the prosecutorial conduct at issue in his case[20]—current constitutional law does not preclude a State from invoking *Teague* in state collateral proceedings where a defendant failed to raise a claim on direct review because prosecutorial misconduct prevented him from doing so.[21] Texas ultimately relied on *Teague* in its brief opposing McGregor's Petition for a Writ of Certiorari to the U.S. Supreme Court;[22] the denied McGregor's petition,[23] and McGregor is still serving life in prison.[24]

When a State is permitted to invoke the *Teague* doctrine as a bar to collateral relief, despite the defendant having had no opportunity to raise his claim in a prior proceeding, a prosecutor's incentive to behave constitutionally at trial ceases to exist.[25] Instead, *Teague* becomes a mask for misconduct, stripping from an entire category of defendants their constitutional right to due process under law.[26] The Court

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18. *See* Reply Brief for the Petitioner, *supra* note 1, at 1.

19. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules of criminal procedure are applied retroactively to all cases pending on direct or not yet final on review, whether state or federal).

20. *See Ex parte* McGregor, No. WR-85,833-01, 2019 WL 2439453, at *1 (Tex. Crim. App. June 12, 2019), *cert. denied*, 141 S. Ct. 84 (2020).

21. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) (requiring states to apply *Teague*); Martinez v. Ryan, 566 U.S. 1, 16 (2012) (carving a path to habeas review around retroactivity limitations, but only in ineffective assistance of counsel cases).

22. Respondent's Brief in Opposition at 20–22, McGregor v. Texas, No. 19-685, 2020 WL 2575731 (May 2020).

23. McGregor v. Texas, 141 S. Ct. 84 (2020).

24. *Cf.* Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that a state prisoner could not raise a Fourth Amendment claim in a petition for federal habeas corpus relief if the prisoner had been afforded a "full and fair" opportunity to raise the claim in state court).

25. *See* Reply Brief for the Petitioner, *supra* note 1, at 11 (arguing that allowing prosecutors to behave as the State did in McGregor's case "guides prosecutors on how to make agreements, not disclose them to the defense, and present false testimony . . . , thereby increasing the likelihood of an unjust conviction without jeopardizing it").

26. *See* U.S. CONST. amend. XIV (expanding the authority of the Due Process Clause to the states); *see also* Reply Brief for the Petitioner, *supra* note 1, at 11

established a remedy for this constitutional predicament in cases where defendants raise ineffective assistance of counsel claims for the first time on collateral review. In *Martinez v. Ryan*,[27] the Court held that when collateral proceedings are a defendant's first opportunity to raise an ineffective assistance of counsel claim, "collateral review may become the functional equivalent of a direct appeal."[28] By treating Martinez's collateral claim as if it were raised on direct review, the Court effectively said no debate over the retroactive application of new rules need occur because, under *Griffith v. Kentucky*,[29] *Teague*'s new rules are automatically applied to all cases pending on direct appeal.

Scholars have debated and critiqued *Teague*'s retroactivity doctrine since its inception.[30] This Comment does not attempt to introduce novel insight into that discussion. Rather, this Comment argues that when a state collateral proceeding provides the first opportunity for a petitioner to present a claim due to extra-record misconduct, the Constitution's Due Process Clause compels states to treat the case as functionally equivalent to a direct review proceeding; as such, retroactivity cannot provide a barrier to review.[31]

(explaining that in McGregor's case, failure to intervene would lead to an injustice for McGregor and other similarly situated defendants).

27. 566 U.S. 1 (2012).

28. Rebecca Sharpless & Andrew Stanton, Teague *New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of* Padilla*,* Chaidez*, and* Martinez, 67 U. MIA. L. REV. 795, 805 (2013); *see Martinez*, 566 U.S. at 17.

29. 479 U.S. 314, 322 (1987) (arguing that the failure to apply a novel constitutional rule in criminal cases on direct review contrasts directly with the Constitution); *see also Martinez*, 566 U.S. at 11 (reasoning that Martinez's ineffective assistance of counsel claim raised in an initial-review collateral proceeding was equivalent to a prisoner's direct appeal because "no other court ha[d] addressed the claim"); Mary Dewey, Comment, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENVER U. L. REV. 269, 284 (2012) (explaining that "federal habeas review presents the only opportunity for prisoners to have their claims heard" when a state court is precluded from reaching the merits of a claim due to ineffective postconviction assistance of counsel).

30. *See* Peter Bozzo, *What We Talk About when We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 15–16 (2019) (explaining that despite the longevity of *Teague*, scholars have not particularly liked the decision and some Justices dislike the retroactivity framework as established in the case or applied in future cases).

31. Petitioners like McGregor, whose claims courts adjudicate and conclude would not have had a material impact on the case—as the TCCA did in McGregor's case—would not necessarily benefit from this Comment's recommendations, but McGregor's case highlights the potential issues that this Comment seeks to resolve. If, as this Comment argues, *Teague* does not apply to claims not raised until an initial-review

Part I provides the framework for retroactivity jurisprudence in the United States and explains the Court's monumental shift in retroactivity doctrine with *Teague*. Additionally, Part I examines the treatment of post-conviction claims brought in habeas proceedings, with *Martinez* at the forefront. Part II argues that the Due Process Clause compels courts to treat all extra-record claims of trial malfeasance that petitioners raise for the first time in initial-review collateral proceedings as if the petitioners raised the claims on direct review, analogous to the Court's treatment of ineffective assistance of counsel claims like that raised in *Martinez*. Part II further argues that treatment of initial-review collateral proceedings as direct appeals means that *Teague* cannot be available as a bar to relief under *Griffith*. This Comment concludes by emphasizing that the constitutional right to due process demands that all defendants receive a full and fair opportunity to have their claims litigated. Therefore, when the State's unclean hands obstruct a defendant's ability to exercise this constitutional right, habeas proceedings must be treated as initial-review collateral proceedings and dispose of *Teague* and retroactivity concerns as a bar to relief.

I. BACKGROUND

The Supreme Court's retroactivity doctrine has evolved considerably, in response to an increasing interest in limiting the power of federal habeas relief.[32] This Part first provides a brief history of American retroactivity jurisprudence, outlines *Teague*'s lasting impact on both federal and state collateral proceedings, and discusses the Court's treatment of post-conviction claims in initial-review collateral proceedings, using *Martinez* as the springboard. This Part concludes with a description of the equitable doctrine of unclean hands and its impact on habeas relief.

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collateral proceeding, then petitioners raising such new claims would need to show they had cause for not raising the claim earlier and that they were prejudiced by the inability to raise the claim. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977). If a court has already found that the claim is immaterial and that it would not have impacted the outcome, then a bar to a *Teague* defense may not affect the disposition. However, a bar to a *Teague* defense would be significant if a petitioner was able to establish prejudice.

32. *See* Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 826 (2018) (describing the evolution of the "Supreme Court's doctrine of adjudicative retroactivity [as transitioning from] a blurry and vacillating compromise to a well-defined, decades-old doctrine").

A. The Evolution of American Retroactivity Doctrine

Retroactivity doctrine determines when a new rule established in one case is applied to another case pending or final on direct appeal.[33] Habeas or collateral proceedings provide convicted or detained persons with an opportunity to have the legality of their imprisonment or detention reviewed.[34] In 1956, Justice Felix Frankfurter first hinted at retroactivity's role in habeas cases in his concurring opinion in *Griffin v. Illinois*.[35] To prevent the "floodgates to post-conviction relief"[36] from bursting open, Justice Frankfurter cautioned against the broadening scope of habeas review for prisoners whose cases were made final years prior.[37] However, the Court's allowance of expanded habeas relief despite Justice Frankfurter's warnings meant that the Court could not avoid retroactivity doctrine forever.[38]

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33. *See* Jason M. Zarrow & William H. Milliken, *Retroactivity, the Due Process Clause, and the Federal Question in* Montgomery v. Louisiana, 68 STAN. L. REV. ONLINE 42, 43 (2015) (describing retroactivity as "whether a decision announcing a 'new' rule of constitutional law applies to defendants who were convicted before the rule's articulation"). The steps in a criminal case in federal court proceed as follows:

> (1) trial in a federal district court; (2) direct appeal to a federal court of appeals; (3) petition for a writ of certiorari to the U.S. Supreme Court; (4) petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2255; (5) appeal of the habeas decision to a federal court of appeals; and (6) petition for a writ of certiorari to the U.S. Supreme Court. Steps one through three are direct review, and steps four through six are collateral review.

Turner, *supra* note 11, at 1172. Cases are pending on direct through step three, and they are final on direct after step three. *See id.*

34. *See* Margery I. Miller, Note, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause when Habeas Corpus Is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593, 2594 (2004) (explaining that the writ of habeas corpus provides "an important way in which our criminal justice system protects the right of individuals to obtain relief when they have been unjustly imprisoned").

35. 351 U.S. 12 (1956).

36. Bozzo, *supra* note 30, at 28.

37. *Griffin*, 351 U.S. at 25 (Frankfurter, J., concurring in the judgment). In *Griffin*, two convicted offenders needed a transcript of their trial to file an appeal, but both men were denied their requests when they could not pay the requisite fee. *Id.* at 13–14. Subsequently, the state courts denied post-conviction relief and the men appealed to the Supreme Court, which held that Illinois's fee system unconstitutionally denied access to appellate review to indigent offenders. *Id.* at 15, 19.

38. *See* Beske, *supra* note 32, at 828 (referencing the impact that cases like *Brown v. Allen*, 334 U.S. 443 (1953), and *Fay v. Noia*, 372 U.S. 391 (1963), had on broadening the availability of habeas corpus review for criminal defendants).

1. A brief history

Reflective of an evolving national ideology around individual rights and post-conviction relief,[39] retroactivity doctrine has received multiple facelifts, spanning several decades of American jurisprudence.[40] Despite the growing support for the ideas that Justice Frankfurter expressed in his *Griffin* concurrence,[41] the Supreme Court continued to avoid reevaluating retroactivity doctrine and indiscriminately applied new rules in habeas proceedings for seven years.[42]

With Earl Warren's appointment to Chief Justice came an avalanche of landmark rulings that redefined the understanding of the judicial function[43] and transformed criminal procedure.[44] As the Warren Court

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39. *See* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 315, 326, 337.

40. *See* Beske, *supra* note 32, at 827 ("The doctrine of adjudicative retroactivity has followed the serpentine path typical of many federal jurisdiction doctrines over the past few decades.").

41. *See* Eskridge v. Wash. St. Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) (Harlan, J., dissenting) (arguing that *Griffin* should not be applied to a two-decade-old conviction).

42. Bozzo, *supra* note 30, at 28–29 (citing Jackson v. Denno, 378 U.S. 368, 376, 390–96 (1964); Smith v. Crouse, 378 U.S. 584, 584 (1964) (per curiam); Pickelsimer v. Wainwright, 375 U.S. 2, 2–3 (1963) (per curiam); Gideon v. Wainwright, 372 U.S. 335, 337–38, 343–45 (1963)).

43. Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 194–95 (2015) (explaining the *Loving* decision as part of the Warren Court's extension of the judiciary into broadening substantive due process rights); Akhil Reed Amar, *The Warren Court and the Constitution (with Special Emphasis on* Brown *and* Loving*)*, 67 SMU L. REV. 671, 671 (2014) (describing *Brown* as a landmark decision of the Warren Court that dramatically expanded the Bill of Rights); *see* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a statute that prohibits marriages based on race violates the Fourteenth Amendment because marriage is among the "'basic civil rights of man,' fundamental to . . . existence and survival" (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))); Brown v. Board of Educ., 347 U.S. 483, 493, 495 (1954) (determining that the "separate but equal" doctrine violated the plaintiffs' Fourteenth Amendment rights, reasoning that education is considered a right that "must be made available to all on equal terms" and that separate educational facilities are inherently unequal and deprive people of equal protection of law).

44. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961) (stating that evidence obtained in violation of a constitutional right cannot be used in state court); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (establishing procedural safeguards to protect the "privilege against self-incrimination"); Beske, *supra* note 32, at 828–29 (2018) (noting that the Warren Court decided cases that "broadened the substantive scope of habeas corpus so that it became an indispensable step in the process for virtually every criminal defendant" (footnote omitted)).

expanded the protections of the Bill of Rights and their application to the States under the Fourteenth Amendment's Due Process Clause, the Court traded a "Blackstonian sensibility"[45] for a more legislative approach.[46] After multiple Justices had raised retroactivity warnings,[47] the Court finally addressed the issue in the 1965 case *Linkletter v. Walker*,[48] which caused the Court to question whether a new rule should be available to state prisoners in federal habeas proceedings whose convictions were already final on direct appeal.[49] Parting ways with precedent, the *Linkletter* Court held that courts should possess the power to decide whether to limit new rules to prospective application or to expand application retrospectively.[50] With this "practical approach," the Court created a balancing test that would evaluate each new rule on a case-by-case basis by "looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation [would] further or retard its operation."[51] *Linkletter*'s balancing test permitted instances of "selective prospectivity,"[52] despite acknowledging the potential inequities of denying the benefit of a new rule to defendants equally situated.[53] The Court had come to view finality and the potential

45. *See* Bozzo, *supra* note 30, at 29–30. Up to this point, Blackstonian "declaratory theory" was the leading ideology concerning retroactivity, founded on the principle that the primary—if not only—role of the judiciary is not to create law, but rather to apply pre-existing law. *Id.* at 29. Under Blackstonian theory, "judges never 'pronounce a new law' at all; they simply 'expound the old one' and apply the always-existing rule to the parties before them." *Id.* at 30 (quoting Linkletter v. Walker, 381 U.S. 618, 622–23 (1965)).

46. *Linkletter*, 381 U.S. at 623–24 ("[J]udges do in fact do something more than discover law; they make it interstitially by filling with judicial interpretation the vague, indefinite, or generic . . . terms that alone are but the empty crevices of the law.").

47. In addition to Justice Frankfurter, Justice Marshall Harlan also noted concerns in several cases. *See, e.g.*, *supra* note 41 and accompanying text.

48. 381 U.S. 618 (1965).

49. *See id.* at 619–20 (questioning whether *Mapp v. Ohio*, 367 U.S. 643 (1961), is to be applied retroactively to States such that evidence seized in violation of the Constitution should be excluded in state court proceedings).

50. *Id.* at 629 (stating that the Constitution offers no view either way on whether retroactivity should apply).

51. *Id.*; Sharpless & Stanton, *supra* note 28, at 798 (quoting *Linkletter*, 381 U.S. at 629). *But see Linkletter*, 381 U.S. at 653 (Black, J., dissenting) (arguing that keeping people in jail who were convicted with unconstitutionally seized evidence goes against a sense of justice).

52. Beske, *supra* note 32, at 829.

53. Stovall v. Denno, 388 U.S. 293, 301 (1967).

judicial burden of retrying a flood of previously decided cases as more important than the potential for inequity.[54]

However, the *Linkletter* balancing test was not a perfect solution, as evidenced by Justice Harlan's repeated dissents in key habeas cases that adhered to the *Linkletter* standard.[55] He urged a complete overhaul of retroactivity that would repeal courts' discretion to apply new constitutional rules entirely prospectively, while excepting the lucky defendant whose case would be the "vehicle for establishing that rule."[56] Justice Harlan considered this a matter of basic principles of justice, including the Court's duty to "do justice to each litigant on the merits of his own case" rather than executing decisions that are "the commands of a super-legislature."[57]

Eventually, this reasoning persuaded a majority of Justices to do away with the arbitrary guidelines of a balancing test and establish bright line rules for retroactivity.[58] In *Griffith v. Kentucky*, the Court formally rejected *Linkletter*'s selective prospectivity in the criminal context in federal direct review proceedings.[59] The Court held that new rules must apply to all cases not yet final on direct because "selective

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54. *Id.* (conceding that the reality that some defendants may receive the benefit of a new rule while others similarly situated do not is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum"). The *Stovall* Court relied upon constitutional principles of decision making that command the judiciary solely resolves issues in concrete cases or controversies. U.S. CONST. art. III, § 2. This creates the unavoidable consequence of "chance beneficiaries." *See* Beske, *supra* note 32, at 830 (citing *Stovall*, 388 U.S. at 299–301).

55. *E.g.*, Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part); Desist v. United States, 394 U.S. 244, 257 (1969) (Harlan, J., dissenting).

56. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting) ("I can no longer[] [] remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle."); *see also* Beske, *supra* note 32, at 832 ("[T]he Court's rulings on retroactivity in its criminal procedure decisions [were] a haphazard mess.").

57. *Desist*, 394 U.S. at 259 (Harlan, J., dissenting); *see also* Beske, *supra* note 32, at 832–33 (explaining that Justice Harlan supported full retroactivity for cases on direct review, even though habeas cases raised separate, more complex issues).

58. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (declaring that arbitrariness was disruptive of judicial integrity, regardless of whether the new rule constituted a "clear break" from prior law); *see also id.* at 322 (establishing that retroactive application always applies to cases pending on direct review); Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion) (narrowing retroactivity further by excluding cases already made final on direct appeal from receiving the benefit of a new rule unless the new rule falls under two very narrow exceptions). *See infra* notes 68–73 and accompanying text.

59. *Griffith*, 479 U.S. at 322.

application of new rules violates the principle of treating similarly situated defendants the same" and conflicts with fundamental norms of constitutional adjudication.[60] Referencing Justice Harlan's concurring opinion in *Mackey v. United States*,[61] *Griffith*'s majority opinion noted:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.[62]

Griffith thus settled whether courts would apply new rules to federal cases pending on direct review but left open whether petitioners seeking collateral review would receive equivalent treatment.[63] In a controversial plurality opinion, Justice O'Connor provided an answer with *Teague v. Lane*.

2. Teague v. Lane*: A threshold test is born*

Wary of wandering too far from principles of comity and finality,[64] Justice O'Connor utilized *Teague v. Lane* to greatly limit habeas as a powerful tool for review.[65] *Teague* introduced a threshold test that formally abandoned *Linkletter*'s balancing inquiry. While *Griffith* required courts to apply new rules in cases pending on direct—leaving the applicability of new rules in cases final on direct uncertain—*Teague* closed the gap by restricting the application of new rules in cases final

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60. *Id.* at 323. The *Griffith* Court relied upon principles established in the "cases and controversies" clause in Article III of the Constitution to determine that any newly declared rule must apply to other cases pending direct review. *Id.* at 322; *see also*, Beske, *supra* note 32, at 834–35 (describing the Court's decision in *Griffith* as "point[ing] at an Article III mooring").

61. 401 U.S. 667 (1971).

62. *Griffith*, 479 U.S. at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in the judgment in part and dissenting in part)).

63. *See id.* at 328 (holding that a novel rule regarding criminal cases is to apply retroactively to all state and federal cases that are either "pending on direct review or not yet final").

64. *See id.* at 308; Beske, *supra* note 32, at 834 ("The *Teague* plurality premised its departure from the *Griffith* rule of full retroactivity on comity and finality and the potential for massive disruption in the habeas context").

65. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

on direct.[66] In T*eague*, the Court said it would no longer make or apply new rules to cases that had already become final on direct review,[67] save for two very narrow exceptions.[68] Federal habeas courts can only review the merits of a case after this threshold question is answered in the affirmative: is the new rule necessary to the fundamental fairness of the criminal justice system?[69] *Teague* only recognizes retroactivity of a new rule when the rule "breaks new ground or imposes a new obligation on the States or the Federal Government."[70]

Teague explained that new rules are only exempt from the bright line nonretroactivity standard if they fall into one of two categories: (1) if the new rule is "substantive," meaning it is "beyond the power of the criminal law-making authority to proscribe,"[71] or (2) if the rule is a "watershed" procedural rule that would undermine the criminal proceeding and "implicate the fundamental fairness of the trial."[72] Under the first exception, a new rule applies retroactively if the conduct for which a defendant was prosecuted is constitutionally protected; for example, *Loving v. Virginia*[73] established the freedom to

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66. *See* Turner, *supra* note 11, at 1167 (establishing that the Court viewed "retroactivity [as] a threshold question that must be decided before reaching the merits").

67. *See Teague*, 489 U.S. at 316 (stating that unless a constitutional rule is to be applied to defendants regardless of the finality of their convictions, "habeas corpus cannot be used as a vehicle to create" new constitutional rules)); *see also* Christopher S. Strauss, Comment, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1235–37 (2003) (articulating three significant ways that *Teague* modified the Court's retroactivity doctrine: (1) by treating retroactivity as a threshold issue; (2) by creating a bright line distinction between direct and collateral review; and (3) by adopting a new definition of what establishes a new rule for retroactivity).

68. *See* Turner, *supra* note 11, at 1165–66 (identifying two exceptions to *Teague*'s general nonretroactivity rule).

69. *Teague*, 489 U.S. at 307; Bozzo, *supra* note 30, at 60–61; *see also* Sharpless & Stanton, *supra* note 28, at 802 (stating that if a new rule does not fit one of the exceptions for retroactivity, then the court is unable to decide the merits of the case).

70. *Teague*, 489 U.S. at 301.

71. Beske, *supra* note 32, at 834 (quoting *Teague*, 489 U.S. at 311); *see also* Sharpless & Stanton, *supra* note 28, at 800 n.41 (citing *Teague*, 489 U.S. at 311); Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (expanding *Teague*'s retroactivity doctrine to include "not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002)).

72. *See* Sharpless & Stanton, *supra* note 28, at 800 n.41 (citing *Teague*, 489 U.S. at 311–12).

73. 388 U.S. 1 (1967).

marry as a new constitutionally protected right that could not be infringed by state law.[74] The second exception applies when the new rule sets forth a "watershed" rule of criminal procedure; for example, *Gideon v. Wainwright*[75] established the right to assistance of counsel in state felony prosecutions.[76] These are narrow exceptions.[77] Consequently, *Teague*'s threshold test has greatly limited a defendant's chances of receiving habeas review.[78]

States cannot restrict the application of new rules more than *Teague* does. The Court held in *Montgomery v. Louisiana*[79] that in rare instances when one of *Teague*'s two exceptions applies in state habeas proceedings, the State is bound to retroactively apply the new rule because the petitioner must get the benefit of the new rule.[80] While *Montgomery* establishes a floor, it does not inhibit state courts from using their authority to give broader effect to new rules when reviewing

74. *Id.* at 12.

75. 372 U.S. 335 (1963).

76. *See id.* at 348 (Clark, J., concurring) (emphasizing that the Court's precedential interpretation of the Sixth Amendment requires appointment of counsel in all criminal prosecutions).

77. *See Teague*, 489 U.S. at 333–34 (Brennan, J., dissenting) (stating that the plurality's exceptions are narrow rules that rarely apply).

78. *See* Sharpless & Stanton, *supra* note 28, at 800 n.41 (noting that the new rule established in *Gideon* is the only new rule that the Court has ever recognized as a "watershed" rule of criminal procedure, and that the Court has implied it will likely never recognize another "watershed" rule). The Court grappled with the potential negative consequences of announcing a new rule on collateral review to one petitioner's benefit while refraining from extending that benefit to others whose appeals were already final. Griffith v. Kentucky, 479 U.S. 314, 327–28 (1987). Although "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated," the Court dealt with the potential harm of petitioners receiving unequal treatment by creating a bright line rule that made it near impossible for any new rules to be given retroactive application to their cases. *Teague*, 489 U.S. at 315; Hankerson v. North Carolina, 432 U.S. 233, 247 (1977) (Powell, J., concurring); *see also* Sharpless & Stanton, *supra* note 28, at 803 (explaining that *Teague*'s two exceptions "inflict harm on all postconviction litigants by making virtually all new rules inapplicable to their cases").

79. 136 S. Ct. 718 (2016).

80. *See id.* at 729 (holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule[] [because] *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises").

state habeas claims.[81] However, most states have adopted *Teague*'s threshold test or a state-specific equivalent in habeas proceedings.[82]

The U.S. Court of Appeals for the Fifth Circuit has established a third narrow exception to *Teague*, whereby a claim may be reviewed on the merits despite first arising on collateral review.[83] In *Jackson v. Johnson*,[84] the petitioner sought a federal writ of habeas corpus after his conviction for aggravated assault.[85] The district court denied Jackson's petition, but the Fifth Circuit granted a certificate of appealability to decide whether Jackson had a valid ineffective assistance of counsel claim due to his counsel's failure to file a timely motion for rehearing.[86] The court recognized that ruling in Jackson's favor would create a new rule of constitutional law, barring his claim from review under *Teague* unless it met one of *Teague*'s two narrow exceptions.[87] The court acknowledged that the new constitutional rule failed to qualify for either exception; however, the Fifth Circuit established a third narrow exception to *Teague* to address what it perceived to be a constitutional dilemma.[88] This third exception exists when "an alleged constitutional right is susceptible of vindication *only* on habeas review"[89] because, in such circumstances, "application of *Teague* to bar full consideration of the claim would effectively foreclose any opportunity" for the constitutional right to be recognized at all.[90] Under this third exception,

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81. Danforth v. Minnesota, 552 U.S. 264, 289 (2008). The *Danforth* Court elaborated further: "[T]he States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings." *Id.* (citing State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003) (en banc)) ("[A]s a matter of state law, this Court chooses not to adopt the *Teague* analysis . . . ."); *see, e.g.*, Sharpless & Stanton, *supra* note 28, at 801 n.42 (citing Denisyuk v. Maryland, 30 A.3d 914 (Md. 2011)) (pointing out that Maryland utilizes state principles that are broader than *Teague*'s retroactivity doctrine).

82. Sharpless & Stanton, *supra* note 28, at 804.

83. *See* Jackson v. Johnson, 217 F.3d 360, 364 (5th Cir. 2000) (concluding that a third narrow exception to *Teague* justified the court's consideration of Jackson's claim on the merits).

84. 217 F.3d 360 (5th Cir. 2000).

85. *Id.* at 361.

86. *Id.*

87. *Id.* at 363–64.

88. *Id.* at 364.

89. *Id.* Jackson's petition raised the issue that a defendant could never raise an ineffective assistance of counsel claim on direct appeal if the ineffective counsel was the result of his attorney's "failure to file a timely motion for rehearing." *Id.*

90. *Id.*

the court proceeded to consider the merits of Jackson's claim despite it not falling within the purview of *Teague*'s two established exceptions.[91]

B. Initial-Review Collateral Proceedings

Finality and federalism concerns underpin the Supreme Court's hesitancy to interfere with habeas review of state convictions.[92] This reluctance has significantly restricted defendants' ability to petition for federal habeas review of a state conviction, especially where the claim could have been raised during trial or on direct appeal.[93] For instance, in *Davila v. Davis*,[94] the petitioner attempted to seek federal habeas relief when his state post-conviction counsel failed to raise his claim of ineffective assistance of counsel at trial on direct appeal.[95] The Court denied relief, specifying that it could not hear the claim because the petitioner's state post-conviction counsel failed to raise the ineffective assistance of counsel claim on direct appeal.[96] In doing so, the Court relied on the doctrine of procedural default.[97] While the doctrine may have barred the petitioner's claim in *Davila*, it should not have the same effect when petitioners are unable to raise claims on direct appeal due to the State's conduct preventing such claims from being revealed.

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91. *Id.* Jackson lost his appeal, but the Fifth Circuit revisited the narrow third exception to the *Teague* rule three months later in another case, Burdine v. Johnson, 231 F.3d 950 (5th Cir.), *vacated en banc*, 234 F.3d 1339 (5th Cir. 2000). The court distinguished Burdine's case from Jackson's to exclude Burdine from receiving the benefit of the third exception because his claim was "*not* one that could *never* be raised on direct appeal under any circumstances." *Id.* at 956–57.

92. *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012) (defining procedural default as a doctrine "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism"); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (recognizing the finality and federalism interests served by state procedure rules), *superseded by statute,* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 104, 110 Stat. 1214, 1218.

93. *See* Dewey, *supra* note 29, at 274 (emphasizing that concerns about finality and federalism have consistently persuaded the Court and Congress to increase barriers to review of state convictions in federal habeas proceedings).

94. 137 S. Ct. 2058 (2017).

95. *Id.* at 2063.

96. *Id.* at 2062–63.

97. *Id.* at 2069–70.

1. Laying the constitutional groundwork

Procedural default is an equitable doctrine under which a federal court may not review the merits of a claim, constitutional or otherwise, that a state collateral court declined to hear due to a defendant's failure to follow a state procedural rule.[98] Ordinarily, when a state prisoner fails to raise certain objections at trial under a state contemporaneous objection rule, he waives the objection and is barred from federal habeas review of his constitutional claim.[99] However, in the 1997 case *Wainwright v. Sykes*,[100] the Court announced an exception to this rule.

In *Wainwright*, Florida's Supreme Court refused to consider the petitioner's claim challenging the admission of a confession because he had not contemporaneously objected.[101] After granting certiorari, the U.S. Supreme Court established the *Wainwright* cause-and-prejudice exception to the doctrine of procedural default in federal habeas proceedings.[102] The cause-and-prejudice exception only provides a remedy when the petitioner can prove that there were, in fact, specific circumstances that led to his procedural default (cause), and that the jury likely would have acquitted him had those circumstances been absent (prejudice).[103] If the petitioner could have raised his objection on direct appeal and did not, he will not be awarded habeas review.[104] The cause-and-prejudice exception ensures that a federal habeas court has the opportunity to adjudicate the federal constitutional claim of a defendant who, in the absence of such an adjudication, will be the victim of a "miscarriage of justice."[105]

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98. *See* Dewey, *supra* note 29, at 270 (stating that procedural default arises when a prisoner brings a claim to federal court despite failing to comply with state procedural rules in state postconviction proceedings).

99. *See* Marian J. Kent, Note, *Beyond* Wainwright v. Sykes*: Expanding the Role of the Cause-and-Prejudice Test in Federal Habeas Corpus Actions*, 59 NOTRE DAME L. REV. 1360, 1362 (1984) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)) (describing contemporaneous objections as procedural rules that typically require a defendant to raise specific objections at trial).

100. 433 U.S. 72 (1977).

101. *Id.* at 75.

102. *Id.* at 90–91.

103. *Id.* (positing that even if Wainwright had presented sufficient cause for his procedural default, the other evidence of guilt presented at trial would have negated any possibility of actual prejudice).

104. *Id.* at 77 (noting the circuit court's conclusion that the only effect of the state procedural rule would be to bar review where a party did not contemporaneously object due to reasons relating to trial tactics).

105. *Id.* at 90–91.

The Court's cause-and-prejudice exception is rooted in principles of equity that contemporaneously protect the Constitution's mandate that all persons receive due process under the law.[106] Under the Due Process Clause of the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property, without due process of law."[107] While the Constitution does not explicitly include the right to a fair trial,[108] the Court has read the Sixth Amendment to include such a right,[109] and the Court has extended this right through the Fourteenth Amendment to apply in state court proceedings.[110] The right to a fair trial is not limited to the Sixth Amendment's explicit guarantees of the right to a speedy and public trial, an impartial jury, or to assistance of counsel, however.[111] "[A]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."[112] Yet, fairness is not an absolute concept.[113]

If a federal habeas court finds that the State failed to provide "adequate 'corrective process' for the full and fair litigation of federal claims, whether or not 'jurisdictional,' the court [can] inquire into the

106. *See, e.g.*, Frank v. Mangum, 237 U.S. 309, 334–35 (1915). In *Frank*, the Court acknowledged that the facts of the case were conclusive enough to find Frank guilty but still explicitly highlighted the primary question as one involving due process of the law. *Id.* at 334. The Court also emphasized that, when a prisoner petitions for a writ of habeas corpus, the Court must "look beyond forms and inquire into the very substance of the matter" in order to decide whether a prisoner has been deprived of liberty under due process of the law, or whether the "jurisdictional facts . . . appear upon the record or not." *Id.* at 331. The essential question, therefore, was not the guilt or innocence of the prisoner but, instead, "whether the State, taking into view the entire course of its procedure, has deprived him of due process of law." *Id.* at 334.

107. U.S. CONST. amend. XIV. Although *Wainwright* dealt with a federal case, its relevance extends to cases in the state context because the Fourteenth Amendment made the Due Process Clause binding on the states. *See id.*

108. *See* U.S. CONST. amend. VI.

109. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684 (1984) (noting that criminal defendants have a "fundamental right to a fair trial").

110. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (extending the right to counsel in federal felony cases to state proceedings).

111. FindLaw, *Annotation 15—Fourteenth Amendment*, THOMSON REUTERS, https://constitution.findlaw.com/amendment14/annotation15.html#9 [https://perma.cc/PL6G-KYR2].

112. *Id.* (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

113. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 116 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964)).

merits to determine whether a detention was lawful."[114] In *Ross v. Moffitt*,[115] the Court held that there is no constitutional right to counsel in discretionary appeals beyond the first appeal as of right or in petitioning for certiorari to the Supreme Court.[116] Notably, the Court came to this conclusion only after assessing whether the lower court had denied Ross, the petitioner, meaningful litigation of his claim.[117] Since Ross had an adequate opportunity to "present [his] claims fairly within the adversary system"[118] at the lower level, the Court found no violation of the defendant's due process rights in the State's denial of his petition for habeas review.[119] More recently, the Court held that defendants have a due process right to counsel for a petition for a discretionary appeal where it is the "first, and likely the only, direct review the defendant's conviction and sentence will receive."[120] In doing so, the Court identified one scenario where a State's procedural obstacle to "full and fair litigation"[121] of a defendant's claim could result in a due process violation.[122]

2. Martinez v. Ryan

Although the Court continues to curtail the power of habeas review through stringent retroactivity doctrine fueled by a reluctance to interfere with state convictions,[123] the Court has recognized and

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114. *See* Stone v. Powell, 428 U.S. 465, 476 (1976) (citing Frank v. Mangum, 237 U.S. 309, 333–36 (1915)).

115. 417 U.S. 600 (1974).

116. *Id.* at 617.

117. *Id.* at 610–11 (distinguishing the purpose of the trial stage of a state criminal proceeding from the purpose of the appellate stages of a criminal proceeding).

118. *Id.* at 612 (citing Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment)).

119. *See id.* at 610 (differentiating between the trial and appellate stages of a criminal proceeding and noting that the rights of indigents that are binding upon the trial courts under the Sixth and Fourteenth Amendments do not necessarily bind the appellate courts).

120. Halbert v. Michigan, 545 U.S. 605, 619 (2005).

121. Stone v. Powell, 428 U.S. 465, 481–82 (1976).

122. *Halbert*, 545 U.S. at 610.

123. *See* 28 U.S.C. § 2254(d). Congress has also limited habeas review; for example, AEDPA mandated that federal courts give deference to state court rulings "unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*; *see* Dewey, *supra* note 29, at 274

characterized occasions where state claims raised on federal habeas review may bypass retroactivity concerns altogether in the name of due process.[124] The Court referred to such occasions as "initial-review collateral proceeding[s]" in *Martinez*, where a federal habeas proceeding provided the first opportunity for the petitioner to have his state claim fully and fairly litigated.[125]

A jury convicted Martinez of sexual conduct with a minor, and the court sentenced him to two terms of life imprisonment.[126] On direct appeal, the defense raised several arguments on Martinez's behalf, but it did not raise ineffective assistance of counsel because Arizona law prohibits defendants from raising ineffective assistance of counsel claims on direct appeal.[127] The only opportunity to raise such a claim is in the defendant's first collateral proceeding; otherwise, the court considers the claim waived.[128] Martinez asserted that he missed his opportunity to raise the ineffective assistance of counsel claim at his initial collateral proceeding, by no fault of his own, because his counsel never informed him that he had a deadline to file a pro se petition to

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(explaining that the Court and Congress have expanded bars to federal habeas review of state convictions, citing finality and federalism as justification).

124. *See* U.S. CONST. amend. XIV (mandating due process under the law as applied to the States); *see also* Lisenba v. California, 314 U.S. 219, 236 (1941) (emphasizing that in a criminal trial, denial of due process violated basic concepts of fairness and justice).

125. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963) (explaining that under the Due Process Clause, States are responsible for ensuring a criminal defendant has a "full and fair opportunity to make his defense and litigate his case," and if the State fails to do so, due process demands that any resulting conclusion of fact or law not be authoritative).

126. Martinez v. Ryan, 566 U.S. 1, 5 (2012).

127. *See* Dewey, *supra* note 29, at 276–77 (citing State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002)) (noting that Arizona prisoners must instead raise the claim in state collateral proceedings).

128. *Martinez*, 566 U.S. at 5–6; *see also* Sharpless & Stanton, *supra* note 28, at 809 (citing *Martinez*, 556 U.S. at 4). In fact, many states have similar procedural rules that either require or encourage defendants to bring ineffective assistance of counsel claims in a collateral proceeding. *See id.* at 804 n.63 (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)) (calling attention to Trevino v. Thaler, 569 U.S. 413 (2013), in which the Court expanded *Martinez* to include not only cases where defendants were required to bring ineffective assistance of counsel claims on collateral review, but also cases where "[t]he structure and design of the [] system in actual operation [] make[s] it 'virtually impossible' for an ineffective assistance [of counsel] claim to be presented on direct review"); *see also id.* (quoting Commonwealth v. Zinser, 847 N.E.2d 1095, 1096–97 (Mass. 2006)) ("[The] ineffective assistance of counsel claim is 'not one that an appellate court could have resolved on direct appeal in the first instance' and therefore was appropriately raised in postconviction[].").

preserve his rights.[129] When Martinez's new counsel attempted to raise the ineffective assistance of counsel claim in a second collateral proceeding about a year and a half after his case was finalized, the Arizona Supreme Court dismissed his petition, relying on Arizona law barring relief on a claim that Martinez presumably could have raised in a prior collateral proceeding.[130] In a petition for review to the U.S. District Court for the District of Arizona, Martinez continued to argue that he had cause for his procedural default because his initial post-conviction counsel had failed to raise the ineffective assistance of counsel claim at Martinez's only opportunity to do so.[131]

The Supreme Court granted certiorari to answer a question left open by its decision in *Coleman v. Thompson*[132] twenty years prior: whether a prisoner has a right to effective counsel in collateral proceedings that are the first occasion for the defendant to raise the claim.[133] The Court explained that initial-review collateral proceedings that examine the defendant's claim of ineffective assistance of counsel at trial function equivalently to a direct appeal in which the petitioner alleges ineffective assistance of counsel in a prior proceeding.[134] In holding as such, the Court distinguished *Martinez* from *Coleman*, where the petitioner had raised an attorney error claim in a second post-conviction proceeding after previously raising that same claim at an initial collateral review proceeding.[135] No court at any level had previously

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129. *Martinez*, 566 U.S. at 6.

130. *Id.* at 7. Courts refer to this as "procedural default." *See* Dewey, *supra* note 29, at 270 (noting that procedural default results from a failure to comply with state procedural rules in postconviction proceedings).

131. *Martinez*, 566 U.S. at 7. Furthermore, the Supreme Court explained the law of procedural default permitted a petitioner to obtain federal review of a defaulted claim if he is able to prove "cause for the default and prejudice from a violation of federal law." *Id.* at 10 (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

132. 501 U.S. 722 (1991).

133. Sharpless & Stanton, *supra* note 28, at 807 (identifying these types of claims as "first-tier" appeals).

134. *Martinez*, 566 U.S. at 11; *see also* Sharpless & Stanton, *supra* note 28, at 805 (citing *Martinez*, 566 U.S. at 11) ("[W]hen postconviction proceedings are a defendant's first opportunity to raise the issue of ineffectiveness of trial counsel, collateral review may become the functional equivalent of a direct appeal.").

135. *See Martinez*, 566 U.S. at 9 ("This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."); *see also* Sharpless & Stanton, *supra* note 28, at 807 n.86 ("Coleman has had his 'one and only appeal.'" (quoting *Coleman*, 501 U.S. at 756)).

heard Martinez's claim.[136] Relying on principles of equity, the Supreme Court therefore found that "if the state did not provide postconviction counsel or if postconviction counsel was ineffective," Martinez's procedural default in failing to raise his ineffective assistance of counsel claim in the lower court could be excused.[137]

3. Post-conviction claims beyond the scope of Martinez

With *Martinez*, the Court coined the term "initial-review collateral proceedings,"[138] but it explicitly limited that holding to instances of ineffective assistance of counsel claims.[139] The Court ruled similarly in *Trevino v. Thaler*,[140] where it was "virtually impossible" for the defendant to raise his post-conviction claim of ineffective assistance of counsel on direct appeal.[141] In Trevino's case, the Court found that the Texas procedural system—"as a matter of its structure, design, and operation"—effectively robbed defendants of a meaningful opportunity to present their claim on direct appeal.[142] However, there are other extra-record claims[143] that may give rise to habeas relief where the defendant can prove that his constitutional right to fair trial was violated.[144]

As demonstrated in *Martinez*, the writ of habeas corpus exists as a safeguard against unconstitutional imprisonment,[145] but extra-record

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136. *Martinez*, 566 U.S. at 6–8.

137. Sharpless & Stanton, *supra* note 28, at 808.

138. *Martinez*, 566 U.S. at 17.

139. *Id.* at 16 (emphasizing that its holding "does not concern attorney errors in other kinds of proceedings").

140. 569 U.S. 413 (2013).

141. *Id.* at 417 (quoting Robinson v. State, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000)).

142. *Id.* at 428.

143. BRENT E. NEWTON, PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL 245 (3d. ed. 2017) (defining extra-record claims as those that "rely at least in part on facts that are not apparent in the record of the prior proceedings").

144. Cases that evade dismissal on habeas review have found their way around at least one of the five gatekeeping requirements: (1) failure to exhaust state remedies, (2) procedural default, (3) successive petitions, (4) failure to file a timely claim, and (5) nonretroactivity. *See* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 145 (2013). While failure to exhaust state remedies, successive petitions, and failure to file a timely claim have all been codified by Congress, procedural default and nonretroactivity doctrine have not. *See* 28 U.S.C. §§ 2244(a), (d), 2254(b)(1); Hashimoto, *supra*, at 145–48. For the purposes of this Comment, discussion will focus on retroactivity and procedural default doctrines.

145. Harrington v. Richter, 562 U.S. 86, 97–98 (2011) (quoting 28 U.S.C. § 2254(d)) (noting that habeas review may be awarded to a state claim where the

claims may also be raised in a motion for a new trial or on direct appeal as long as the defendant becomes aware of the error within the allotted time frame for raising a motion.[146] Recall that the nonretroactivity doctrine does not create a bar to relief for extra-record claims pending direct review.[147] However, since it is not uncommon for constitutional errors to remain hidden from the defendant for years after his opportunity to file a motion for a new trial has expired,[148] the first opportunity for the defendant to raise his extra-record claim is often in a post-conviction habeas corpus petition.[149]

The equitable doctrine of procedural default will usually foreclose a prosecutorial misconduct claim raised for the first time in collateral review.[150] However, the Court has carved out exceptions to the general rule that make possible the opportunity for habeas relief. In the 1963 case *Brady v. Maryland*,[151] the petitioner brought a habeas corpus claim against the State after he learned that the State had suppressed evidence favorable to his case.[152] The Supreme Court indicated that the suppression of evidence in his case was a violation of the Due Process Clause of the Fourteenth Amendment.[153] Due process violations where

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adjudication of the claim "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States").

146. NEWTON, *supra* note 143, at 245.

147. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that a new rule for the conduct of criminal prosecutions must apply retroactively to cases pending on direct review).

148. NEWTON, *supra* note 143, at 245.

149. *See id.* (describing thoroughly the three most common types of extra-record, post-conviction constitutional claims: ineffective assistance of counsel, prosecutorial misconduct, and jury misconduct). All three types of extra-record claims are grounded in the right to due process. *See* U.S. CONST. amend. XIV; *infra* Section I.B.4 and accompanying text (discussing the Court's treatment of extra-record claims in light of due process).

150. *See* Hashimoto, *supra* note 144, at 145–47 (discussing scope of applicability of the procedural default doctrine).

151. 373 U.S. 83 (1963).

152. *Id.* at 84.

153. *Id.* at 86. By acknowledging a due process violation in Brady's case, the Court affirmed the decision of the court of appeals, which had relied on two decisions from the Third Circuit for its ruling. *See* United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765 (3d Cir. 1955) ("The suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or penalty." (quoting United States *ex rel.* Thompson v. Dye, 123 F. Supp. 759, 762 (W.D. Pa. 1954))); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952) ("[S]uppression of [the evidence],

the prosecution fails to disclose exculpatory material evidence to the defendant in a timely manner are called *Brady* claims in modern court.[154] The burden falls on the petitioner to show a reasonable probability that timely disclosure of the evidence would have resulted in a different outcome of the case.[155] Significantly, however, the burden placed on the petitioner does not require a showing of a different outcome by "a preponderance of the evidence;" just one that "undermines a court's confidence in the verdict."[156]

Unlike *Brady* claims, which can be raised with or without proof of bad faith, claims that the prosecution failed to correct perjured testimony by its witnesses require the petitioner to prove that the prosecution acted with reckless disregard for the truth.[157] In a perjury claim, a prosecutor violates a defendant's due process rights under two scenarios: (1) knowingly or recklessly presenting false testimony or evidence, or (2) knowingly or recklessly failing to correct a prosecution witness's false testimony during trial, even if the prosecutor did not elicit the false testimony himself.[158] The materiality standard "required to prevail on a perjury claim is considerably more favorable to a defendant" than the degree of materiality required for a *Brady* claim.[159] The materiality standard for a perjury claim requires the prosecution

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uncorrectable on appeal since it was not in the record, did cause the Commonwealth to . . . deprive [Almeida] of due process of law.").

154. *See Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (stating that due process of the law is "a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury").

155. *See* United States v. Bagley, 473 U.S. 667, 678 (1985) (limiting the *Brady* doctrine by requiring that suppressed evidence be proven material to the case); *see also* Kyles v. Whitley, 514 U.S. 419, 421, 449 (1995) (clarifying *Bagley*'s materiality standard to require that the Court look at the cumulative evidence from the case and decipher whether any of the suppressed evidence could have been used to "cap an attack on the . . . investigation"); NEWTON, *supra* note 143, at 255–56 (emphasizing that, in determining materiality, a court considers all nondisclosed evidence cumulatively).

156. NEWTON, *supra* note 143, at 256.

157. *See* Franks v. Delaware, 438 U.S. 154, 171 (1978) ("There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.").

158. NEWTON, *supra* note 143, at 256–57.

159. *See id.* at 258 (citing Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir. 1993)).

to prove "beyond a reasonable doubt" that the false testimony or evidence did not "contribute to the verdict obtained."[160] Both *Brady* and perjury claims are rooted in the Due Process Clause, but they also coincide with the legal rules of ethics.[161] While difficult to establish, each provides a path to habeas relief.

4. Precedential treatment of extra-record claims on habeas review

Unlike retroactivity doctrine, which has meandered throughout its development, claims of prosecutorial misconduct that petitioners raise for the first time on collateral review have received consistent treatment in the Court's jurisprudence. The threshold question in this circumstance is not whether the case presents a new rule, but rather whether the petitioner can prove a valid cause for not raising his claim sooner.[162] Put rudimentarily, the court in this context asks: "Whose fault is it that we are here?" By asking this question first, the court shifts the initial focus away from the potential ramifications of the collateral case's outcome[163] and toward the source of the claim and potential constitutional violations of the defendant's rights instead.[164]

For example, in *Alcorta v. Texas*,[165] the Court was faced with facts similar to McGregor's, where the State unethically and unlawfully concealed perjury-related evidence from the defense during trial.[166] At an evidentiary hearing on a petition for habeas corpus, a key witness in the case issued an affidavit stating that he had given false testimony at

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160. *Bagley*, 473 U.S. at 679–80 n.9; *see* Chapman v. California, 386 U.S. 18, 24 (1967) (depicting a comparable measure known as the "harmless-error rule" where the prosecution carries the burden once the defendant proves that a knowing presentation of perjury occurred).

161. *See* NEWTON, *supra* note 143, at 255 n.76 (noting that, while the Due Process Clause provides the constitutional mandate that prosecutors disclose exculpatory evidence and "not knowingly present perjured testimony or evidence," this mandate is found in the legal rules of ethics as well); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) (requiring the making of a "timely disclosure to the defense of all . . . information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

162. Wainwright v. Sykes, 433 U.S. 72, 84 (1977).

163. *See* Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion) (establishing retroactivity as a threshold question).

164. *See* Amadeo v. Zant, 486 U.S. 214, 221 (1988) (citation omitted) (articulating the Court's adoption of the "'cause and prejudice' requirement for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court").

165. 355 U.S. 28 (1957) (per curiam).

166. *Id.* at 30–31; *supra* note 1 and accompanying text.

trial.[167] He further testified that he had informed the prosecutor of his deceit before trial, but the prosecutor instructed him not to disclose information pertaining to the false testimony unless defense counsel specifically asked him about it.[168] The prosecutor admitted that the witness's statements were true and that he had omitted the information in the witness's pre-trial statement that he submitted to the record.[169] The trial judge denied the defendant's petition for habeas corpus, and the Texas Court of Criminal Appeals affirmed the lower court's decision.[170] The Supreme Court granted certiorari and made explicitly clear that the "petitioner was not accorded due process of law."[171]

Likewise, in *Amadeo v. Zant*,[172] when addressing a defendant's ineffective assistance of counsel claim that would have otherwise barred him from habeas review, the Court utilized a "cause-and-prejudice" standard[173] to determine that the "petitioner established . . . cause to excuse . . . [the] procedural default."[174] More recently, the Supreme Court granted certiorari to hear *Banks v. Dretke*,[175] where a deputy sheriff working for the State admitted at a post-conviction evidentiary hearing—for the first time—that he had paid off a key witness for his involvement in the case and the prosecution had suppressed that evidence at trial.[176] Previously, the U.S. Court of Appeals for the Fifth Circuit had denied Banks's *Brady* claim, reasoning that it was Banks's own lack of diligence rather than the sheriff's involvement in prosecutorial misconduct that caused the evidence to remain concealed.[177] The Supreme Court disagreed, stating that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due

167. *Alcorta*, 355 U.S. at 30.
168. *Id.* at 31.
169. *Id.*
170. *Id.*
171. *Id.*
172. 486 U.S. 214 (1988).
173. *See* Wainwright v. Sykes, 433 U.S. 72, 85, 87, 90–91 (1977).
174. *See Amadeo*, 486 U.S. at 222 (concluding that there is sufficient cause for procedural default if the defense attorneys failed to raise a jury challenge in trial court due to the county officials' concealment of exculpatory evidence rather than a mere tactical error).
175. 540 U.S. 668 (2004).
176. *Id.* at 685–86.
177. *Id.* at 688 ("Banks's lack of diligence in pursuing his . . . state-court plea . . . rendered the evidence uncovered in the federal habeas proceeding procedurally barred.").

process."[178] A defendant is entitled to treat a prosecutor's actions and submissions of evidence as truthful; it is not the defendant's duty to prove such representations as false.[179]

The Supreme Court has for decades considered untimely discovery of perjured testimony a valid "cause" for procedural default. The *Alcorta* Court referenced *Mooney v. Holohan*,[180] where, in a petition for habeas review, the defendant claimed that the sole basis for his conviction was the presence of perjured testimony knowingly used by the prosecutors in conjunction with suppressed evidence that would have impeached one of the State's witnesses.[181] The Supreme Court made clear that "[s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is . . . inconsistent with the rudimentary demands of justice," and that the actions of prosecutors fall under the purview of the Fourteenth Amendment.[182] In Mooney's case, the Court found no finality or federalism concerns in applying a cause-and-prejudice exception in state collateral claims because the "corrective judicial process" of the State "still remain[ed] open."[183] Rather, conducting the cause-and-prejudice analysis was a way to "adequate[ly] guarantee" that state procedural rules barring federal habeas review "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[184]

C. Underpinnings of Equity

It is impossible to separate principles of equity from a discussion on the writ of habeas corpus and collateral review in American criminal

178. *Id.* at 696.
179. *Id.* at 698.
180. 294 U.S. 103 (1935) (per curiam).
181. *Id.* at 104–05.
182. *Id.* at 112–13.
183. *Id.* at 115; *see also* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (reiterating the importance of upholding the role of the state trial on the merits as the "'main event,' . . . rather than [the] 'tryout on the road' for what will later be the determinative federal habeas hearing"); United States v. Timmreck, 441 U.S. 780, 784 (1979) (refusing to award habeas review to the defendant whose only claim was one of technical error that could have been raised on direct appeal).
184. *Wainwright*, 433 U.S. at 91.

law.[185] As previously discussed, one of the principles of equity most relevant to this Comment is the procedural default doctrine, which "bears a kinship to the traditional equitable defense of unclean hands."[186]

While the procedural default doctrine is relevant where a petitioner has deprived the State of the opportunity to review his claims in the first instance and correct the wrong of his unlawful detention,[187] the unclean hands doctrine is relevant when the State has committed misconduct. The unclean hands doctrine provides an equitable defense for the petitioner when the State acts unlawfully at trial.[188] Generally, under the unclean hands doctrine, a petitioner for habeas review "brings a federal action against the State alleging that his continued detention violates his federal constitutional rights."[189] Procedural default doctrine is based on the reverse posture, where the petitioner has not complied with state procedural rules while litigating his claim(s). Similarly, the unclean hands doctrine provides an equitable defense for the petitioner when the State acts unlawfully at trial, reflecting the familiar maxim, "he who comes into equity must come with clean hands."[190] In the interest of preserving equity, the Court must address whether retroactivity doctrine should bar relief despite the State's misconduct.

II. ANALYSIS

In order to provide all defendants with a fair trial, due process requires that defendants have the opportunity to have their claims fully

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185. *See* Hashimoto, *supra* note 144, at 148 (outlining the way "the Court—and sometimes Congress as well—has emphasized the importance of 'equitable principles'" (quoting McCleskey v. Zant, 499 U.S. 467, 493 (1991))); *see also id.* at 150 n.68 ("[N]oting that the procedural default rules reflect equitable principles." (citing Martinez v. Ryan, 566 U.S. 1, 13–14 (2012))); Holland v. Florida, 560 U.S. 631, 646 (2010) ("'[E]quitable principles' have traditionally 'governed' the substantive law of habeas corpus . . . ." (quoting Munaf v. Geren, 553 U.S. 674, 693 (2008))); Schlup v. Delo, 513 U.S. 298, 319 (1995) (stating that habeas corpus is an equitable remedy at its core).

186. Hashimoto, *supra* note 144, at 152.

187. *Id.* at 152 n.78 (citing Coleman v. Thompson, 501 U.S. 722, 729–30 (1991)).

188. *See, e.g.*, Green v. Higgins, 535 P.2d 446, 449 (Kan. 1975) (describing the purpose of the unclean hands doctrine as allowing recourse for a defendant whose trial was tainted by unlawful conduct).

189. Hashimoto, *supra* note 144, at 153.

190. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 241 (1933); *Green*, 535 P.2d at 449.

and fairly litigated.[191] If the writ of habeas corpus is to continue to adhere to the constitutional mandate of the Due Process Clause, then courts should not deny habeas review to defendants who raise their claims of prosecutorial misconduct on collateral appeal when it is their first opportunity to do so.

This Part argues that the *Teague* retroactivity doctrine should not bar relief where extra-record malfeasance of any kind forced the defendant to raise his claim for the first time on collateral review. To allow States to invoke *Teague* in this way would reward unlawful behavior by shielding extra-record claims of malfeasance from being reviewed at any level. This Part explores two possible scenarios in which a defendant might raise a claim of misconduct for the first time on collateral review where the court should disregard *Teague* as a bar to relief. First, this Part discusses why *Teague* should be dismissed as the threshold test to review in initial-review collateral proceedings based on the Court's analysis in *Martinez*. Next, this Part addresses why, even if the court is operating as the forum of a true collateral proceeding, the law should preclude the State from invoking *Teague* as a bar to relief because the State should not benefit from an equitable remedy when the State has unclean hands.[192]

A. When a Petitioner Raises a Claim of Extra-Record Malfeasance for the First Time on Collateral Review Due to External Impediments, Due Process Compels the Court to Treat the Initial-Review Collateral Proceeding as Functionally Equivalent to a Direct Appeal

Martinez highlights the Supreme Court's willingness to view collateral proceedings as if they were direct appeals when the petitioner has not been given a full and fair opportunity to raise his ineffective assistance of counsel claim[193]—a right protected under the Fourteenth Amendment's

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191. *See* Dewey, *supra* note 29, at 283.

192. *See Keystone Driller Co.*, 290 U.S. at 244 (explaining that coming to the court with "clean hands" requires a complainant to "be frank and fair with the court," guarding "nothing about the case under consideration," and placing "everything that tends to a full and fair determination of the matters in controversy . . . before the court" (quoting JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 98 (14th ed. 1918))).

193. *See, e.g.*, Martinez v. Ryan, 566 U.S. 1, 8, 11 (2012) (coining the phrase "initial-review collateral proceedings" and distinguishing between first- and second-tier petitions for habeas review); *see also* Dewey, *supra* note 29, at 281 (describing *Martinez* as a "landmark shift toward easing the procedural barriers" that historically prevented

Due Process Clause.[194] Denying a review of analogous post-conviction claims that arise for the first time on collateral review due to extra-record malfeasance violates due process for the same reason denying review of Martinez's case would have violated his right to due process.[195] In such circumstances, *Teague* should not be the threshold test for review; rather, the court should ask, "could the petitioner have raised his claim in a prior proceeding?" If the answer is yes, then a court may deny review of the defendant's claim under the procedural default doctrine. However, if the answer is no, and the petitioner could *not* have raised his claim in an earlier proceeding by no fault of his own, then the court should treat his claim as if it were raised on direct review. *Martinez* provides the legal framework under which *Teague* need not be discussed in initial-review collateral proceedings for two reasons: (1) the *Martinez* Court acknowledged that denying petitioners review in initial-review collateral proceedings raises due process concerns, and (2) the Court's analysis of Martinez's ineffective assistance of counsel claim logically encompasses similar types of extra-record claims brought in initial-review collateral proceedings.

1. The Martinez *Court acknowledged that denying petitioners review in initial-review collateral proceedings raises due process concerns*

By acknowledging the existence of initial-review collateral proceedings, the *Martinez* Court identified a state procedural scheme that inherently violated the petitioner's right to have his claim fully and fairly litigated.[196] Martinez had no choice but to raise his claim in a collateral proceeding because Arizona law actually required that ineffective assistance of counsel claims be reserved for state collateral

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prisoners from access to habeas review by emphasizing the "full and fair adjudication of constitutional claims").

194. *See* Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (recognizing that the Sixth Amendment's right to counsel is necessary to protect the right to a fair trial, which is guaranteed through the Due Process Clauses).

195. *See Martinez*, 566 U.S. at 11. Despite not explicitly referencing "due process," the *Martinez* Court alluded to its language in saying "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default" because "the prisoner has been denied *fair process* . . . [to] obtain an adjudication on the merits of his claims." *Id.* (emphasis added).

196. *See id.* at 8–9 (referencing *Coleman*, where the Court suggested that state-provided counsel may be required by the Constitution in initial-review collateral cases because state collateral review is often the first opportunity a prisoner has to challenge his conviction).

proceedings rather than direct review.[197] However, the Court clarified that state procedural rules cannot preclude violations of constitutional due process.[198]

According to the Court's logic in *Martinez*, collateral relief was acceptable because it was the petitioner's first opportunity to raise his ineffective assistance of counsel claim.[199] The Court described Martinez's "first-tier" collateral proceeding as "the equivalent of a prisoner's direct appeal" because "no other court ha[d] addressed the claim."[200] There is no difference in cases like McGregor's or those of other defendants who learn of prosecutorial misconduct for the first time in a collateral proceeding. Just as in Martinez's case, "no other court has addressed the claim."[201] Although prosecutorial misconduct is not a state-mandated procedural scheme, it is still an impediment that results in collateral review providing the petitioner's first opportunity to raise his claim.[202] In such scenarios, the initial-review collateral proceedings should be seen as functionally equivalent to a direct appeal and should be treated as such.[203]

There is a distinction between defendants who fail to raise an extra-record claim at trial or on direct review despite having every opportunity and defendants who could not have raised their claims at trial or on direct review because they did not know they had grounds for a claim until after the fact. Unlike the petitioner in *Davila*, who had every opportunity to raise his extra-record claim on direct appeal,[204] McGregor could not have raised his claim of prosecutorial misconduct

197. *Id.* at 6, 11.

198. *See* Dewey, *supra* note 29, at 283 (explaining that due process is meant to give criminal defendants a "full and fair opportunity" to challenge the constitutionality of their detention or sentence).

199. *See generally Martinez*, 566 U.S. at 11–12 (reasoning that the defendant is not at fault for the procedural default of his ineffective assistance of counsel claim when he was not instructed to raise it at the appropriate proceeding).

200. *Id.* at 11.

201. *Id.*

202. *See* Reply Brief for the Petitioner, *supra* note 1, at 8 (arguing that McGregor was precluded from raising his prosecutorial misconduct claim within the procedurally allocated time frame only because the prosecutor suppressed the exculpatory evidence from him).

203. *See supra* note 11 (discussing the opportunities available to defendants to petition for further review of their claims).

204. Davila v. Davis, 137 S. Ct. 2058, 2063 (2017).

sooner because the prosecutorial misconduct was unlawfully concealed.[205] Importantly, the Constitution does not require that the court overrule the verdict; such a requirement would disrupt foundational principles of finality.[206] However, due process does, at a minimum, compel the court to review the verdict as if the proceeding were a direct appeal.[207]

Separating ineffective assistance of counsel claims as unique from other categories of extra-record claims of malfeasance is unfounded.[208] Unlike "record claims," which are based on facts apparent in the trial record, ineffective assistance of counsel, prosecutorial misconduct, and jury misconduct claims all are generally only discoverable long after trial and past the deadline for a motion for new trial.[209] Therefore, petitioners usually must raise these types of post-conviction claims for the first time in post-conviction collateral proceedings.[210] The *Martinez* Court explicitly stated that the holding of the case only applied to ineffective assistance of counsel claims at initial-review collateral proceedings.[211] However, if the Court's ruling in *Martinez* was based on an equitable judgment due to the lower court's inability to fairly adjudicate the claim on direct review of the state proceeding,[212] then prosecutorial misconduct and other types of extra-record claims that

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205. *Compare Davila*, 137 S. Ct. at 2062–63 (describing the limits to raising extra-record claims on direct appeal and stating that Davila could have challenged the jury instructions about transferred intent on direct appeal), *with Ex parte* McGregor, No. WR-85,833-01, 2019 WL 2439453, at *12–14 (Tex. Crim. App. June 12, 2019) (noting that the State knowingly presented false testimony, but it was not found to be material to McGregor's conviction), *cert. denied*, 141 S. Ct. 84 (2020).

206. *See* Marcy L. Kahn & Christopher H. Benbow, *The Supreme Court's New Plea Counsel Cases and Retroactivity: Should New York Revisit* Eastman-Teague*'s Retroactivity Rubric?*, 85 N.Y. ST. BAR ASS'N J. 31, 36 (2013) (reiterating the federal and state courts' shared goal of "according finality to past judgments").

207. *See* U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

208. *Compare* NEWTON, *supra* note 143, at 245 (grouping together ineffective assistance of counsel, prosecutorial or police misconduct, and jury misconduct as "[t]he [three] main types of [extra-record] constitutional claims raised in a motion for new trial or habeas corpus"), *with* Martinez v. Ryan, 566 U.S. 1, 17 (2012) (explaining that the Court's holding was limited to addressing the constitutional claims accusing the State of barring the defendant's ineffective assistance of counsel claims on direct appeal).

209. NEWTON, *supra* note 143, at 245.

210. *Id.*

211. *See Martinez*, 566 U.S. at 9, 12, 15–16.

212. *See id.* at 10 (describing the Court's reasoning for establishing cause for Martinez's procedural default).

are precluded from direct review by no fault of the defendant should be eligible for review in an "initial-review" collateral proceeding as well.

2. The Martinez *Court's analysis of a petitioner's ineffective assistance of counsel claim in an initial-review collateral proceeding logically applies to similar types of extra-record claims*

To treat a claim as if it were raised on direct appeal means that the collateral court may consider the merits of the petitioner's claim without disrupting principles of finality. Once *Teague* is precluded as a bar to relief in initial-review collateral proceedings, the *Wainwright* cause-and-prejudice exception may be logically applied to types of external impediments in initial-review collateral proceedings beyond claims of ineffective assistance of counsel. The Supreme Court has done this for decades.[213]

When a petitioner has presumably waived his right to raise a claim due to procedural error, courts utilize the *Wainwright* cause-and-prejudice exception to provide the petitioner with the opportunity to prove that he had cause for his default, which resulted in prejudice against his case.[214] The Court applied the *Wainwright* cause-and-prejudice exception to Martinez's case once the collateral proceeding was characterized as one of initial review.[215] In *Martinez*, the Court reasoned that ineffective assistance of counsel claims raised in initial-review collateral proceedings may establish cause for a petitioner's procedural default, in part because "ineffective-assistance [of counsel] claims often depend on evidence outside the trial record."[216] Accordingly, concealed evidence that is revealed for the first time at an initial-review collateral proceeding surely gives rise to a prosecutorial misconduct claim that similarly depends on evidence outside the trial record. Just as Martinez's "one and only appeal" was in an initial-review collateral proceeding for his ineffective assistance of counsel claim, an

213. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 221 (1988) (citation omitted) (explaining that in Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court "adopted the 'cause and prejudice' requirement . . . for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court").

214. *See supra* notes 101–05 and accompanying text (explaining the operation of *Wainwright*'s cause-and-prejudice exception).

215. *Martinez*, 566 U.S. at 7–8.

216. *Id.* at 13–14 (noting that the ability of federal habeas courts to hear claims of ineffective assistance of trial counsel that result in "a procedural default in an initial-review collateral proceeding" acknowledges that proper consideration might not otherwise be given to a substantial claim).

initial-review collateral proceeding is also a petitioner's "one and only appeal" when the prosecution committed perjury or a *Brady* violation and concealed the evidence of misconduct until after the petitioner's opportunity to raise the claim on direct appeal.[217]

The Fifth Circuit created its third exception to the *Teague* doctrine to address this very issue.[218] In considering the appropriate application of *Teague*, the Fifth Circuit reasoned in *Jackson* that "[w]hen an alleged constitutional right is susceptible of vindication *only* on habeas review, application of *Teague* to bar full consideration of the claim would effectively foreclose any opportunity for the right ever to be recognized."[219] Although one might argue that the Fifth Circuit's third exception to *Teague* should be acknowledged by the Supreme Court and applied globally, the Supreme Court will likely not revisit the well-established doctrine that first emerged as a solution to the Court's prior fragmentation over retroactivity.[220] The best approach, instead, is to set aside *Teague* as a threshold question in the context of initial-review collateral proceedings altogether and utilize the tools already available to defendants and courts alike to litigate post-conviction claims.[221]

The petitioner in *Trevino* was procedurally barred by the very "structure" of the Texas procedural system, but he was then awarded relief on collateral review.[222] The *Alcorta* petitioner was procedurally barred by default, but the Supreme Court reviewed his prosecutorial misconduct claim and determined that he had not received due process under the law following the revelation that the prosecution had committed perjury.[223] Similarly, the petitioner in *Banks* was barred from raising a prosecutorial misconduct claim by the state habeas court

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217. *See id.* at 8 (quoting Coleman v. Thompson, 501 U.S. 722, 756 (1991)) ("[T]he initial-review collateral proceeding [is] a prisoner's 'one and only appeal' as to an ineffective-assistance claim . . . .").

218. Jackson v. Johnson, 217 F.3d 360, 364 (5th Cir. 2000) (concluding that deeper consideration of Jackson's claims was warranted by the "third narrow exception to *Teague*," which had previously not been recognized by the courts).

219. *Id.*

220. *See* Beske, *supra* note 32, at 832 (reiterating Justice Harlan's sentiment that the Court's retroactivity doctrine throughout the pre-*Teague* era was "a haphazard mess").

221. *See supra* note 98 and accompanying text (describing the doctrine of procedural default).

222. Trevino v. Thaler, 569 U.S. 413, 428 (2013); *supra* notes 140–42 and accompanying text.

223. Alcorta v. Texas, 355 U.S. 28, 31 (1957) (per curiam); *supra* notes 165–71 and accompanying text.

for lack of cause and prejudice but won relief from the Supreme Court when he could prove that the cause of his procedural default was prosecutorial misconduct that prejudiced the outcome of his case.[224] Certainly, then, it is not outside the realm of reason that prosecutorial malfeasance, of which a defendant is ignorant due to concealment of evidence, not only robs the defendant of a meaningful opportunity to present his claim, but offers no opportunity to do so.[225]

External impediments may allow a collateral court to review a claim that was presumably waived due to procedural default.[226] To make a distinction between defendants on the basis of their timing is inequitable when a procedural default only occurred because extra-record prosecutorial malfeasance was concealed beyond the allotted time frame for raising such post-conviction claims. Concealing evidence that could have altered the outcome of a defendant's trial, only to then deny him the opportunity to raise a prosecutorial misconduct claim in an initial-review collateral proceeding by invoking *Teague* as a bar to relief, creates an unfair dilemma for defendants. Such defendants, if given the opportunity, would be able to successfully articulate both the cause of their procedural default (prosecutorial malfeasance), and the actual prejudice suffered as a result (the inability to fully and fairly litigate a claim that would have otherwise been available to them). A defendant cannot waive something he was kept unaware of, particularly when that ignorance is the result of prosecutorial malfeasance.[227]

Broadening the scope of *Martinez* to include extra-record claims beyond ineffective assistance of counsel does not raise significant finality or federalism concerns. Federalism permits states to determine

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224. *See* Banks v. Dretke, 540 U.S. 668, 702–03 (2004) (explaining that the prosecutorial misconduct played a significant role in the trial verdict); *supra* notes 175–76 and accompanying text (referring to the sheriff in Banks's case, who paid off a key trial witness, which the prosecution did not reveal to Banks).

225. *Compare Banks*, 540 U.S. at 702–03 (awarding habeas review to the defendant because he could prove that prosecutorial concealment of exculpatory evidence prejudiced his case), *with* Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that "where the State [had] provided an opportunity for full and fair litigation[,]" a state prisoner could not be granted collateral review).

226. *See Trevino*, 569 U.S. at 421 (explaining that a prisoner can obtain federal review of a defaulted claim by showing that a violation of federal law caused the default and prejudiced the result).

227. See Hashimoto, *supra* note 144, for an in-depth discussion on equity and due process.

their own procedures for habeas review;[228] however, the federal Constitution mandates due process for all state defendants.[229] If a defendant cannot meaningfully raise a claim on collateral review that he did not know about in time to raise it on direct appeal—by no fault of his own—he is left utterly deprived of an opportunity to raise it at all. He does not receive the benefit of his right to due process under the law, a constitutional mandate that entitles him to a fair trial.[230] Whether the petitioner brings an ineffective assistance of counsel, prosecutorial misconduct, or jury misconduct claim in an initial-review collateral proceeding, it is not an "attempt[] to use collateral review to obtain a second bite at the judicial apple."[231] Additionally, the Court has recognized that in "extraordinary case[s], where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[232] The scale should always tip in favor of upholding the Constitution over preventing retroactivity. For these reasons, any arguments against allowing prosecutorial misconduct claims to be heard in initial-review collateral proceedings in the name of finality and federalism fall short of convincing.[233]

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228. *See* Dewey, *supra* note 29, at 274 ("[T]he Supreme Court has demonstrated a preference for deferring to state-court judgments on constitutional issues in state criminal cases.").

229. U.S. CONST. amend. XIV; *see* Glenda K. Harnad, Annotation, *Construction and Application of* Teague *Rule Concerning Whether Constitutional Rule of Criminal Procedure Applies Retroactively to Case on Collateral Review—Supreme Court Cases*, 44 A.L.R. FED. 2D 557 (2010) (reasoning that it is incorrect to assume that the amount of time spent completing the appellate process determines "whether constitutional violations occurred in trials conducted before a certain date").

230. *See* U.S. CONST. amend. VI; *supra* notes 107–11 and accompanying text (explaining the states' obligation under the Constitution to provide fair trials and noting that fairness in the context of a trial sweeps broader than the text of the Sixth Amendment); *see also* Maxwell v. Dow, 176 U.S. 581, 603 (1900) (positing that the Constitution's guarantee of due process means that citizens receive equal treatment from law and do not suffer from arbitrary exercises of governmental power).

231. Brief for the Petitioner at 29, Chaidez v. United States, No. 11-820, 2012 WL 2948891 (July 2012).

232. Murray v. Carrier, 477 U.S. 478, 496 (1986).

233. *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012) (explaining that federal habeas courts "are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism" when reviewing the constitutionality of a state defendant's conviction).

B. Teague *and State-Equivalent Retroactivity Doctrines Must Be Excluded as a Bar to Relief in Initial-Review Collateral Proceedings Because* Teague *New Rules Apply to Cases Still Pending on Direct Appeal Under* Griffith v. Kentucky

If, during the course of a *Wainwright* cause-and-prejudice analysis conducted in an initial-review collateral proceeding, the State identifies a new rule in the petitioner's claim for relief, *Teague* still would not preclude further review.[234] *Teague* did not alter *Griffith*'s holding that retroactivity doctrine does not bar application of new rules in cases pending on direct or not yet final, whether in state or federal court.[235] Logically, then, if the Supreme Court recognized in *Martinez* that initial-review collateral proceedings are functionally equivalent to direct appeals, *Teague* and its exceptions to nonretroactivity matter little when a court is determining whether a case is awarded review in initial-review collateral proceedings.[236] Therefore, even if a petitioner raised a claim in an initial-review collateral proceeding that constitutes a "new" rule under *Teague*, the defendant should be given the benefit of the new rule.[237]

C. The State's Unclean Hands Must Prohibit the Use of Teague *as an Equitable Bar to Relief*

Finally, even if a court decides not to acknowledge special treatment of initial-review collateral proceedings, *Teague* and other state-equivalent

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234. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that a new rule under *Teague* must be applied retroactively to "all cases, state or federal, pending on direct review or not yet final").

235. *See id.* at 322, 328 (declaring that failing to provide defendants whose cases are still pending or not yet final with the benefit of new rules "violates basic norms of constitutional adjudication").

236. *See, e.g.*, *Martinez*, 566 U.S. at 11 (coining the phrase "initial-review collateral proceeding[s]" and distinguishing between first- and second-tier petitions for habeas review); *see also* Dewey, *supra* note 29, at 281 (describing *Martinez* as a "landmark shift toward easing the procedural barriers" that historically prevented prisoners from access to habeas review by emphasizing the "full and fair adjudication of constitutional claims").

237. *See Griffith*, 479 U.S. at 328. Note that the *Martinez* holding is limited to claims of ineffective assistance of counsel. *See* Dewey, *supra* note 29, at 288 (restating that the *Martinez* Court's holding is limited to prisoners raising claims of ineffective assistance of trial counsel). However, in his dissenting opinion, Justice Scalia expressed the inevitable expansion of the *Martinez* holding to other types of post-conviction claims because there is "not a dime's worth of difference in principle" between ineffective assistance of counsel claims and those based on prosecutorial misconduct, exculpatory evidence, or impeachment of prosecutorial witnesses. *Martinez*, 566 U.S. at 19 (Scalia, J., dissenting).

retroactivity doctrines "cannot fairly be invoked when the State has 'unclean hands'" because *Teague* is "a non-jurisdictional 'equitable' doctrine that is subject to waiver."[238] Prosecutors should not be rewarded for their bad behavior, particularly not in the name of justice. *Teague* should not be accessible as an equitable bar to relief from a claim that is only raised in a collateral proceeding because the prosecutor's unethical conduct "prevented it from being raised on direct appeal."[239]

The unclean hands doctrine "provides that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct."[240] This is precisely what the State maneuvered with its invocation of *Teague* against McGregor's prosecutorial misconduct claim.[241] By failing to disclose the agreements made with key witnesses, in addition to eliciting and failing to correct the witnesses' false testimony regarding the agreements to the court, lead prosecutor Shipley acted fraudulently and gained an unfair advantage at trial.[242] McGregor's petition for review detailed Shipley's scheming with the possibility of future acquittal on the line, and the State unfoundedly raised an equitable doctrine as a bar to relief. This result directly conflicts with the requirements of the Constitution and thus is impermissible.

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238. Reply Brief for the Petitioner, *supra* note 1, at 9 (citing Danforth v. Minnesota, 552 U.S. 264, 278 n.15 (2008)) (stating that *Teague* is an equitable doctrine); *see also* Schiro v. Farley, 510 U.S. 222, 229 (1994) (stating that *Teague* is subject to waiver).

239. Reply Brief for the Petitioner, *supra* note 1, at 7.

240. Green v. Higgins, 535 P.2d 446, 449 (Kan. 1975).

241. Reply Brief for the Petitioner, *supra* note 1, at 2 (noting that, by invoking *Teague*, the State sought "to profit from the trial prosecutor's criminal conduct"). However, "the clean hands maxim is not a binding rule, but is to be applied in the sound discretion of the court." *Green*, 535 P.2d at 449.

242. Reply Brief for the Petitioner, *supra* note 1, at 1. The State Bar of Texas's Commission for Lawyer Discipline acknowledged Shipley's unlawful behavior and eventually pursued disciplinary action against her for perjury, seeking reprimand, suspension, and disbarment. *See* Richard Resch, *State Bar of Texas Pursuing Disciplinary Action Against Prosecutor Who Lied About Deals with Jailhouse Informants in Capital Case*, PRISON LEGAL NEWS (Nov. 16, 2017), https://www.prisonlegalnews.org/news/2017/nov/16/state-bar-texas-pursuing-disciplinary-action-against-prosecutor-who-lied-about-deals-jailhouse-informants-capital-case [https://perma.cc/EAF8-XPLN]. And yet, no relief was made available to McGregor, who continues to sit in prison, sentenced for life without parole. *Ex parte* McGregor, No. WR-85,833-01, 2019 WL 2439453, at *14 (Tex. Crim. App. June 12, 2019), *cert. denied*, 141 S. Ct. 84 (2020).

CONCLUSION

The right to appeal is not guaranteed in the Constitution, but the right to due process under the law is.[243] If criminal defendants cannot raise a claim in a motion for a new trial or on direct appeal due to unethical prosecutorial actions, the courts are robbing those defendants of their right to have their claims fully and fairly litigated.[244] To raise *Teague* or other retroactivity doctrines in initial-review collateral proceedings is to put the cart before the horse, to focus on the potential outcome of the case without first asking why the case has arrived at habeas review to begin with. This is why the threshold question for state post-conviction claims on initial-review collateral review should not be "is the rule new?" as *Teague* would have it,[245] but rather, "is there an underlying cause for the claim's delay that might signal a constitutional violation?" No court is above the "obligation to guard and enforce every right secured by [the] Constitution."[246] When prosecutorial misconduct causes an impediment to a defendant raising a claim on direct appeal, the Due Process Clause compels the court to treat the habeas proceeding as if it were a direct proceeding, and because retroactivity doctrine has no authority over whether relief is awarded for claims brought on direct review,[247] any discussion of *Teague* and its equivalents in state court should be set aside.

Prisoners "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[248]

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243. U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

244. *See supra* note 111 and accompanying text (noting that a defendant's right to a fair trial sweeps broader than the text of the Sixth Amendment).

245. Teague v. Lane, 489 U.S. 288, 300 (1989) (plurality opinion) (treating retroactivity as a threshold question that limits a petitioner's chances of receiving habeas relief).

246. Mooney v. Holohan, 294 U.S. 103, 113 (1935) (per curiam).

247. Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

248. Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).