A CONSTITUTION WITHOUT A REMEDY:

FORFEITURES AND ALTERNATIVE HOLDINGS UNDER AEDPA*

[T]he error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights." . . . With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.[1]

I. INTRODUCTION

The Fourteenth Amendment prohibits states from depriving a person of life, liberty, or property without affording them due process. Yet, as the Supreme Court has recognized, a constitutional right without a remedy is a dead letter.[2] A petition for a writ of *habeas corpus ad subjiciendum*—through which federal district courts determine whether someone has been unlawfully imprisoned—is often the only way to obtain a remedy for constitutional violations (and hold states accountable). However, competing federal and state interests have left the Great Writ in a procedural morass, which has curtailed the vindication of federal rights.

Over the course of the twentieth century, federal habeas corpus became a microcosm of two major aspects of American jurisprudence: civil rights and federalism.[3] The incorporation of the Bill of Rights turned federal habeas corpus into a battleground for the vindication of newly created federal rights.[4] Without

* Justin Kadoura, J.D. Candidate, Temple University Beasley School of Law, 2017. I thank Professor Richard Greenstein for advising the writing of this Comment; Professor James Strazzella for his assistance, particularly in the area of forfeitures; and the *Temple Law Review* staff, particularly Liz Coyne and Andrew Voystock for their input and patience. I also apologize to my readers: for every page I was able to write, there are many more pages I could not write. There was neither time nor space for all that needed to be said and done. I have tried to note at least some of the more important omissions. I hope, despite these omissions, that I have said something profitable about the current state of habeas corpus jurisprudence.

1. Chapman v. California, 386 U.S. 18, 21 (1967) (quoting James Madison).
2. *See* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring).
3. *See infra* Part II.B.
4. *See infra* Part II.B.1.

federal habeas corpus, prisoners would be limited to the review and potential relief of the state courts that ordered them imprisoned.

At the same time, federal habeas review has changed our conception of federalism. Well-established practice has required prisoners to seek relief for their federal claims in state court before petitioning federal court. Accordingly, most federal claims were addressed by a state court before reaching federal habeas review. Many jurists felt that federal courts should afford deference to these state court decisions, especially where de novo federal review threatened the integrity of state procedural rules. As a result, in the 1970s, federal courts began declining to review habeas claims if the state court had denied the claim based on a procedural rule.[5] Thus, federal courts were tasked with determining whether state court decisions rested on procedural grounds.[6]

The variety of state procedural rules and court practices made it nearly impossible to predictably and reasonably determine the basis of state court decisions.[7] State rules were often hurriedly created in reaction to the new requirements imposed on them by federal courts—and then developed by a patchwork of state court opinions that dealt with the merits of civil rights claims while focusing less thoroughly on the complex procedural niceties of each case.[8] Therefore, in the 1980s and '90s, the Supreme Court created rules to assist federal courts in determining whether a state court's decision was based on procedural grounds.[9] However, critics continued to insist on even greater deference to state court decisions. In 1996, enduring concerns in favor of state interests led to the creation of the Antiterrorism and Effective Death Penalty Act (AEDPA), which requires federal courts to defer to a state court's adjudication on the merits of a federal claim.[10] AEDPA's new barriers to federal review, particularly 28 U.S.C. § 2254(d), had to contend with the baggage of pre-AEDPA habeas corpus jurisprudence, which was designed to determine whether the state court had ruled on procedural grounds, not whether it had ruled on the merits.[11]

Prisoners must enter this jurisprudential swamp if they wish to seek a remedy for a constitutional violation. This Comment confronts the procedural morass of habeas jurisprudence by addressing its most complex iteration. It asks: What is a federal court to do, in light of our federalism jurisprudence and the demanding strictures of AEDPA, when a state court provides two reasons to deny a federal claim, finding the claim both procedurally barred and without merit ("forfeiture-merits rulings")?

This Comment concludes that federal courts can and should apply procedural deference, but not AEDPA deference on the merits. To reach this

5. *See infra* Part II.B.2.
6. *See infra* Part II.C.
7. *See infra* Part II.C. and Part II.C.1.
8. *See infra* Parts II.C.1–2.
9. *See infra* Part II.C.3.
10. *See infra* Part II.D.
11. *See infra* Part II.E.

conclusion, this Comment argues that the circuit courts' prevailing approach to forfeiture-merits rulings—which is to apply both procedural and AEDPA deference—is neither a forgone conclusion nor persuasively supported by the circuit courts' opinions. It further argues that federal courts can (and should) widen the increasingly narrow window for habeas relief by applying only procedural deference, not AEDPA deference, to forfeiture-merits rulings. Most importantly, this Comment argues that federal courts can reach this interpretation of AEDPA using existing legal tools—for example, a technical interpretation of state procedural rules, a narrow view of adjudications, the text and historical progression of pre-AEDPA precedents, and a view of federalism that places a high premium on the uniform interpretation of federal law. While these tools occasionally appear to be implemented in an attenuated or formalistic manner, they must be viewed in light of their purpose: to demonstrate that the prevailing doctrine of the circuit courts and the restrictions on federal habeas review, which have continuously grown stronger over the last twenty years, are neither mandated by existing law nor the results of judicial predestination. In short, this Comment presents an enabling argument to show that if a habeas court is so inclined, it can interpret existing law as emboldening rather than hampering its power to grant relief and to provide a remedy where there otherwise would be none.

II. OVERVIEW

Federal habeas corpus is arguably the most complex body of American jurisprudence. This complexity stems in part from the tense relationship between the federal and state courts in our system of federalism. In order to explain the difficulties faced by habeas corpus petitioners and federal courts presented with alternative holdings by state courts, this Overview will begin by elucidating federalism's effect on American habeas corpus law and the jurisprudence concerning alternative holdings.

Part II.A begins with a brief overview of the relationship between the federal and state judiciaries, the concept of procedural default, and the independent and adequate state ground doctrine. Part II.B examines habeas corpus law in the United States prior to the passage of AEDPA, including the role habeas plays in vindicating federal rights, and the emergence of the "cause and prejudice" standard. Part II.C examines the ways pre-AEDPA habeas jurisprudence attempted to resolve ambiguous state court opinions, including alternative holdings. This Part extensively examines alternative holdings and their limits. It then focuses primarily on the introduction of the plain-statement rule and the often-cited footnote ten of *Harris v. Reed*.[12] Part II.D introduces AEDPA's deferential "adjudication on the merits" provision—which requires a federal court exercising its habeas jurisdiction to defer to a state court's decisions on the merits of a federal claim—and Congress's intent in passing the Act. This

12. 489 U.S. 255, 264 n.10 (1989).

Part also examines the Supreme Court's decision in *Cullen v. Pinholster*[13] and its effect on fact-finding procedures available to petitioners. Finally, Part II.E looks closely at how the federal courts have tried to decipher ambiguous state court opinions under AEDPA.

A. Direct Appeals: Federalism and the Independent and Adequate State Ground Doctrine

The coordinate ability of the federal and state judiciaries to interpret federal law has been a constant source of tension.[14] Article III of the Constitution extends the federal judicial power to all cases arising under federal law and the Constitution, subject to the limitations placed on it by Congress.[15] However, "[f]rom the very nature of their judicial duties [state courts will often] be called upon to" decide federal questions in the first instance.[16] Without federal review, state decisions may undermine federal interests such as the uniformity of federal law.[17] However, federal review of state court decisions encroaches on the states' sovereignty[18] by questioning the administration of their courts and the finality of their judgments.[19] This tension was the impetus for several eighteenth-, nineteenth-, and twentieth-century cases and statutes that defined the scope of the power of the federal and state judiciaries.[20]

1. State Substantive Law: The Limits of Federal Direct Review

Since the early nineteenth century, the Supreme Court has tried to determine its proper relationship with the state courts. In *Martin v. Hunter's Lessee*,[21] the Court held that section 25 of the Judiciary Act of 1789—which gave the Court jurisdiction to hear writs of error from state court judgments deciding federal questions—was constitutional under Article III.[22] The Court added that its appellate jurisdiction in such cases served certain federal interests, including uniformity of federal law.[23] Furthermore, *Martin* provided that although state

13. 563 U.S. 170 (2011).

14. *See infra* Parts II.A.1–2.

15. U.S. CONST. art. III, § 2, cls.1–2.

16. Martin v. Hunter's Lessee, 14 U.S. 304, 340–42 (1816); *accord* Engle v. Isaac, 456 U.S. 107, 128 (1982); *see also* U.S. CONST. art. VI, cl. 2.

17. *Martin*, 14 U.S. at 347–48.

18. *Id.* at 342–43 ("It has been argued that . . . . if the power [to review state court decisions] exists, it will materially impair the sovereignty of the states, and the independence of their courts.").

19. *Cf.* Murray v. Carrier, 477 U.S. 478, 490–91 (1986) (discussing these state interests in the context of habeas corpus).

20. *See infra* Part II.A–B.

21. 14 U.S. 304 (1816).

22. *Martin*, 14 U.S. at 351 (citing Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (codified as amended at 28 U.S.C. § 1257 (2012))).

23. *Id.* at 346–51. These are "federal interests" in the sense that the federal government has an interest in enforcing federal law. *See* Francis v. Henderson, 425 U.S. 536, 541–42 (1976) (referring to the vindication of federal rights as a federal interest); Younger v. Harris, 401 U.S. 37, 44 (1971) ("[T]he National Government [is] anxious . . . to vindicate and protect federal rights and federal

judges "are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, . . . [t]he constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct . . . the regular administration of justice."[24]

The final clause of section 25 of the Judiciary Act of 1789 explicitly limited the Supreme Court's review to federal questions.[25] In *Murdock v. City of Memphis*,[26] the Court held that the 1867 act that repealed this clause of section 25 did not give the Court jurisdiction to reverse state courts on matters of state law that are independent of any federal question.[27] The Court explained that its prior cases demonstrated that this limitation on it's jurisdiction arose from "general principles" separate and apart from the clause of the Judiciary Act of 1789.[28] Further, the Court said that Congress had not intended such "a radical and hazardous change of a policy vital in its essential nature to the independence of the State courts."[29]

The *Murdock* Court noted the federal interest in uniformity and Congress's intent to provide federal review for the vindication of federal rights, which "should not be left to the exclusive and final control of the State courts."[30] The Court concluded, however, that eighty-five years of experience under the Judiciary Act of 1789 suggested that federal rights would be adequately protected without requiring federal courts to examine state law and that state courts would not disregard rules that the Supreme Court "clearly laid down to them" regarding federal questions.[31] The Court held that where "there exists [nonfederal grounds] actually decided by the State court which are sufficient to maintain the judgment of that court," the judgment should be affirmed.[32]

The decision in *Murdock* evolved into the independent and adequate state

interests. . . ."); Fay v. Noia, 372 U.S. 391, 431 (1963) ("The paramount interest [in vindicating petitioner's rights under the Fourteenth Amendment] is federal.").

24. *Martin*, 14 U.S. at 346–47.

25. § 25, 1 Stat. at 85–87 (codified as amended at 28 U.S.C. § 1257).

26. 87 U.S. 590 (1874).

27. *Murdock*, 87 U.S. at 616 (discussing Act of Feb. 5, 1867, 14 Stat. 385 (amending Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755)).

28. *Id.* at 630.

29. *Id.*

30. *Id.* at 632.

31. *Id.*

32. *Id.* at 635; *accord* Fox Film Corp. v. Muller, 296 U.S. 207, 210–11 (1935); John v. Paullin, 231 U.S. 583, 586 (1913) (requiring actual decision of federal question before federal jurisdiction attaches); Walters v. Scott, 21 F.3d 683, 689 (5th Cir. 1994) (finding that jurisdiction attaches unless claim is denied "because of" the procedural rule); *see also* Irvin v. Dowd, 359 U.S. 394, 408 (1959) (Frankfurter, J., dissenting) ("Th[e] decision [to restrict Supreme Court review to federal questions] has not unjustifiably been called one of the twin pillars . . . on which have been built the main lines of demarcation between the authority of the state legal systems and that of the federal system." (internal quotation marks omitted)). The "twin pillars" to which Justice Frankfurter referred in *Irvin* were the *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Murdock v. City of Memphis*, 87 U.S. 590 (1874), decisions.

ground doctrine.[33] Under this doctrine, the Supreme Court lacks jurisdiction to review any claim disposed of by a state court actually relying on an issue arising under state law if that issue is (1) "independent" of any interpretation of federal law, and (2) "adequate" to support the state court's judgment.[34] If both prongs are satisfied, federal review is barred even when the case involves a federal question.[35] An issue arising under state law is not independent if it is intertwined with federal law or if "the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.'"[36] Moreover, an issue is not adequate unless it is dispositive.[37] This doctrine was later interpreted as implicating the Article III prohibition on rendering advisory opinions[38] because nothing on remand would actually hinge on the Supreme Court's disposition of the federal issue.[39]

2. State Procedural Law: Denying a Forum to Litigate Federal Claims

The independent and adequate state ground doctrine applies to both substantive and procedural state laws.[40] However, state procedural rules "do not necessarily prevail."[41] Whether a state procedural rule precludes federal jurisdiction is itself a federal question.[42] This distinction between substantive and procedural state law stems from the nature and effects of state procedural rules, and from policies of fairness and federalism.[43]

State procedural rules may deny petitioners[44] a forum to adjudicate federal

33. *Irvin*, 359 U.S. at 408.

34. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

35. *Id.*

36. Michigan v. Long, 463 U.S. 1032, 1044 (1983) (omission in original) (quoting Zacchini v. Scripps-Howard Broad. Co., 443 U.S. 562, 568 (1977)); *accord Fox Film Corp.*, 296 U.S. at 210–11 ("[Federal] jurisdiction attaches where the nonfederal ground is so interwoven with the [federal ground] as not to be an independent matter.").

37. Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54–55 (1934).

38. Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945). Article III of the United States Constitution limits the federal judicial power to "cases" and "controversies," U.S. CONST. art. III, § 2, cl. 1, which the Court has interpreted as limiting its ability to render advisory opinions or rule on issues that will not affect the actual rights of a party. *Herb*, 324 U.S. at 125–26 ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

39. *Coleman*, 501 U.S. at 729.

40. *Id.*; Henry v. Mississippi, 379 U.S. 443, 446 (1965).

41. *Henry*, 379 U.S. at 447 (quoting Love v. Griffith, 266 U.S. 32, 33–34 (1924)).

42. *Id.*

43. See *infra* notes 45–69 and accompanying text for a discussion of these limitations.

44. Because this Comment addresses the specific issue of habeas corpus, I will, for the sake of convenience, refer to claimant parties as "petitioners"—meaning a petitioner for a writ of habeas corpus—unless clear reasons are present for doing otherwise. In some instances this term will in fact be either incomplete or inaccurate. In the present instance it is incomplete, in that a forfeiture does not have to involve a habeas petitioner. In other instances it will be inaccurate, such as where the party referred to is actually a defendant who has not yet petitioned for the writ or where state procedures brought the case before a court in a manner other than a petition for habeas corpus or *corum nobis*.

rights.[45] Procedural rules usually create prerequisites to seeking and/or obtaining a remedy (e.g., a new trial) in state court.[46] Two common procedural rules are the "contemporaneous objection rule," requiring petitioners to object at the time an error occurs to preserve the claim[47] for appeal,[48] and res judicata, limiting state postconviction review to claims that could not have been raised on direct review.[49] Procedural defaults and "forfeitures" of remedies[50] result from a petitioner's failure to comply, knowingly or otherwise, with a procedural rule when raising his claim.[51] Traditional procedural rules limit the ability to *seek and obtain* a remedy by dictating how and when a claim must be raised.[52] When a petitioner does not raise a claim in the manner prescribed, he loses the opportunity to raise, contest, or litigate that claim.[53] Unless the court raises the claim sua sponte,[54] it is not properly before the court and consequently will not be heard or considered.[55] The claim is disposed of irrespective of the merits[56]

Where the distinction is material, I will use the proper terms. Where it is not, I will defer to convenience and use the term petitioner to avoid confusion.

45. *See Henry*, 379 U.S. at 447 (expressing concern where "[a] procedural default which is held to bar [a] challenge to a conviction in state courts . . . prevents implementation of [a] federal right").

46. *See, e.g.*, VA. SUP. CT. R. 5:25 (stating that no claim "will be considered as a basis for reversal unless" there was a contemporaneous objection); *see also* JAMES A. STRAZZELLA, CRIMINAL APPELLATE PROCEDURE: CASES AND MATERIALS 18 (2011) (describing procedural defaults).

47. For the purposes of this Comment, "claim" means an alleged constitutional violation that would be grounds for granting a new trial. This Comment assumes a basic familiarity with prosecutorial misconduct (*Brady*) and ineffective assistance of counsel (*Strickland*) claims. For the uninitiated, see *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984).

48. State v. King, 204 P.3d 585, 591 (Kan. 2009). This rule protects the trial judge by requiring parties to alert him or her to possible errors. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1029–30 (1987). It derives from the rule that appellate courts only review rulings made by the lower court—a limit on the common law writ of error, which was initially a criminal suit against the trial judge for giving a false judgment. *Id.* at 1026–28. Even with the advent of bills of exceptions—whereby exceptions to trial court rulings were written down by the parties and appended to the record by the trial judge—review was still limited to that amended record. STRAZZELLA, *supra* note 46, at 170–73; Note, *Influence of the Writ of Error on the Scope of Appellate Review in the Federal Courts*, 32 COLUM. L. REV. 860, 860–65 (1932); *see also* Commonwealth v. Collins, 888 A.2d 564, 574 n.12 (Pa. 2005) (limiting review to errors apparent from the record).

49. *See* People v. Thompson, 65 N.E.2d 362, 363 (Ill. 1946) ("[A]ll questions that might have been raised are forever settled by [the first] judgment.").

50. *See* Amin v. State, 774 P.2d 597, 600 (Wyo. 1989) (Urbigkit, J., dissenting) (discussing the difference between waiver and forfeiture); STRAZZELLA, *supra* note 46, at 18 (same).

51. STRAZZELLA, *supra* note 46, at 18.

52. *See, e.g.*, N.J. R. MUN. CT. R. 7:10-2(d)(1) (establishing that "[t]he defendant is barred from asserting in a proceeding under this rule any grounds for relief not raised in a prior proceeding"); OHIO REV. CODE ANN. § 2953.21(A)(1)(c)(4) (West 2016).

53. STRAZZELLA, *supra* note 46, at 18.

54. See *infra* notes 62–63 and accompanying text for a discussion of courts' discretion to reach the merits.

55. *See, e.g.*, Martinez v. People, 2015 CO 16, ¶¶ 12–13, 344 P.3d 862, 867; Silver v. State, 188 So. 2d 300, 301 (Fla. 1966); State v. Reim, 2014 MT 108, ¶ 28, 323 P.3d 880, 889; State v. McAdams, 594 A.2d 1273, 1273 (N.H. 1991); Miller v. Smith, 282 P.2d 715, 719 (N.M. 1955); Commonwealth v.

because the ability to obtain a ruling—and consequently, a remedy—is forfeited.[57] The forfeiture of remedies is part "of the procedural law of judgments . . . concerning finality."[58]

Alternatively, a few modern statutes only limit the ability to *obtain* (rather than seek and obtain) a remedy. For example, a rule might allow petitioners to bring a claim but make them show both that the claim is valid and that it could not be brought on direct review, thus making the absence of res judicata an additional element of the claim.[59] However, most courts interpret these statutes as traditional procedural rules,[60] and some of the statutes explicitly require a

Kindler, 639 A.2d 1, 8 n.1 (Pa. 1994) (Cappy, J., concurring); Gaumont v. State Highway Comm'r, 135 S.E.2d 790, 791 (Va. 1964); Martineau, *supra* note 48, at 1032 ("[T]he appellate court must [decide] whether to consider the issue . . . ."); *cf.* Walker v. Martin, 562 U.S. 307, 315 (2011) (referring to forfeiture as "a procedural barrier to adjudication of the claim on the merits"); Cone v. Bell, 556 U.S. 449, 466 (2009) (asking whether a claim "was waived, and thus not presented at all"); Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) ("The [independent state ground] doctrine applies . . . when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement."); Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967) ("[S]ince the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and independent state ground even if . . . the state court might properly have . . . avoid[ed] deciding the federal question."); James v. Ryan, 733 F.3d 911, 914 (9th Cir. 2013) ("[T]he critical question is whether a state court's decision is an adjudication on the merits or a procedural ruling that precludes an adjudication on the merits."); Lundgren v. Mitchell, 440 F.3d 754, 765 (6th Cir. 2006) (describing a state res judicata rule as a "rule denying review of the merits"). Some courts call procedural rules "an admonition to the parties, not a limitation upon the jurisdiction of the reviewing court" which has "the responsibility . . . [to achieve] a just result and for the maintenance of a sound and uniform body of precedent." Hux v. Raben, 230 N.E.2d 831, 832 (Ill. 1967). However, these courts are referring to their discretion to "override" the rules and notice plain error, discussed *infra* notes 62–63 and accompanying text. *See Hux*, 230 N.E.2d at 832.

56. STRAZZELLA, *supra* note 46, at 18; *see also* Riner v. Owens, 764 F.2d 1253, 1256–57 (7th Cir. 1985) (noting that the state court would have granted relief but for the procedural bar).

57. *See* Johnson v. Commonwealth, 609 S.E.2d 58, 60 (Va. 2005). In *Johnson*, the trial court denied a motion to suppress on two alternative grounds, and the petitioner did not properly raise one of those grounds on direct appeal. *Id.* at 59. Finding that ground forfeited, the state appellate court said that it only had to determine whether the forfeited ground was sufficient to sustain the judgment below. *Id.* at 60. "But, in making that decision, we do not examine the underlying merits of [that ground]—*for that is the very thing being waived by the appellant as a result of his failure to raise the point on appeal*." *Id.* (emphasis added). Indeed, a remedy is forfeited because determinations of the merits cease the moment a claim was not properly raised. *See* STRAZZELLA, *supra* note 46, at 18 ("[Forfeitures are] an attribute of the procedural law of judgments concerning finality of judgments."); Martineau, *supra* note 48, at 1031–32 ("[P]ersons who avail themselves of a forum should follow that forum's rules of procedure, and not be heard to complain about an adverse effect from their failure to do so.").

58. STRAZZELLA, *supra* note 46, at 18; *see also* Martineau, *supra* note 48, at 1030–31 (describing the "speak up now or forever hold your peace" rationale for contemporaneous objection rules); E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. CIN. L. REV. 1353, 1355 (2004) (noting that forfeitures help ensure finality).

59. *E.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(3) (West 2016); *cf.* KAN. STAT. ANN. § 60-404 (2016) (prohibiting reversal on an error for which there was no contemporaneous objection).

60. *See, e.g.*, State v. King, 204 P.3d 585, 591 (Kan. 2009) (holding that KAN. STAT. ANN. § 60-404 *bars* appellate review); Commonwealth v. Collins, 888 A.2d 564, 570–74 (Pa. 2005) (referring to

final determination of the procedural issue before the court may review the claim.[61] Finally, both types of rules often give the court discretion[62] to hear the claim if it meets a safety-valve exception, such as "plain" or "fundamental" error.[63] Thus, the nature of procedural rules is to effectively curtail the federal interest of providing a forum to litigate federal rights.[64]

Limitations on the effects of state procedural rules exist to ensure fairness and effectuate federal interests. First, a procedural rule is not "independent" if its application depends upon federal law, for example, where there is a safety-valve exception that depends upon a finding of constitutional error.[65] Secondly, unlike substantive state laws, a procedural rule is not "adequate" unless it serves a legitimate state interest[66] and is "firmly established and regularly followed" at the time of the forfeiture.[67] This ensures notice to petitioners and prevents state courts from applying forfeitures to "insulate disfavored claims from federal review."[68] In short, federal courts may take jurisdiction where state rules unduly burden the vindication of federal rights.[69]

Despite these limitations, federal courts almost always defer to state

previously litigated claims under PA. STAT. AND CONS. STAT. § 9543, the Post Conviction Relief Act (PCRA), as "precluded").

61. *E.g.*, LA. CODE CRIM. PROC. ANN. art. 927–28 (2016).

62. Whether this should be called "discretion" is debated. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1139–42, 1140 n.49 (1986); *see also* People v. Givens, 934 N.E.2d 470, 479 (Ill. 2010) (holding that the lower court erred by reviewing a claim); Brown v. Commonwealth, 380 S.E.2d 8, 10 (Va. App. 1989) ("[Procedural rules] are to be strictly enforced except where the error has resulted in manifest injustice.").

63. Generally, exceptions to procedural default rules allow state courts to notice errors that meet certain criteria under state law. *See* Harris v. Reed, 489 U.S. 255, 271–76 (1989) (Kennedy, J., dissenting). For example, courts might notice the forfeited error if it is in the "interest of justice" to do so, People v. Dunbar, 713 N.Y.S.2d 437, 438 (App. Div. 2000) (mem.); *see also* People v. Sudol, 932 N.Y.S.2d 49, 51 (App. Div. 2011) (referring to "interest of justice" review as a type of "jurisdiction"), or where the error is "plain" from the record. Dailey v. State, 471 So. 2d 1349, 1351 (Fla. Dist. Ct. App. 1985) ("[Forfeited s]entencing errors may be reviewed on appeal . . . if the errors are apparent from the four corners of the record.").

64. *Cf.* Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

65. Foster v. Chatman, 136 S. Ct. 1737, 1747 n.4 (2016); *see also* Sochor v. Florida, 504 U.S. 527, 534 n.* (1992) (arguing over whether a procedural rule providing an exception for fundamental error implicitly reaches the merits); Ake v. Oklahoma, 470 U.S. 68, 75 (1985); Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982); Campbell v. Burris, 515 F.3d 172, 177–79 (3d Cir. 2008) (finding "fundamental error" independent because "the term, as employed in the Indiana cases, appears to be a term of art employed on a fact-specific basis for the purpose of determining whether to excuse noncompliance with the requirement that a timely objection be made on the record").

66. *See* Lee v. Kemna, 534 U.S. 362, 381 (2002); Osborne v. Ohio, 495 U.S. 103, 124 (1990); Henry v. Mississippi, 379 U.S. 443, 447 (1965).

67. *Campbell*, 515 F.3d at 179; *accord* James v. Kentucky, 446 U.S. 341, 348 (1984). *But see* Beard v. Kindler, 558 U.S. 53, 60 (2009) (holding that a completely discretionary rule denying review of a claim brought by a prisoner who escaped during his state appeal is adequate).

68. *Campbell*, 515 F.3d at 179.

69. *See Davis*, 263 U.S. at 24; *see also* Reed v. Ross, 468 U.S. 1, 10 (1984) (noting Congress's interest in interposing federal courts between the people and the states).

procedural rules.[70] Procedural rules are not designed to be punitive but to vindicate state interests in finality and efficiency.[71] Procedural rules promote finality by ending litigation of claims not brought at the correct time or in the correct manner.[72] Finality serves the state's interest in repose and prevents duplicative judicial efforts, delay in punishment, and postponement of litigation that could lead to unreliable factual determinations.[73] Contemporaneous objections allow the trial court to make a record when evidence is freshest, to make factual determinations that benefit reviewing courts, and to prevent the need for review by correcting errors early.[74] Res judicata brings an end to litigation and allows the courts to deal with all of the petitioner's claims at once.[75] Indeed, the interest in efficient procedures is almost always legitimate and will generally block federal review.[76]

B. Habeas Corpus in the Pre-AEDPA Era: Federalism and State Prisoners

In addition to amending the Judiciary Act of 1789, the 1867 act also opened the federal courthouse doors to state prisoners through the expansion of federal habeas jurisdiction.[77] However, as discussed below, while federal habeas review tends to protect federal interests, it also tends to amplify tensions between

70. *See Henry*, 379 U.S. at 448 n.3 ("[W]here the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases.").

71. *See generally* Comment, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951). For example, when Virginia codified its contemporaneous objection rule, the state's supreme court said the rule's purpose was

> not to obstruct petitioners in their efforts to secure writs of error, or appeals, but . . . to put the record in such shape that [it accurately reflects the trial and] . . . to prevent attorneys from dealing unfairly with the trial courts by making objections to writs . . . without stating the ground of their objection.

Kercher's Adm'r v. Richmond, Fredericksburg & Potomac R.R. Co., 142 S.E. 393, 395 (Va. 1928).

72. *Cf.* Massaro v. United States, 538 U.S. 500, 504 (2003) (discussing federal defaults).

73. Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J., concurring).

74. Wainwright v. Sykes, 433 U.S. 72, 88–89 (1977); Martineau, *supra* note 48, at 1029–31 (arguing that the contemporaneous objection rule is justified "in terms of 'correction and avoidance'" (quoting Pfiefer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982))).

75. *See* Hoffner v. Bradshaw, 622 F.3d 487, 498–99 (6th Cir. 2010) (enforcing state's res judicata rule where the claim could have been brought on direct review); *cf.* Teague v. Lane, 489 U.S. 288, 308–09 (1989) (discussing the federal doctrine of res judicata in relation to retroactivity).

76. *See Teague*, 489 U.S. at 308 ("We have declined to make the application of the procedural default rule dependent on . . . the State's interest in the enforcement of its procedural rule." (citations omitted)). But to support this dicta, *Teague* cited *Murray v. Carrier*, 477 U.S. 478 (1986), which found that res judicata *still* served the state's interest in finality even when counsel inadvertently failed to raise a claim on direct review and declined to create a "manifest injustice" standard weighing those interests against petitioner's interests. *Murray*, 477 U.S. at 491.

77. Brown v. Allen, 344 U.S. 443, 532–33 (1953) (Jackson, J., concurring). Habeas corpus review, very generally, is a mechanism that allows prisoners to challenge the lawfulness of their imprisonment. States usually have a statutory postconviction court to hear claims not heard on direct review. Under 28 U.S.C. § 2254, prisoners may apply for the writ in federal district court after exhausting their state remedies. 28 U.S.C. § 2254(b) (2012).

federal and state courts.[78]

1. Vindicating Federal Interests: The Due Process Clause and Federal Habeas Review

Habeas corpus is vital to protecting federal interests. Traditionally, it was limited to challenging the jurisdiction of the trial court.[79] However, the scope of habeas review grew over the twentieth century as the protections of the Due Process Clause, which initially encompassed only the right to a full and fair hearing,[80] expanded through the incorporation of the Bill of Rights.[81] Federal habeas review became vital as the Supreme Court—unable to review the claims of every state prisoner on direct review—began to rely on the lower federal courts to vindicate these new federal rights.[82]

2. Vindicating State Interests: Exhaustion, Deference, and *Wainwright v. Sykes*

While habeas corpus protects federal interests, it also greatly infringes on state interests.[83] In addition to the state interests harmed on direct federal appeal,[84] federal habeas jurisdiction has the potential to interrupt state procedures midstream,[85] to harm society's interests in finality and punishing offenders, and to frustrate a state court's good faith attempts to apply the Constitution.[86] Furthermore, claim preclusion does not apply on federal habeas review;[87] de novo federal review of claims already presented to state courts

78. *See Sykes*, 433 U.S. at 78–79 (listing concerns with federal habeas). *See generally* Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1344–52 (1961).

79. *See Ex parte Watkins*, 28 U.S. 193, 203 (1830).

80. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1792 (2003); *see also* Stone v. Powell, 428 U.S. 465, 494 (1976) (precluding federal habeas review of Fourth Amendment claims where the state afforded petitioner a full and fair opportunity to contest the issue). *See generally* Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1 (2010).

81. Justin F. Marceau, *Un-incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1232–33, 1242–43, 1253–55 (2008).

82. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1041 (1970); Marceau, *supra* note 81, at 1235–36.

83. Coleman v. Thompson, 501 U.S. 722, 730–31 (1991) ("When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on . . . state ground[s], it renders ineffective the state rule . . . . [and] ignores the State's legitimate reasons for holding the prisoner." (citation omitted)).

84. *See supra* Parts II.A.1–2.

85. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490–91 (1973).

86. Engle v. Isaac, 456 U.S. 107, 127–28 (1982). *Contra id.* at 146–48 (Brennan, J., dissenting) (arguing (1) that prisoners are not admitted offenders if they did not get fair trials, (2) that society has no interest in finality in such cases, (3) that the state should be blamed for violating the Constitution, and (4) that federal supremacy trumps a state's good faith efforts).

87. Brown v. Allen, 344 U.S. 443, 458 (1953); Roosevelt, *supra* note 80, at 1792. *But see* State v.

challenges the position of the state courts as coordinate to lower Article III courts, placing *all* federal courts, not just the Supreme Court, in a position to upset state courts' constitutional determinations.[88]

In response to this conflict, Congress and the courts have developed various mechanisms to afford respect to state courts during federal habeas review.[89] One such mechanism is the requirement of exhaustion of state remedies.[90] Another is the deference afforded to state courts' findings of fact (which, as initially created by the 1966 amendment to the 1867 act, applied if the state court made "a determination after a hearing on the merits").[91]

A third mechanism for protecting state interests is the independent and adequate state ground doctrine itself.[92] Since the middle of the twentieth century, the doctrine's foundation and application on federal habeas review has been markedly different than on direct review.[93] In 1963, in *Fay v. Noia*,[94] the Court held that the independent state ground doctrine was not jurisdictional on federal habeas review.[95] The Court found that habeas courts do not risk rendering advisory opinions because they do not review judgments of lower courts, "but [the] detention *simpliciter*," thus sidestepping the issue of remand.[96] Moreover, the "state interest in an airtight system of forfeitures is of a different order from that, vindicated in *Murdock*, in the autonomy of state [substantive] law."[97] The state interest of "orderly criminal procedure" must compete against the federal interest of due process,[98] and "is sufficiently vindicated by the

Whitmore, 469 N.W.2d 527, 531 (Neb. 1991) (noting that habeas is not a substitute for direct appeal).

88. See *supra* notes 6–11 and accompanying text for a discussion of the coordinate position of state courts.

89. See *infra* notes 90–110 and accompanying text for a discussion of these mechanisms.

90. *Engle*, 456 U.S. at 140 (Brennan, J., dissenting). Federal habeas courts must afford state courts the first opportunity to rule on a claim and may only review claims for which there are actually or effectively no remaining remedial procedures in state court. 28 U.S.C. § 2254(b)(1) (2012); *see also Braden*, 410 U.S. at 490 (noting the state and federal interests advanced by the exhaustion doctrine); Marino v. Regan, 332 U.S. 561, 563 (1947) (Rutledge, J., concurring) (stating that exhaustion of state remedies rests on the assumption that remedies are available). Accordingly, a claim that was not raised in state court, but that would be forfeited under state law, is exhausted but procedurally defaulted for the purposes of federal habeas corpus review. Gray v. Netherland, 518 U.S. 152, 161 (1996).

91. Sumner v. Mata, 449 U.S. 539, 550–52 (1981). In 1966, Congress amended the Act of 1867 to afford deference to state factual determinations unless the petitioner could meet one of eight exceptions. Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2254(d), 80 Stat. 1104, 1105–06. See *infra* Part II.D.2 for a discussion of the current factual deference applied on habeas.

92. *See supra* Part II.A.1–2.

93. Coleman v. Thompson, 501 U.S. 722, 730 (1991).

94. 372 U.S. 391 (1963).

95. *Fay*, 372 U.S. at 425 (finding that "rarely, if ever, has the Court predicated its deference to state procedural rules on a want of *power* to entertain a habeas application" (emphasis added)); *accord* Riner v. Owens, 764 F.2d 1253, 1256 (7th Cir. 1985).

96. *Fay*, 372 U.S. at 429–30.

97. *Id.* at 432.

98. *Id.* at 431.

prisoner's forfeiture of his state remedies."[99] Nevertheless, the Court left the district courts some discretion to deny habeas review if a petitioner deliberately bypassed state procedural rules.[100]

Fay's liberal approach, however, was quickly replaced by a rule that better served state interests. In *Wainwright v. Sykes*,[101] the Court held that, as a matter of federalism and comity, the standard for overcoming state contemporaneous objection rules should be the same as the standard for overcoming their federal counterpart.[102] Under *Sykes*, petitioners cannot receive habeas review of federal claims that "were *not* resolved on the merits in the state proceeding due to [a petitioner]'s failure to raise them there as required by state procedure," unless they show "cause" for failing to comply with the procedural rule and actual "prejudice" resulting from the constitutional violations.[103] Cause requires a showing that an "objective factor external to the defense" prevented the petitioner from complying with the procedural rule.[104] For example, a petitioner's failure to raise a *Brady* claim on direct appeal might be caused by the prosecutor continuing to suppress evidence.[105] Prejudice requires a showing that the claim would have prevailed but for the procedural bar and that the alleged error affected the verdict.[106]

The *Sykes* Court listed the extensive state interests served by the contemporaneous objection rule and argued that these interests are equally applicable in state and federal courts.[107] Further, the Court said *Fay*'s liberal deliberate-bypass rule made state appellate courts less stringent in the application of their procedural rules because they knew federal courts would likely address the merits anyway.[108] By contrast, *Sykes*'s cause-and-prejudice rule would prevent certain methods of skirting state procedural rules, would

99. Coleman v. Thompson, 501 U.S. 722, 744–45 (1991) (describing the holding in *Fay*).

100. *Fay*, 372 U.S. at 433–34.

101. 433 U.S. 72 (1977). See also *Francis v. Henderson*, 425 U.S. 536 (1976), the companion case to *Sykes*, which was decided a year earlier.

102. *Sykes*, 433 U.S. at 84–87; *see also Francis*, 425 U.S. at 539–42 (citing Davis v. United States, 411 U.S. 233, 240–43 (1973) (ruling that the Federal Rules of Criminal Procedure superseded *Fay* by requiring contemporaneous objections in federal court absent a showing of cause)); Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1056–59 (1978) (discussing the doctrinal basis for applying the federal rule to state prisoners).

103. *Sykes*, 433 U.S. at 87. Petitioners may also obtain review to prevent a miscarriage of justice. *Coleman*, 501 U.S. at 730. Miscarriage of justice effectively entails a claim of actual innocence. The details of this exception are not relevant for the purposes of this Comment. It is enough to acknowledge that the exception exists.

104. Murray v. Carrier, 477 U.S. 478, 488 (1986); *see also* Riner v. Owens, 764 F.2d 1253, 1256 (7th Cir. 1985) (explaining that the cause standard is intentionally vague because of the variety of circumstances that lead to default).

105. *See* Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 465 (6th Cir. 2015) (noting that establishing the elements of a *Brady* claim also establishes cause and prejudice).

106. United States v. Frady, 456 U.S. 152, 169 (1982).

107. *Sykes*, 433 U.S. at 88–89; *see also Murray*, 477 U.S. at 490–92 (extending *Sykes* to include rules requiring claims to be raised on appeal, and listing the state interests served by these rules).

108. *Sykes*, 433 U.S. at 89–90.

ensure that the trial remained the primary place for asserting constitutional rights,[109] and would prevent federal habeas courts from deciding claims that the Supreme Court cannot decide on direct review.[110]

C. *Deciphering Ambiguous State Court Opinions: A Question of Judicial Administration*

Unsurprisingly, placing so much weight on whether the state court "actually relied" on state grounds resulted in volumes of case law deciphering ambiguous state court decisions.[111] Ambiguities were attributed to various foibles in state court judgments such as unclear writing,[112] alternative holdings,[113] safety-valve rules,[114] perfunctory opinions,[115] and the "independent" prong itself.[116] Eventually, in order to avoid misconstruing state court opinions, the Court sought out a uniform method of interpreting these ambiguities.[117]

1. Alternative Holdings: The *Ratio Decidendi* and Determining What Was Adjudicated

One type of ambiguity is the often misunderstood "alternative holding."[118] Alternative holdings occur when a court offers multiple grounds or rationales that are each sufficient to support its disposition.[119] For example, a court may determine that an ineffective assistance of counsel (*Strickland*) claim fails both because counsel was not deficient and because there was no prejudice.[120] In a habeas case, a state court might find a claim procedurally barred *and* without

109. *Id.*; Engle v. Isaac, 456 U.S. 107, 128–29 (1982).

110. Coleman v. Thompson, 501 U.S. 722, 730–31 (1991); Hill, *supra* note 102, at 1050.

111. *See, e.g.*, Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983) (explaining the Fifth Circuit's test for determining if there is a procedural bar), *overruled by* Harris v. Reed, 489 U.S. 255 (1989).

112. *See, e.g.*, Irvin v. Dowd, 359 U.S. 394, 403–04 (1959).

113. For a pre-AEDPA argument that the cause and prejudice standard should apply to alternative holdings, see generally James W. Dobbins, Note, *Applying* Wainwright v. Sykes *to State Alternative Holdings and Summary Affirmances*, 53 FORDHAM L. REV. 1357 (1985).

114. *See, e.g.*, Sochor v. Florida, 504 U.S. 527, 534 n.* (1992).

115. *See, e.g.*, *Preston*, 705 F.2d at 116; *cf.* Harrington v. Richter, 562 U.S. 86, 99 (2011) (analyzing perfunctory dismissal under AEDPA standard).

116. See, for example, *Michigan v. Long*, 463 U.S. 1032, 1037–44 (1983), discussed *infra* Part II.C.2. *See generally* Marianna Brown Bettman, *Identical Constitutional Language: What Is a State Court to Do? The Ohio Case of* State v. Robinette, 32 AKRON L. REV. 657, 660–63 (1999).

117. *See infra* Part.II.C.2.

118. The term "alternative holding" is somewhat loaded because it begs the question whether it is a *conclusion* about what a court has done or a *description* of what it has done. Saying that part of an opinion is an "alternative holding" is, in effect, saying that it qualifies as a holding. Though I disagree, for convenience, I will adopt the term.

119. *See* Union Pac. R.R. Co. v. Mason City & Fort Dodge R.R. Co., 199 U.S. 160, 166 (1905) (explaining that when a court's holding rests on two independent grounds, neither holding can be considered dictum); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005).

120. *See, e.g.*, Brooks v. Bagley, 513 F.3d 618, 624 (6th Cir. 2008).

merit (a forfeiture-merits ruling).[121] These rulings are ambiguous because it is unclear which issues the court has actually decided (i.e., adjudicated). Thus, when a court makes a forfeiture-merits ruling, *Sykes* is difficult to apply because we do not know if the state court subjectively intended to or even doctrinally can rely on the forfeiture. This difficulty arises in part because the jurisprudence surrounding alternative holdings generally is unclear. Because both the independent and adequate state ground doctrine, discussed above,[122] and AEDPA, discussed below,[123] require deference to issues actually decided by state courts, it is useful to evaluate how courts view alternative holdings in terms of two traditional decisional concepts that arise from adjudications: precedent (holdings) and preclusion. When interpreting such rulings, it may be difficult to determine which parts, if any, are holdings and which parts, if any, are preclusive.[124]

It can be difficult to determine what counts as a holding. Generally speaking, a holding is a statement of law resolving an issue that was *necessary* to reach the judgment on the facts before the court.[125] Holdings are distinguished from obiter dictum—"[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand [that] lack the force of an adjudication."[126] Some courts further distinguish between obiter and judicial dicta.[127] Judicial dicta are issues that are "argued . . . *and deliberately passed upon*" but still unnecessary to the outcome.[128] Courts apply so much deference to judicial dicta that some courts do not even consider it distinct from a holding.[129] Indeed, the

121. *See id.*

122. *See supra* note 32 and accompanying text.

123. *See infra* note 247 and accompanying text.

124. *See, e.g.*, N.J.–Phila. Presbytery of the Bible Presbyterian Church v. N.J. State Bd. of Higher Educ., 654 F.2d 868, 876 (3d Cir. 1981) (affording no preclusion to alternative holdings where "a subsequent court cannot tell what issue or issues were in fact fully *adjudicated*" (emphasis added)).

125. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 188–90 (2014); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 161 (1930); *see also* Cranston v. Thomson, 530 P.2d 726, 728–29 (Wyo. 1975) (relating to advisory opinions).

126. Hett v. Duffy, 78 N.W.2d 284, 287 (Mich. 1956), *overruled on other grounds*, Weller v. Mancha, 91 N.W.2d 352 (Mich. 1958); *accord* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821); Gochicoa v. Johnson, 238 F.3d 278, 286 n.11 (5th Cir. 2000).

127. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 907 (Ill. 2010).

128. Exelon Corp. v. Dep't of Revenue, 917 N.E.2d 899, 907 (Ill. 2009); *see also* Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 225 n.37 (2010).

129. *See* Fla. Cent. R.R. Co. v. Schutte, 103 U.S. 118, 143 (1880) (finding that the alternative holding "was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended"); 40 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 2:16 (West, 3d ed. 2011) ("What the [Texas] Supreme Court characterizes as judicial dictum, the Court of Criminal Appeals—using a *broader definition* of 'holding'—would probably characterize as a holding rather than dictum of any sort." (emphasis added)); *see also* McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n.21 (5th Cir. 1977) (noting that discussion of whether part of an opinion is dicta is largely academic); Parker v. Bailey, 15 S.W.2d 1033, 1035 (Tex. Comm'n App. 1929) (finding that a deliberate but unnecessary statement was both "not dictum" and "technically dicta").

jurisprudence on judicial dicta is muddled in large part because, like alternative holdings, the only thing that distinguishes it from a holding is that judicial dicta is unnecessary.[130] However, judicial dicta is, emphatically, still dicta[131]: only binding on lower courts,[132] "persuasive and should be followed unless found to be erroneous,"[133] and primarily intended to guide lower courts in matters likely to come up again.[134]

Similarly, it can be difficult to decide which issues were actually adjudicated and therefore precluded. Preclusion bars relitigation of an issue previously decided.[135] An issue is precluded if (1) it was actually litigated and decided on the merits, (2) it was essential to the judgment, and (3) the party who is precluded had a full and fair opportunity to litigate the issue.[136] Courts ask whether a litigant had a "full opportunity to be heard and was in no way, motivationally or procedurally, restricted or inhibited in the presentation of his position."[137] This includes, among other things, "whether without fault of his own the [petitioner] was deprived of crucial evidence or witnesses in the first litigation"[138] or whether a party who properly invoked federal jurisdiction was forced to litigate in state court.[139]

The concern with alternative holdings is that if either is sufficient to sustain the judgment, neither is *necessary* or *essential*. Courts often say, with little explanation, that it is "well settled" that alternative holdings receive equal precedential value as classic holdings,[140] and many courts view alternative

130. *See* Stinson, *supra* note 128, at 225 n.37 (discussing jurisprudence on judicial dicta).

131. *Id.*; *see also* Frost v. State, 53 So. 3d 1119, 1123 (Fl. Dist. Ct. App. 2011) (noting that judicial dicta "is a form of dictum"), *quashed for other reasons*, 94 So. 3d 481 (Fla. 2012). In *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969), the court cited to, among other cases, *United States v. Poller*, 43 F.2d 911, 912 (2d Cir. 1930), to justify reliance on an alternative holding. *Cross*, 418 F.2d at 1105 n.64. However, when *Poller* pointed to statements in a Supreme Court case that it "must follow," it explicitly called those statements "obiter." *Poller*, 43 F.2d at 912.

132. Carpet Servs., Inc. v. George A. Fuller Co. of Tex., Inc., 802 S.W.2d 343, 349 (Tex. Ct. App. 1990) (Baker, J., dissenting).

133. Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 773 (Tex. 1964) (relying on judicial dicta, not because it was binding, but because it had "substantial support from other authorities . . . , [was] not without merit . . . . , [and had] been on the books for over twenty years").

134. *Frost*, 53 So. 3d at 1123; DIX & SCHMOLESKY, *supra* note 129, § 2:16.

135. Taylor v. Sturgell, 553 U.S. 880, 892 (2008); Witkowski v. Welch, 173 F.3d 192, 199 (3d Cir. 1999).

136. *Witkowski*, 173 F.3d at 199.

137. Nycal Corp. v. Inoco PLC, 968 F. Supp. 147, 151 (S.D.N.Y. 1997) (quoting Malloy v. Trombley, 405 N.E.2d 213, 216 (N.Y. 1980)); *accord* Montana v. United States, 440 U.S. 147, 164 n.11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."); Kulak v. City of New York, 88 F.3d 63, 72 (2d Cir. 1996) (listing New York's requirements for preclusion).

138. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333 (1971).

139. *See Montana*, 440 U.S. at 163 ("[The] abstention doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have a federal court make factual determinations essential to the resolution of federal questions.").

140. Holt v. State, 494 S.W.2d. 657, 659 (Mo. Ct. App. 1973); *accord* Union Pac. R.R. Co. v. Mason City & Fort Dodge R.R. Co., 199 U.S. 160, 166 (1905); Abramowicz & Stearns, *supra* note 119,

holdings as grounds for preclusion.[141] The argument courts typically make for dispensing with the requirement that a holding must be *necessary* to the disposition goes as follows: if one alternative ground is not considered precedential, neither ground can be considered precedential because it is analytically impossible to determine which holding predominates; although a court did not *need* to reach the second issue if the first issue was dispositive, it also did not *need* to reach the first issue if the second issue was dispositive.[142] If the order in which the first court reached either dispositive issue is presumably arbitrary, choosing to give precedential value only to the first issue that court discussed is equally arbitrary. To avoid arbitrarily choosing to give precedential value to one issue over the other, courts give precedential weight to all issues purportedly decided by the first court. Because this argument is frequently used to justify giving precedential value to a court's ruling on both prongs of a *Strickland* claim (performance and prejudice), I will refer to this argument as the "*Strickland* Dilemma."[143] Further, courts have found that "a judgment based on alternative grounds either precludes necessary issues decided in each or precludes" none at all.[144] Finally, some courts have justified alternative holdings as preclusive on the grounds that they conserve judicial resources by eliminating the need for remand,[145] give guidance to lower courts,[146] and offer losing parties

at 959; *see also* Stinson, *supra* note 128, at 225 n.37 (stating that most courts consider judicial dicta to be different from alternative holdings, but offering no reason for the distinction). *But see, e.g.*, Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 463 n.6 (6th Cir. 2015) (noting that the language in *Hoffner v. Bradshaw*, 622 F.3d 487, 595 (6th Cir. 2010), which addressed the merits in the alternative, was dicta).

141. Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986) ("The general rule in this Circuit is that 'if a court decides a case on two grounds, each is a good estoppel.'" (quoting Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926))). *Contra* Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. 1981) ("[I]t has always been the rule that although an issue was fully litigated and a finding made on the issue in prior litigation, the prior judgment will not act as collateral estoppel as to the issue if the issue was not necessary to the rendering of the prior judgment . . . ."). *See* Stebbins v. Keystone Ins. Co., 481 F.2d 501, 508 (D.C. Cir. 1973) (denying preclusion of merits where second ground was failure to exhaust remedies); Halpern v. Schwartz, 426 F.2d 102, 107 (2d Cir. 1970) (noting that the opinion in *Irving* was not an alternative holding); Jean F. Rydstrom, *Collateral Estoppel Effect, in Federal Court, of Judgment Resting on Independent Grounds*, 29 A.L.R. FED. 764 (1976) (noting that courts either blindly follow the well settled view or dilute the ruling's precedential value). *See generally* Jo Desha Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. CHI. L. REV. 701 (1983).

142. *See, e.g.*, Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 251 (3d Cir. 2006); David L. Horan, *The Rules that Govern the Rules that Govern in the Federal Courts of the Fifth Circuit*, 67 TEX. B.J. 622, 628 (2004).

143. *See, e.g.*, *Holt*, 494 S.W.2d at 659. See *Brooks v. Bagley*, 513 F.3d 618, 624–25 (6th Cir. 2006), discussed *infra* note 279 and accompanying text.

144. *Halpern*, 426 F.2d at 108. *But see* United States v. Adamson, 665 F.2d 649, 656 n.19 (5th Cir. 1982) (suggesting that an alternative holding is binding even if it is contrary to the disposition).

145. *See* Cullen v. Pinholster, 563 U.S. 170, 186–87 (2011) (finding no need to remand a case after reversing one ruling by the circuit court because the circuit court had made an alternative holding).

146. *See Adamson*, 665 F.2d at 656 n.19; Cross v. Harris, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969).

consolation that they did not lose on a technicality.[147]

Having disregarded the "necessary" and "essential" requirements of holdings and preclusion, most courts "focus[] instead on the trustworthiness and practical considerations surrounding the adjudication."[148] In an often cited opinion, the Seventh Circuit suggested that particular parts of an opinion are not precedential if they were not carefully considered.[149] By this reasoning, to determine if a passage should be given weight, courts should consider whether the discussion or resolution of an issue (1) "was unnecessary to the outcome of the earlier case"; (2) "can be sloughed off without damaging the analytical structure of the opinion"; (3) "was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis"; or (4) "was not presented as an issue, [and was] not refined by the fires of adversary presentation."[150]

Alternatively, some courts have argued that alternative holdings should have precedential but not preclusive effect, even if they are fully litigated.[151] They argue (1) that neither the trial or appellate court will carefully consider each ground when they can rely on the alternative ground;[152] (2) that the losing party has little incentive to appeal an alternative ground that cannot lead to reversal unless he foresees that a second suit will involve the same issues;[153] and (3) that, even if the losing party appealed, the appeal would waste the resources of the judiciary and the litigants.[154] In *Halpern v. Schwartz*,[155] the Second Circuit explicitly rejected the prevailing resolution of the *Strickland* Dilemma, saying that when a prior court makes an alternative holding, it makes just as much sense to preclude neither of the issues decided by a prior court as is does to preclude both issues.[156]

Wellons v. Hall[157] shows the importance of careful consideration. The petitioner found evidence that the jury had given gifts to the judge during the trial for unknown reasons.[158] Due in part to lack of evidence, the state appellate

147. *See Brooks*, 513 F.3d at 624.

148. Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 251 (3d Cir. 2006). *Contra* Equitable Life Assurance Soc'y v. Gillan, 70 F. Supp. 640, 650 (D. Neb. 1945). *See generally* FED. JUDICIAL CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 17 (2d ed. 2013).

149. United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988), *quoted with approval in* Exelon Corp. v. Dep't of Revenue, 917 N.E.2d 899, 907 (Ill. 2009) (Thomas, J., concurring).

150. *Crawley*, 837 F.2d at 292–93 (focusing on indicia that a "particular passage was not a fully measured judicial pronouncement, that it was not likely to be relied on by readers, and indeed that it may not have been part of the decision that resolved the case or controversy" at hand).

151. *See, e.g.*, Halpern v. Schwartz, 426 F.2d 102, 105–06 (2d Cir. 1970).

152. Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168–69 (5th Cir. 1981); *Halpern*, 426 F.2d at 105; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 n.23 (2006).

153. *Halpern*, 426 F.2d at 105.

154. *Hicks*, 662 F.2d at 1169.

155. 426 F.2d 102 (2d Cir. 1970).

156. *Halpern*, 426 F.2d at 108.

157. 558 U.S. 220 (2010).

158. *Wellons*, 558 U.S. at 221.

court denied the petitioner's judicial misconduct claim, and the state habeas court found the claim was barred because it was already decided on direct appeal.[159] On federal habeas review, the Eleventh Circuit affirmed the district court's denial of an evidentiary hearing, ruling that the claim was defaulted, speculative, and without merit.[160] The Supreme Court, however, held that the claim was not barred under *Sykes* because the state court reviewed it on direct appeal.[161] It then remanded the case back to the circuit court: "Having found a procedural bar, . . . the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing *and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar*."[162]

Other courts disapprove of alternative holdings for running afoul of the principle of judicial restraint[163] or for unnecessarily addressing constitutional issues.[164] Moreover, all courts disregard alternative holdings where one of the alternative grounds was a lack of jurisdiction.[165] It is fundamental that a judgment rendered without jurisdiction is void ab initio.[166] In *United States v. 5.935 Acres of Land, Tax Map Key (3)2-8-017-43, Honomu*,[167] involving statutory forfeiture of marijuana fields, the district court extended this general rule.[168] In a prior forfeiture case, the circuit court had interpreted the statute's "innocent owner" defense favorably to the government, but also had found that the claimant lacked standing.[169] Standing—which involves whether "the litigant is entitled to have the court decide the merits of the dispute"—is usually a mandatory jurisdictional barrier, but it also has a discretionary dimension.[170] The

159. *Id.*

160. *Id.* at 221–22. There was some discussion by the Supreme Court about whether the Eleventh Circuit actually addressed the merits of the claim or only addressed whether to grant discovery and a hearing. *Id.* at 223. The Court said, however, that it would reverse either way. *Id.* at 224.

161. *Id.* at 222. When a state court declines to review a claim because it has already reviewed the claim before, federal review is not barred. Cone v. Bell, 556 U.S. 449, 466 (2009).

162. *Wellons*, 558 U.S. at 222 (emphasis added).

163. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 296 (1987) (Scalia, J., concurring) (mocking the idea that "we can decide any issue, so long as the facts before us either do or do not present it").

164. *See* Detroit Edison Co. v. E. China Twp. Sch. Dist. No. 3, 378 F.2d 225, 230 (6th Cir. 1967); Stinson, note 128, at 231 n.63 ("[S]ome courts have concluded that alternative holdings are non-binding dicta, at least when one alternative holding involves a finding of unconstitutionality and the other ground, such as a procedural violation, does not require the court to reach the constitutional issue.").

165. *E.g.*, *Guerra*, 479 U.S. at 296; Gumm v. Mitchell, 775 F.3d 345, 362 (6th Cir. 2014).

166. *Gumm*, 775 F.3d at 362; *cf.* Brooks v. Arlington Hosp. Ass'n, 850 F.2d 191, 196 (4th Cir. 1988) (noting that a judgment that a court is without jurisdiction is only preclusive as to the issues necessary to determine the question of jurisdiction); Stinson, *supra* note 128, at 227 (suggesting that judicial dicta and dicta following a lack of standing raise the same concerns).

167. 752 F. Supp. 359 (D. Haw. 1990) [hereinafter *Honomu*].

168. *Honomu*, 752 F. Supp. at 360.

169. *Id.* at 361.

170. Warth v. Seldin, 422 U.S. 490, 498 (1975). Issues of justiciability, such as standing and

Supreme Court has described the discretionary dimension of standing as an act "of judicial self-governance" limiting the "persons who may invoke the courts' decisional and remedial powers."[171] The *Honomu* court ruled that the prior circuit court opinion was not precedential as to the "innocent owner" issue

> because one ground in [the circuit court's opinion] is a necessary threshold to the court's consideration of the other . . . .
>
> [T]he doctrine of standing is always either a limitation on federal court jurisdiction *or a limitation on its exercise*. . . . *Since no court can rule on the merits of a case over which it has not exercised jurisdiction*, it follows that a court's statement of the law applicable to the merits of such a case is necessarily dictum.[172]

In short, alternative holding jurisprudence is muddled, and many of the decisions that give wholesale deference to alternative holdings do so with little explanation. Those courts that have closely examined alternative holdings often reject a bright-line rule of acceptance of both holdings as preclusive and instead try to determine whether a given part of an opinion received the careful attention expected of a holding or adjudication.[173] The lack of clarity in this jurisprudence is compounded by the fact that courts rarely say whether adjudication is concomitant with precedent.[174]

State court forfeiture-merits rulings create further difficulties for federal courts. Suppose a state court rules that a claim is (A) forfeited for being defectively raised, and (B) without merit. To decide whether *Sykes* bars federal review, the habeas court must determine whether the state court actually relied on A. The state court might have relied only on A, with B being dicta; only on B, with A being dicta; or on both A and B.[175] Prior to AEDPA, this determination depended on whether "the state court's decision was substantially based on a procedural ground."[176]

The difficulty created by these ambiguous forfeiture-merits rulings is

mootness, usually only apply to federal courts, but they also limit some state courts. *See* People v. Richmond, 782 N.W.2d 187, 190 (Mich. 2010) (noting that "[the] principal duty of this Court [is] . . . to decide actual cases and controversies" (omission in original) (quoting Federated Publications, Inc. v. City of Lansing, 649 N.W.2d 383, 389 (Mich. 2002))). Some state courts have discretion to rule on nonjusticiable issues, *see, e.g.*, *id.* at 190 (noting an exception for issues of public importance that are likely to recur), while others are restricted from doing so by their constitutions, *see, e.g.*, State v. Viers, 469 P.2d 53, 54 (Nev. 1970) (holding that a statute authorizing advisory opinions is unconstitutional).

171. *Warth*, 422 U.S. at 499–500.

172. *Honomu*, 752 F. Supp. at 361–62 (emphasis added); *cf. Richmond*, 782 N.W.2d at 190–91 (identifying mootness as a similar threshold issue a court must address before reaching the merits). The Supreme Court has recognized both the threshold nature of standing, F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 417 (2013), and the existence of a discretionary standing doctrine requiring courts to decide if they *can* exercise jurisdiction and if they *will* exercise it. *See Warth*, 422 U.S. at 498–502 (discussing the dual nature of standing doctrine).

173. *See supra* notes 148–62 and accompanying text.

174. *See supra* notes 128–134 and accompanying text.

175. *See* Dobbins, *supra* note 113, at 1361–63.

176. *See id.* at 1361–62 n.24 (citing Hockenbury v. Sowders, 620 F.2d 111, 115–16 (6th Cir. 1980)).

exacerbated when a state court's procedural rule has a safety-valve exception that involves a foray into the merits of a federal question.[177] It is not always clear whether the state court discussed B only in the context of the exception (ultimately finding the exception inapplicable and resting on A) or ignored or forgave A entirely (thus resting on B).[178] Further, although a state procedural rule is not independent if its application depends upon or is influenced by a federal question,[179] it is unclear whether a rule is independent where it rests upon an exception that is not coterminous with federal constitutional error, applies only to some constitutional errors, or increases the burden for showing prejudice.[180]

2. *Michigan v. Long*: The Plain Statement Rule as a Rule of Judicial Administration

In the wake of *Sykes*,various methods were employed to determine the grounds of state courts' decisions. These included looking at the face of the opinion or at what was argued,[181] sending ambiguous opinions back to the state courts for clarification, or remanding the case for further consideration.[182] In some instances, courts simply dismissed the claim.[183]

In 1983, in *Michigan v. Long*,[184] the Court set a rule of judicial administration to help determine if independent state grounds were "the most reasonable explanation" of a state court's decision.[185] The state court had granted a claim under the state's analogue to the Fourth Amendment. However, the state court opinion relied heavily on federal cases, citing state law only twice.[186] It was unclear whether the federal cases were used only as persuasive authority and whether the state constitutional issue was sufficiently independent of federal law to preclude federal review.[187]

The Court rejected the "ad hoc method[s]" it had previously employed as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[188] Examining state law was an

177. See *supra* notes 62–63 and accompanying text for mention of these exceptions.

178. *Compare* Harris v. Reed, 489 U.S. 255, 265 n.11 (1989) (majority opinion), *with id*. at 276 n.2 (Kennedy, J., dissenting).

179. *See supra* note 65 and accompanying text.

180. *See* Fleming v. Metrish, 556 F.3d 520, 538–42 (6th Cir. 2009) (Clay, J., dissenting); Cargle v. Mullin, 317 F.3d 1196, 1205 n.7 (10th Cir. 2003) (listing different circuits' approaches).

181. *See, e.g.*, Cty. Court of Ulster Cty. v. Allen, 442 U.S. 140, 152 (1979).

182. Herb v. Pitcairn, 324 U.S. 117, 126–28 (1945).

183. Michigan v. Long, 463 U.S. 1032, 1038–39 (1983). The Fifth Circuit asks if there was a "[r]esolution on the merits" to determine if "the court's disposition of the case [was] substantive or procedural." Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997) (first internal quotation marks omitted).

184. 463 U.S. 1032 (1983).

185. *Long*, 463 U.S. at 1041, 1044.

186. *Id.* at 1037.

187. *Id.* at 1037–38.

188. *Id.* at 1039.

unsatisfactory potential solution because it required interpretation of state law with which the Court was unfamiliar.[189] Sending cases back to state courts would cause undue delay and would place the burden on the state courts to determine the Supreme Court's jurisdiction.[190] Finally, automatic dismissal was unsatisfactory because it undermined the "important need for uniformity" in cases where the decision rested primarily on federal law.[191]

The Court held that the state court's decision was not independent and that it had "jurisdiction in the absence of a *plain statement* that the decision below rested on an adequate and independent state ground."[192] This "plain statement rule" protects state interests by giving state courts a way of clarifying the basis of their opinions to insulate their jurisprudence.[193] It also avoids the rendering of advisory opinions.[194] Instead, it presumes that the decision rested on federal grounds if the state court's decision "fairly appeared to rest primarily on resolution of [federal] claims . . . and did not clearly and expressly rely on an independent and adequate state ground" (the *Harris* presumption).[195] The plain statement rule was extended to procedural rules in *Caldwell v. Mississippi*.[196]

3. *Harris v. Reed:* Footnote Ten and Extending *Long* to Habeas

In *Harris*, the Supreme Court extended the *Long* plain statement rule to federal habeas corpus proceedings, foreclosing review "to the extent permitted by *Sykes*."[197] In *Harris*, the state court had dismissed the petition without an evidentiary hearing.[198] It noted the "well-settled principle . . . that those [issues] which could have been presented [on direct appeal], but were not, are considered waived," but then proceeded to the merits.[199] The Seventh Circuit dismissed the case on procedural grounds, finding that the state court intended to make an alternative holding.[200]

189. *Id.*

190. *Id.* at 1039–40.

191. *Id.* at 1040.

192. *Id.* at 1044 (emphasis added).

193. *Id.* at 1041. *But see* Harrington v. Richter, 562 U.S. 86, 99 (2011) ("Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.").

194. *Long*, 463 U.S. at 1042.

195. Coleman v. Thompson, 501 U.S. 722, 735 (1991). In other words, the *Harris* presumption does *not* apply unless there is some indication that the decision rested on federal grounds. *Id.* The name of the presumption comes from *Harris*, which established the same presumption on habeas. See *infra* Part II.C.3 for a discussion of the *Harris* opinion.

196. 472 U.S. 320, 327–28 (1985).

197. Harris v. Reed, 489 U.S. 255, 256 (1989).

198. *Id.* at 257.

199. *Id.* at 258 (alterations in original) (internal quotation marks omitted).

200. Harris v. Reed, 822 F.2d 684, 687 (7th Cir. 1987), *rev'd*, 489 U.S. 255 (1989). The circuit court distinguished this case from those that addressed the merits and either did not mention the forfeiture, *id.* at 686 (citing United States *ex rel.* Williams v. Franzen, 687 F.2d 944 (7th Cir. 1982)), or expressly overlooked the forfeiture (which did not preclude habeas review), *id.* at 687 (citing People v. Ross, 380 N.E.2d 897 (Ill. App. Ct. 1978)), from those that expressly relied on the forfeiture (which did

Finding no plain statement, the Supreme Court reversed.[201] The Court stated that the need to resolve ambiguities, which had led to the decisions in *Long* and *Caldwell*, also exists during habeas review.[202] The Court stated that extending *Long*'s familiar rule to federal "habeas [review] burdens [state] interests only minimally," as it would be more intrusive to second guess their decisions on state law.[203] Moreover, the plain statement rule relieves federal courts of the burden of examining the state court record and analyzing unfamiliar matters of state law.[204] While foreclosing review "to the extent permitted by *Sykes*,"[205] the Court noted (in footnote ten):

> Moreover, a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. . . . Thus, by applying this doctrine to habeas cases, *Sykes* curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.[206]

The Court rejected the argument that *Long*'s rule presumes "that state courts disobey their own procedural bar rules."[207] It found this argument in conflict with *Caldwell*, and "[i]n any event . . . in some instances state courts have discretion to forgive procedural defaults."[208] The plain statement rule, the Court stated, "relieves a federal court from having to determine whether in a given case . . . the state court has chosen to forgive a procedural default."[209] If the state court "chooses not to rely on a procedural bar . . . then there is no basis" for a federal court to refuse habeas review.[210] Accordingly, the Court presumed the petitioner's claim was not forfeited.[211]

Dissenting, Justice Kennedy argued that the plain statement rule should not

preclude habeas review), *id.* at 686 (citing Farmer v. Prast, 721 F.2d 602 (7th Cir. 1983)).

201. *Harris*, 489 U.S. at 266.

202. *Id.* at 263. Prior to *Harris*, circuit courts held mixed opinions on whether deference applied to state procedural rules when there was an alternative holding. *See* Dobbins, *supra* note 113, at 1362 n.24.

203. *Harris*, 489 U.S. at 264–65.

204. *Id.* at 264–65.

205. *Id.* at 264.

206. *Id.* at 264 n.10 (citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935)). Notably, the state court in *Fox*—a contract case—did not determine the invalidity of the contract under federal law because the parties conceded that issue. *Fox Film Corp.*, 296 U.S. at 210–11 ("The case, in effect, was disposed of before the federal question said to be involved was reached.").

207. *Harris*, 489 U.S. at 265 n.11.

208. *Id.*

209. *Id.*

210. *Id.* at 265 n.12.

211. *Id.* at 266. Although the state court's statement would normally be enough to bar review, by addressing the merits, it was unclear if it forgave the forfeiture. *Id.* at 266 n.13.

apply.[212] First, he argued that *Long*'s concern about advisory opinions did not apply on habeas.[213] Further, Justice Kennedy argued that *Long* only applies where it fairly appears that state *substantive law is not independent* of a federal question.[214] *Long* might apply on direct review of state procedural law "where the independence of a state procedural ground is in doubt,"[215] such as where "the State has made application of the procedural bar depend on an antecedent ruling of federal law."[216] However, petitioner did not allege that federal law was determinative of the safety-valve exception under Illinois law.[217] The ambiguity was not the independence of state law, but only "whether the state ground was invoked at all."[218]

Justice Kennedy argued that the majority's rule did not accomplish *Long*'s goal of finding the "most reasonable explanation" of the state court's ruling.[219] Instead, it presumed the state court disobeyed its procedural rules where applicable even though the "most reasonable explanation for a court's reference to the general rule is [not] that the court intends to rely on some exception it does not mention."[220] The majority's argument that the *Long* rule saves the federal court from having to determine whether the state court forgave the default incorrectly "assumes that in all cases of ambiguity there will always be an exception to the State's procedural bar that is at least arguably applicable to the situation."[221] Justice Kennedy advocated a presumption that the default would apply absent a plain statement that the court relied on an exception.[222] In its briefs, the State similarly argued that the petitioner should have to show that the state court applied an exception and reached the merits.[223]

Between 1989 and 1996, the Court attempted to clarify the holding in *Harris*.[224] Notably, courts continued to fight over whether a merits adjudication

212. *Id.* at 271–72 (Kennedy, J., dissenting).

213. *Id.* at 277 n.3.

214. *Id.* at 274.

215. *Id.*

216. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

217. *Id.* at 275. See *supra* notes 177–80 and accompanying text for a discussion of the ambiguities created when the applicability of a safety-valve exception depends upon a determination of federal law.

218. *Harris*, 489 U.S. at 275 (Kennedy, J., dissenting).

219. *Id.* at 276.

220. *Id.*

221. *Id.* at 276 n.2.

222. *Id.* at 276–77. Justice Kennedy's approach would require no more review of state law than the adequacy prong already requires, would serve the purposes of clarity and accurately measuring intent, and would "not presum[e] that a state court has disregarded its own laws." *Id.* at 277.

223. Brief for Respondents at *8–14, Harris v. Reed, 489 U.S. 255 (1989) (No. 87-5677) (arguing that the *Long* rule presumes that state courts ignore their own rules, and that petitioner should have to demonstrate "that the state has created in his case an exception to the established rule and reached the merits." (quoting Campbell v. Wainwright, 738 F.2d 1573, 1578 (11th Cir. 1984))). Justice Kennedy further argued that *Caldwell*'s reference to *Long* was dicta. *Harris*, 489 U.S. at 278 (Kennedy, J., dissenting).

224. *See* Ylst v. Nunnemaker, 501 U.S. 797, 802–04 (1991) (relating to perfunctory opinions);

obviated a procedural default.[225] In one case, where a state court on direct appeal found a claim procedurally barred but the state postconviction court ruled on the merits, the Court said "[i]f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available."[226] In *Sochor v. Florida*,[227] the Court declined to take jurisdiction where the state court denied a claim as "not preserved for appeal" and "in any event" without merit.[228] The Court found that this was a plain statement of forfeiture and therefore the procedural bar applied.[229] Dissenting, Justice Stevens argued that there was no plain statement and that the state court "ha[d] given even further indication that petitioner's claim was not procedurally barred by proceeding to the merits, albeit in the alternative."[230] The entire issue of alternative holdings was only addressed in two footnotes of the parties' briefs, neither of which cited *Harris*.[231] The State argued that Sochor "did not preserve this issue . . . and therefore he was precluded from asserting" it in the state court and that "[o]nly alternatively, did the [state] court note in passing that the claim had 'no merit,' and was then rejected without discussion."[232] The petitioner argued that the forfeiture did not apply and that the state court "reached the merits" because under state law "failure to object at bar does not preclude review."[233] Although *Long*'s applicability to habeas was clear, the meaning of *Harris*' footnote ten[234] was not.

D. AEDPA: Changing the Habeas Landscape

Aside from the 1966 statute and the Supreme Court's retroactivity rules,[235] federal habeas courts exercised nearly plenary review prior to 1996.[236] That year,

Coleman v. Thompson, 501 U.S. 722, 740 (1991).

225. *See Ylst*, 501 U.S. at 801.

226. *Id.*; *accord* Cooper v. Wainwright, 807 F.2d 881, 886–87 (11th Cir. 1986).

227. 504 U.S. 527 (1992). *Sochor* is the last alternative holdings case to reach the Supreme Court.

228. *Sochor*, 504 U.S. at 534.

229. *Id.* The Court then rejected Justice Stevens's argument that by finding a forfeiture, the state court ruled on the merits by implicitly finding that there was no "fundamental error," which was the state's safety-valve exception to the procedural default. *Id.* at 534 n.*. Citing the *Harris* dissent, the Court reasoned that this was not "the most reasonable explanation" of the state court's holding and that not all constitutional errors would be "fundamental" under state law. *Id.*

230. *Id.* at 547–48 (Stevens, J., dissenting).

231. *See* Brief for Petitioner at 33 n.38, Sochor v. Florida, 504 U.S. 527 (1992) (No. 91-5843); Brief on the Merits in Support of Respondent at 37 n.24, *Sochor*, 504 U.S. 527 (No. 91-5843).

232. Brief on the Merits in Support of Respondent, *supra* note 231, at 37 n.24.

233. Brief for Petitioner, *supra* note 231, at 33 n.38; *see also* Oral Argument at 22:32, *Sochor*, 504 U.S. 527 (No. 91-5843), http://www.oyez.org/cases/1991/91-5843 [http://perma.cc/2DYD-QG5X] (questioning petitioner's counsel about whether an alternative holding overcomes a procedural bar).

234. See *supra* note 206 and accompanying text quoting *Harris*'s footnote ten.

235. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that "new" rules of constitutional law—those created after the conclusion of petitioner's direct review—could not be retroactively applied on federal habeas. *Teague*, 489 U.S. at 310.

236. *Compare* Wright v. West, 505 U.S. 277, 291–94 (1992) (Thomas, J., plurality), *with id.* at

Congress fundamentally changed the habeas landscape by passing AEDPA.[237] The Act added a statute of limitations for habeas claims and amended § 2254(d) to preclude relief on a

> claim that was adjudicated on the merits in State court proceedings 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, as determined by the Supreme Court of the United States; 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.[238]

1. Deference: Unpacking AEDPA and Defining "Adjudications on the Merits"

The statute does not define the term "adjudicated on the merits." The Court has provided some guidance, saying it refers to the actual grounds of the state court's ruling, rather than the reasons in its opinion.[239] Although the Court has been reluctant to impose substantive standards that might limit what counts as an adjudication on the merits,[240] it views the on-the-merits requirement as separate from and additional to the adjudication requirement.[241] The Court has held that "on the merits" means "delivered after the court heard and evaluated the evidence and the parties' substantive arguments" based on "the intrinsic rights and wrongs of [the] matter, in contradistinction to extraneous points such as the competence of the tribunal[,] . . . procedural details, technicalities, [or]

307–10 (Kennedy, J., concurring in the judgment), *and id.* at 297 (O'Connor, J., concurring in the judgment).

237. Pub. L. No. 104-132, 110 Stat. 1218 (1996) (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 19 U.S.C., 21 U.S.C., 22 U.S.C., 28 U.S.C., 40 U.S.C., 42 U.S.C., 49 U.S.C., and 50 U.S.C.); *see also* Marceau *supra* note 81, at 1236 n.22 (arguing that § 2254(d) is different than any other limitation placed on federal habeas).

238. 28 U.S.C. § 2254(d) (2012). Despite its similarities, *Teague*'s retroactivity principle, discussed *supra* note 235, is a separate inquiry than AEDPA deference. *See* Horn v. Banks, 536 U.S. 266, 270–72 (2002) (applying the *Teague* retroactivity analysis after finding the state court decision unreasonable under AEDPA).

239. Harrington v. Richter, 562 U.S. 86, 98 (2011) ("There is no text in the statute requiring a statement of reasons."). Although Congress uses the phrase "adjudicated on the merits" in other contexts, these adjudications generally receive different treatment than those under § 2254(d). *See, e.g.*, Craighead v. E.F. Hutton & Co., 899 F.2d 485, 495 (6th Cir. 1990) (applying res judicata to dismissals under FED. R. CIV. P. 12(b)(6)).

240. *See* Johnson v. Williams, 133 S. Ct. 1088, 1099–100 (2013) (Scalia, J., concurring). In *Johnson*, Scalia argued that "'decided after due consideration' is not . . . the meaning of the legal term of art 'decided on the merits.'" *Id*. at 1099. It "does not suggest a line between a *considered* rejection of a claim and an *unconsidered*, *inadequately considered*, or *inadvertent rejection*." *Id.* at 1100. "Rather," he argued, "it refers to a 'determination that there exist or do not exist grounds entitling a petitioner' to relief under his claim, as contrasted with a 'denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Id.* (quoting Gonzalez v. Crosby, 545 U.S. 524, 532 n.4 (2005)).

241. *Id.* at 1097 (majority opinion).

personal feelings."[242] However, the case law still does not clearly explain what relationship, if any, exists between "adjudications on the merits" under the statute and traditional decisional concepts such as precedent and preclusion.[243]

Where there is an adjudication on the merits, relief can only be granted if one of AEDPA's restrictive conditions are met.[244] Under § 2254(d)(1), it is not enough for the state court to incorrectly apply federal law; an adjudication is only "unreasonable" if all fair-minded jurists would agree that the state court either misconstrued or misapplied the "holdings, as opposed to the dicta," of the United State Supreme Court, as they stand at the time of the state court's decision.[245]Alternatively, to obtain relief under § 2254(d)(2), a petitioner must show that the state court unreasonably credited the evidence in front of it in determining the facts on which the merits adjudication rested.[246]

Section 2254(d) is designed to be extremely deferential. AEDPA gives the state court "the benefit of the doubt" when it has adjudicated a claim on the merits[247] and "confirm[s] that state courts are the principle forum for asserting constitutional challenges to state convictions."[248] AEDPA was deliberately designed to provide petitioners with fewer reversals and shorter review,[249] thereby "promoting comity, finality, and federalism."[250] The floor debates over the statute repeatedly brought up concerns about protracted postconviction litigation dragging the families of victims into court without any assertion of

242. *Id.* (emphasis omitted) (first quoting *On the Merits*, BLACK'S LAW DICTIONARY (9th ed. 2009); then quoting 9 OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989); and then quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 897 (1967)); *accord* Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) (defining "on the merits" as "a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." (quoting Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001))); Neal v. Puckett, 286 F.3d 230, 235 (5th Cir. 2002) (similar); *see also* Hittson v. GDCP Warden, 759 F.3d 1210, 1231–32 (11th Cir. 2014) (holding that the state court's perfunctory denial of a certificate of probable cause to appeal the state habeas decision was on the merits because the statute authorizing a certificate requires issuance of appeal where the claim has arguable merit and the state court had the benefit of a developed record, transcripts from the lower court, and briefing on the merits).

243. See *supra* Part II.C.1 for a discussion of the ambiguities surrounding decisional concepts, including holdings, judicial dicta, preclusion, and alternative holdings.

244. Andrew L. Adler, *The Non-Waivability of AEDPA Deference's Applicability*, 67 U. MIAMI L. REV. 767, 788–94 (2013) (arguing that § 2254(d) deference cannot be waived).

245. Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)); *accord* Cullen v. Pinholster, 563 U.S. 170, 182 (2011). This standard does not apply to circuit or district court opinions. *Williams*, 529 U.S. at 379.

246. *See* Rice v. Collins, 546 U.S. 333, 338 (2006) ("Thus, a federal habeas court can only grant [this] petition if [the state court unreasonably] credit[ed] the prosecutor's race-neutral explanations for the Batson challenge.").

247. Woodford v. Visciotti, 537 U.S. 19, 24 (2002). Since AEDPA was passed, it is estimated that less than four-tenths of one percent of petitioners get relief. Adler, *supra* note 244, at 771.

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

249. Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 183–84, 184 n.36 (2002).

250. *Pinholster*, 563 U.S. at 185 (quoting Jimenez v. Quarterman, 555 U.S. 113, 121 (2009)).

actual innocence.[251] During the floor debates, the Senate suggested that petitioners should receive "only one bite out of the apple," citing concerns about lengthy delays in executions and petitioners who receive six rounds of review before even reaching federal habeas review.[252] Debate focused on reducing the delay of imposing punishments "without unduly limiting the right of access to Federal courts."[253] Despite the statements by President Clinton to the contrary,[254] the import of AEDPA is to limit duplicative review by federal courts.[255]

2. *Cullen v. Pinholster*: A Necessary Digression into Fact-Finding Procedures

The amendments to § 2254(d) significantly curtailed fact-finding mechanisms for habeas review. Factual determinations made by a state court are presumed correct, and a federal court is not allowed to grant an evidentiary hearing where the petitioner "failed to develop the factual basis of a claim in State court proceedings," except under very limited circumstances.[256] Moreover, habeas petitioners can only obtain discovery for good cause shown.[257]

In *Cullen v. Pinholster*, the Court further limited fact-finding procedures, interpreting § 2254(d) to mean that if the state court adjudicated a claim on the merits, the federal habeas court would be confined to the record that was before the state court and could not consider new evidence or grant an evidentiary hearing.[258] No circuit has decided whether this restriction also applies to granting discovery.[259] This is especially troubling because many state courts deny claims

251. 141 CONG. REC. 7,596 (1995) (statement of Sen. Orrin Hatch). *But see* 142 CONG. REC. 3,446 (1996) (statement of Sen. Orrin Hatch) (discussing deferential review in light of the many existing levels of review, but also describing § 2254(d) as "de novo [review of] whether the State court decided the claim in contravention of Federal law").

252. 141 CONG. REC. 7,483 (1995) (statement of Sen. Joe Biden); *see also* Adler, *supra* note 244, at 772–73.

253. 141 CONG. REC. 7,596 (1995) (statement of Sen. Orrin Hatch).

254. *See* Press Release, President Clinton, Office of the Press Sec'y, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (April 24, 1996), http://www.presidency.ucsb.edu/ws/?pid=52713 [http://perma.cc/ZSY5-L87T].

255. Glidden, *supra* note 249, at 183–84, 184 n.36.

256. 28 U.S.C. § 2254(e) (2012). This restriction does not apply if the petitioner tries to develop the record in state court but is unsuccessful. Williams v. Taylor, 529 U.S. 420, 434–35 (2000).

257. A habeas petitioner is not entitled to discovery as a normal civil litigant would be. Bracy v. Gramley, 520 U.S. 899, 904 (1997). However, "[a] judge may, for good cause, authorize a party to conduct discovery." Rules Governing Section 2254 Cases in the United States District Courts R. 6(a) (2010), http://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf [http://perma.cc/K4VK-YD75].

258. *Pinholster*, 563 U.S. at 185–87.

259. For cases addressing this issue, see generally Rega v. Wetzel, No. 2:13-CV-1781, 2014 WL 4079949, at *9 n.2 (W.D. Pa. Aug. 18, 2014); Showers v. Kerestes, No. 11-950, 2012 WL 1463313, at *2–3 (W.D. Pa. Apr. 27, 2012); Romero v. Beard, No. 08-0528, 2011 WL 3862317, at *3–12 (E.D. Pa. Aug. 31, 2011); Preik v. Dist. Attorney of Allegheny Cty., No. 2:10-cv-01612, 2011 U.S. Dist. LEXIS 100417, at *53–54, *53 n.3 (W.D. Pa. Aug. 12, 2011); Walden v. Schriro, No. CV 99-559-TUC-RCC, 2006 WL 2872485, at *1–4 (D. Ariz. Oct. 6, 2006); Order on Motion for Discovery ¶ 5, Miller v. Beard, No. 10-

on the merits for being "speculative," without granting an evidentiary hearing or discovery—a phenomenon that has bothered even some state court judges.[260] Moreover, in many instances, the discovery standards in state court are much more limited than in federal court.[261]

E. Reinterpreting the Ambiguities in Light of Higher Stakes: The Baggage of Precedent

Under AEDPA, determining what constitutes an adjudication on the merits is vital. However, pre-AEDPA ambiguities have given rise to new problems, and federal courts have struggled to reconcile earlier jurisprudence with AEDPA's deferential scheme.

1. Applying Precedent to Find the Grounds of Decision: *Harris* and the "Binary Situation"

The *Harris* presumption (i.e., the plain statement rule) was preserved under AEDPA.[262] In *Jimenez v. Walker*,[263] the Second Circuit ruled that AEDPA deference was "due to a state court's rejection of a federal claim as 'either unpreserved . . . or without merit'"[264] because that phrase does not constitute a plain statement of forfeiture under *Harris*.[265] The court noted that if the *Harris* presumption applied to AEDPA, it would create a

> binary situation . . . in which we either apply AEDPA deference . . . or refuse to review the claim because of a procedural bar. But if the presumption does not apply under AEDPA [we might be faced with situations where we deem] a state court to have decided a federal claim on its merits (negating the existence of a procedural bar) while simultaneously deeming the state court's decision to not rest on the merits of the federal claim (negating AEDPA deference).[266]

The court presumed a merits adjudication[267] because *Harris*'s "predictive and administrative foundations" did not indicate that it was intended to maximize potential relief.[268] It said, however, that if a decision appears to rest on the merits, but there is a plain statement of default, "[n]o AEDPA deference is

3469 (E.D. Pa. Oct. 13, 2011); Order on Motion for Discovery at 1 n.1, Uderra v. Beard, No. 05-1094 (E.D. Pa. Feb. 9, 2009).

260. *See, e.g.*, Commonwealth v. Keaton, 45 A.3d 1050, 1095 (Pa. 2012) (Saylor, J., dissenting) (expressing this concern in relation to a *Strickland* claim).

261. *See, e.g.*, PA. R. CRIM. P. 902(E) (requiring a showing of exceptional circumstances).

262. Harrington v. Richter, 562 U.S. 86, 99 (2011).

263. 458 F.3d 130 (2d Cir. 2006).

264. *Jimenez*, 458 F.3d at 133.

265. Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 810 (2d Cir. 2000).

266. *Jimenez*, 458 F.3d at 136–37 (footnote omitted) (citations omitted); *accord* DeBerry v. Portuondo, 403 F.3d 57, 70–72 (2d Cir. 2005).

267. *Jimenez*, 458 F.3d at 137 n.4 (concluding that "the term 'on the merits' in AEDPA takes the same meaning as it does in the procedural-bar context").

268. *Id.* at 145–46 (rejecting a "middle ground" wherein neither § 2254(d) nor a procedural bar apply (citing Shih Wei Su v. Filion, 335 F.3d 119, 126 n.3 (2d Cir. 2003))).

due . . . but the state may . . . assert that habeas relief is foreclosed" absent cause and prejudice.[269] This "binary" view can be seen in pre- and post-AEDPA decisions.[270]

Similarly, in *Harrington v. Ritchter*,[271] the presumption was applied to perfunctory opinions—opinions denying a claim without explanation.[272] The Court explained that § 2254(d) relies on the actual grounds of the state court decision and does not require a written opinion.[273] Therefore, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[274]

2. Alternative Holdings: *Brooks v. Bagley* and Distinctions Without Differences

Most, if not every, circuit court that has addressed the issue of forfeiture-merits rulings has, often without explanation, applied AEDPA deference to the state court decision.[275] In *Brooks v. Bagley*,[276] the Sixth Circuit offered three reasons to afford AEDPA deference to forfeiture-merits holdings.[277] First, although the state court did not have to address the "merits once it identified a procedural bar, it surely had the authority to do so. . . making this additional ground no less a 'claim . . . adjudicated on the merits' . . . than if the case had not

269. *Id.* at 145.

270. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 134 n.44 (1982) (noting that if the state relied on plain error review, federal review is allowed); Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); James v. Ryan, 733 F.3d 911, 914 (9th Cir. 2013) (asking "whether a state court's decision is an adjudication on the merits or a procedural bar"); Mercadel v. Cain, 179 F.3d 271, 274–75 (5th Cir. 1999) (per curiam) (noting the binary between AEDPA deference and the procedural bar doctrine); Whitmore v. Avery, 63 F.3d 688, 691 (8th Cir. 1995) (Heaney, J., dissenting) (similar); Resnover v. Pearson, 965 F.2d 1453, 1458 (7th Cir. 1992) (similar); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981) (holding, prior to *Harris*, that *Sykes* does not bar review where a state court reaches the merits).

271. 562 U.S. 86 (2011).

272. *Harrington*, 562 U.S. at 98–100.

273. *Id.* at 98–99; *see also* Johnson v. Williams, 133 S. Ct. 1088, 1094 (2013) (applying presumption where state court addressed some claims but not others).

274. *Harrington*, 562 U.S. at 99. Consistent with pre-AEDPA practice, federal courts determine the basis of perfunctory opinions by "look[ing] through" them to the last explained state court opinion addressing the claim. Hittson v. Chatman, 135 S. Ct. 2126, 2128 (2015) (citing Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991)). If no prior opinion exists, the presumption can be overcome by affirmative evidence that the claim was overlooked or by state law principles indicating that the merits were not reached. *Johnson*, 133 S. Ct. at 1094–96.

275. *See* Rolan v. Coleman, 680 F.3d 311, 319–21 (3d Cir. 2012); Hoffner v. Bradshaw, 622 F.3d 487, 505 (6th Cir. 2010); Sharpe v. Bell, 593 F.3d 372, 382 (4th Cir. 2010); Stephens v. Branker, 570 F.3d 198, 208 (4th Cir. 2009); Brooks v. Bagley, 513 F.3d 618, 624–25 (6th Cir. 2008); Zarvela v. Artuz, 364 F.3d 415, 417 (2d Cir. 2004); Busby v. Dretke, 359 F.3d 708, 721 (5th Cir. 2004); Crawford v. Head, 311 F.3d 1288, 1324 (11th Cir. 2002); Johnson v. McKune, 288 F.3d 1187, 1192 (10th Cir. 2002); Bacon v. Lee, 225 F.3d 470, 478 (4th Cir. 2000); *see also* James v. Ryan, 733 F.3d 911, 915 (9th Cir. 2013) (noting that if the state court made an alternative holding, it might apply AEDPA deference); Taylor v. Norris, 401 F.3d 883, 886 (8th Cir. 2005).

276. 513 F.3d 618 (2008).

277. *Brooks*, 513 F.3d at 624.

presented a procedural-bar at all."[278] The court saw "no material difference between this type of alternative ruling" and one where a court rules on both prongs of a *Strickland* claim.[279] Second, the court said that alternative holdings "favor judicial practices that in the main will benefit both sides. . . . It is the rare criminal defendant [or prosecutor] who would prefer that the state courts *not* reach the merits of his constitutional claim."[280] Alternative holdings "show a prisoner . . . that it was not merely a procedural technicality that precluded him from obtaining relief."[281] Finally, the court invoked *Harris*'s footnote ten:

> Just as a state court wishing to invoke an independent and adequate state ground to dispose of a case "need not fear reaching the merits of a federal claim in an alternative holding," so it need not fear losing the benefit of the doubt that AEDPA gives to state court rulings whenever it invokes an independent and adequate state ground as an alternative holding.[282]

If forfeiture-merits rulings require AEDPA deference, then the habeas court must decide whether the state court actually made a forfeiture-merits holding, forgave its procedural bar, or merely opined on the merits.[283] As the Supreme Court noted in *Harrington*, AEDPA requires the basis of the decision to be the merits.[284] The state court cannot merely "assume without deciding" that the claim would fail on the merits.[285] Thus, where a state court merely expresses doubt that a defaulted claim would succeed absent the forfeiture, the most likely basis of the ruling is procedural.[286]

In *Bell v. Miller*,[287] the Second Circuit applied this rule to counterfactuals.[288] In *Bell*, the petitioner failed to raise a *Strickland* claim on direct appeal.[289] The state habeas court found that the claim was therefore defaulted, denied it without a hearing, and then said, "[b]ut if the merits were reached, the result would be the same."[290] The circuit court found that there was

278. *Id.*

279. *Id.* The court's only citation at this point was to *Wiggins v. Smith*, 539 U.S. 510 (2003), with a parenthetical reading "applying AEDPA deference to those prongs of *Strickland* that the state courts 'reached.'" *Id.*

280. *Id.*

281. *Id.* (omission in original) (quoting Carey v. Saffold, 536 U.S. 214, 226 (2002)).

282. *Id.* (citations omitted) (quoting Harris v. Reed, 489 U.S. 255 (1989)); *see also, e.g.*, Rolan v. Coleman, 680 F.3d 311, 319–21 (3d Cir. 2012).

283. See *supra* notes 175–180 and accompanying text for a discussion of these options prior to AEDPA.

284. Harrington v. Richter, 562 U.S. 86, 98 (2011).

285. Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 461 n.5 (6th Cir. 2015).

286. *Id.* at 461 ("[T]he state trial court did, in dicta, appear to consider some of the substantive aspects behind Barton's claim. . . . [But it] went on to note that it 'ha[d] *strong reservations* as to what limited relevant evidence would have been admitted had the defense attempted to raise the matter at trial.'" (third alteration in original)).

287. 500 F.3d 149 (2d Cir. 2007).

288. *Bell*, 500 F.3d at 155.

289. *Id.* at 151–53.

290. *Id.* at 153–54.

no adjudication on the merits: "[T]he disposition was not premised on the court's view of the merits. The discussion of the merits was preceded by a contrary-to-fact construction: '*if* the merits *were* reached, the result *would* be the same.' And a contrary-to-fact construction is not the same as an alternative holding."[291] By contrast, the Second Circuit has found an adjudication on the merits where the state court ruled that a claim was "unpreserved . . . and *in any event* . . . without merit."[292]

General alternative holding jurisprudence is applicable to forfeiture-merits holdings. In *Gumm v. Mitchell*,[293] the Sixth Circuit held that the state court could not alternatively rule on the merits where the procedural bar was jurisdictional.[294] Ohio's res judicata statute conditioned the state court's ability to "entertain" a claim on a finding of "outcome-determinative constitutional error by clear and convincing evidence."[295] The state court fully analyzed the record before denying the prejudice prong of the *Brady* claim, and therefore, the prerequisite to entertaining the claim was not met.[296] The circuit court found that this was not an alternative holding and that AEDPA did not apply because any judgment made without jurisdiction was void ab initio.[297]

Courts must also contend with safety-valve exceptions.[298] In *Fleming v. Metrish*,[299] the petitioner raised a Fifth Amendment claim at a pretrial *Walker* hearing.[300] However, the trial court took a limited view of *Walker* hearings, saying the "only issue" was whether the confession was voluntary.[301] The state appellate court held that the claim was forfeited because it was not addressed at the *Walker* hearing and that the petitioner could only obtain relief if he showed plain error.[302] The state court held "that the admission of [petitioner's] statements was not plainly erroneous, and that [petitioner] may not avoid forfeiture of this issue."[303]

291. *Id.* at 155 (quoting the state court opinion). The federal district court found the procedural bar inadequate because it was not consistently applied to *Strickland* claims, which usually have to be raised on collateral review because they cannot be raised during the initial trial. *Id.* at 154.

292. Zarvela v. Artuz, 364 F.3d 415, 417 (2d Cir. 2004) (emphasis added).

293. 775 F.3d 345 (6th Cir. 2014).

294. *Gumm*, 775 F.3d at 362. See *supra* notes 167–172 and accompanying text for a discussion of *Honomu*.

295. *Id.* at 362.

296. *Id.* at 361.

297. *Id.* at 362.

298. See *supra* notes 177–180 and accompanying text for a discussion of the issues created by exceptions.

299. 556 F.3d 520 (6th Cir. 2009).

300. *Fleming*, 556 F.3d at 524. *Walker* hearings are a construction of Michigan state law and determine the voluntariness of confessions before trial. *Id*. *See generally* Michigan v. Mosley, 423 U.S. 96 (1975).

301. *Id.* (first and third alterations and omission in original) (quoting the trial court opinion).

302. People v. Fleming, No. 228731, 2002 WL 988568, at *1 (Mich. Ct. App. May 14, 2002). Plain error review requires a showing that (1) there was error, (2) it was plain, and (3) it affected a substantial right. *Id*. It is a higher standard than de novo review. *See id.*

303. *Id.* at *2.

The Sixth Circuit ruled that the claim was not forfeited. The State conceded that the claim was raised in state court but argued that "the Fifth Amendment issue was not *properly* raised" because *Walker* hearings are limited to the issue of voluntariness.[304] Petitioner argued that the scope of *Walker* hearings under Michigan law includes "all issues of admissibility of a defendant's statements."[305] The court agreed with petitioner and added that "the state's concession that the *Miranda* issue 'had been raised in state court' negates a finding of procedural default."[306] However, after reviewing its precedents, the court ruled that plain error review reaches the merits, and applying § 2254(d), found that petitioner was still not entitled to relief.[307]

Dissenting in part, Judge Clay objected to the use of AEDPA deference, saying that "[b]y its very terms . . . AEDPA applies only to any claim that was *adjudicated on the merits* . . . . not, more broadly speaking, whenever a state court merely addresses . . . the merits of the claim."[308] Plain error review, he asserted, is not a merits adjudication.[309] Judge Clay argued that plain error review "does not open up the merits any wider for consideration by the federal court"[310] and should be seen as a means of enforcing a procedural bar and the state court's "right to overlook procedural defects."[311] Furthermore, plain error review places a greater burden on petitioners, and the Michigan court "did not consider the merits of Fleming's claim outside the context of its plain-error inquiry."[312] "If the federal courts have rejected the state court's 'analytically prior' ruling that a claim has been procedurally defaulted, then there is no justification for the federal courts to be bound by the *effects* of that determination, *i.e.*, the application of a more burdensome safety valve standard."[313] Judge Clay argued that "Fleming is entitled to a full review of the merits of his claim" because he "properly raised his . . . claim before the trial court, and pressed that claim at

304. *Fleming*, 556 F.3d at 525 (emphasis added).

305. *Id.* (quoting People v. Ray, 431 Mich. 260, 272 (Mich. 1988)).

306. *Id.* (citations omitted).

307. *Id.* at 530.

308. *Id.* at 538 (Clay, J., dissenting in part) (emphasis added) (internal quotation marks omitted).

309. *Id.* (stating that deference would be "contrary to controlling authority, illogical, and manifestly unjust").

310. *Id.* at 541 (quoting Neal v. Gramley, 99 F.3d 841, 844 (7th Cir. 1996)).

311. *Id.* at 539.

312. *Id.* at 538. Judge Clay rejected the argument that plain error review "simply made reversal of the state trial court's judgment less likely, but did not cause the Michigan Court of Appeals to bypass the merits." *Id.* at 540. It was precisely this higher standard, he argued, that led prior courts to find no adjudication on the merits. *Id.* at 540–41. One of the main sources of contention between the dissent and the majority was the interpretation of several Sixth Circuit cases. Most of these cases did not directly support Judge Clay. For the most part, the cases Judge Clay cited stand for the less remarkable proposition that plain error review does not waive a procedural bar. *But see* Jells v. Mitchell, 538 F.3d 478, 511 (6th Cir. 2008) ("[T]he [state] court's plain-error review is not considered a review on the merits, and therefore Jells has procedurally defaulted on this claim if no exception is applicable.").

313. *Fleming*, 556 F.3d at 542.

every stage of his state court proceedings."[314] Other circuits are split on this issue, with only a few following this approach.[315]

Although almost every circuit to address forfeiture-merits rulings has cited *Harris* (which said the procedural bar should apply),[316] only one court has ever applied both AEDPA deference and the procedural bar.[317] However, if both *Brooks* and *Harris* are good law, it would seem to follow that both AEDPA deference and the procedural default would apply in such cases. The following Discussion will demonstrate that AEDPA deference in such cases is not required by the statute or precedent and will advocate to reverse the current circuit trend of applying AEDPA deference to forfeiture-merits rulings.

III. DISCUSSION

When a state court makes a forfeiture-merits ruling, the federal habeas court should treat the claim as procedurally barred, per *Harris*, but should not apply AEDPA deference to the state court decision. Current treatment of alternative holdings by the circuit courts stems from a misconstruction of *Harris* and of alternative holdings generally.[318] Moreover, applying AEDPA deference to forfeiture-merits holdings creates pernicious results for civil rights claims and degrades the relationship between state and federal courts.[319]

This Comment is designed to give advocates and circuit courts the tools to reverse the current trend of applying AEDPA deference. An honest look at case law, alternative holding jurisprudence, and considerations of equity reveals why AEDPA deference need not and should not apply to forfeiture-merits rulings. Part III.A of this Section discusses the preliminary issue of why federal courts are not required to apply AEDPA deference to forfeiture-merits holdings. Part III.B discusses why courts should not apply AEDPA deference. Part III.B.1 reconciles this author's recommendations with *Harris*. Part III.B.2 shows that forfeiture-merits holdings are "materially different" from other alternative holdings because they logically and practically ignore state procedural rules and that alternative holdings are never necessarily "adjudications on the merits." Part III.B.3 discusses why applying AEDPA deference is bad judicial policy. Finally, Part III.C proposes a satisfactory resolution to the treatment of forfeiture-merits holdings.

314. *Id.* at 538.

315. *See, e.g.*, *Jells*, 538 F.3d at 511; *see also* Thomas v. Gilmore, 144 F.3d 513, 518 (7th Cir. 1998); Roy v. Coxon, 907 F.2d 385, 389–91 (2d Cir. 1990).

316. *See, e.g.*, Velasquez v. Leonardo, 898 F.2d 7, 9 (2d Cir. 1990) (citing *Harris* prior to AEDPA's passage).

317. Crawford v. Head, 311 F.3d 1288, 1326–28 (11th Cir. 2002). Other exceptions might include *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009) and *Busby v. Dretke*, 359 F.3d 708 (5th Cir. 2004). Interestingly, the petitioner in *Head* was able to overcome § 2254(d)(1) deference *and* show cause for his default but could not show prejudice. 311 F.3d at 1326–28.

318. *See infra* Part III.B.1.

319. *See infra* Part III.B.3.

A. Federal Courts Are Not Required to Apply AEDPA Deference to Alternative Holdings

AEDPA does not mandate deference to forfeiture-merits holdings. While federal habeas courts must apply § 2254(d) when the state court adjudicated the claim on the merits, the statute does not define "adjudicated on the merits."[320] Case law indicates that it is the grounds of the disposition, not what the court did or did not opine on, that determines whether a claim was "adjudicated on the merits."[321] AEDPA says nothing about alternative holdings, so federal courts will only be required to apply AEDPA deference if the *federal courts* interpret forfeiture-merits rulings as resting on the merits.

The Supreme Court's definition of "adjudicated on the merits"[322] is unhelpful in this analysis because, although it distinguishes merits rulings from procedural rulings, it does not indicate whether those rulings are mutually exclusive. Indeed, because the Court has not given much color to its definition, it has left the door open to this author's final recommendations. Similarly, the legislative materials regarding AEDPA are ambiguous about whether the courts must apply AEDPA deference in these cases.[323] The floor debates never mention alternative holdings. Despite a clear intent to limit federal review, the floor debates seem to indicate an intent to provide some chance at de novo review by either the state or federal court: "one bite at the apple."[324] However, as discussed below, fair de novo review is unlikely when the state court alternatively rules on procedural grounds.[325] Furthermore, Congress's concern over drawn-out postconviction review is not implicated by forfeiture-merits holdings[326] because witnesses are not likely to be dragged into court multiple times in these cases[327] and because AEDPA's statute of limitations will still apply.[328] Accordingly, congressional intent does not demand AEDPA deference.

It is no answer to say that § 2254(d) is jurisdictional.[329] *Long*[330] showed that the Court can use interpretive tools to bypass jurisdictional rules that depend on the actual grounds of state court rulings.[331] This author is not suggesting that

320. See Part II.D.2 for this interpretation of AEDPA.

321. See *supra* notes 271–74, 285–86 and accompanying text for a discussion of *Harrington*, *Johnson*, and *Barton*.

322. See *supra* notes 239–42 and accompanying text for a discussion of the Court's definition.

323. See *supra* notes 251–53 for a discussion of the floor debates on AEDPA.

324. *See supra* notes 251–53 and accompanying text.

325. *See infra* notes 431–40 and accompanying text.

326. See *supra* note 252 and accompanying text for a description of this concern.

327. See *infra* notes 421–25 and accompanying text for the argument that evidentiary development is unlikely to occur in state court. No one will have to come to court if there are no hearings.

328. *See supra* note 238 and accompanying text.

329. *See generally* Adler, *supra* note 244.

330. *Long* held that, where the state court decision fairly appears to rest on federal grounds, federal courts will take jurisdiction in the absence of a plain statement that the decision rested on independent and adequate state grounds. *See supra* notes 192–96 and accompanying text.

331. See Part II.C.2 for a discussion of *Long*.

federal courts should not apply § 2254(d) to an adjudication on the merits but rather that they should interpret forfeiture-merits rulings as resting only on procedural grounds. Furthermore, in line with the Court's resistance to qualitative evaluations of state court proceedings,[332] this author's proposal would create a bright-line rule—ensuring the doctrinal consistency the *Long* Court said was essential, while still protecting state interests. Interpreting forfeiture-merits rulings as resting solely on procedural grounds would preserve the binary situation noted in *Jimenez* and other case law,[333] respond to the arguments in *Brooks*, and represent the soundest judicial policy.

B. Federal Courts Should Not Apply AEDPA Deference to Forfeiture-Merits Rulings

The *Brooks*[334] court gave three justifications for applying AEDPA deference to forfeiture-merits rulings: (1) that *Harris*, which applied *Long*'s plain statement rule to habeas cases, requires AEDPA deference in such cases; (2) that state courts have the power to make such rulings; and (3) that such rulings represent sound judicial policy.[335] This Part will address and rebut each of these points.

1. De Novo Review Is Consistent with *Harris v. Reed*

The *Brooks* court tried to justify the application of AEDPA deference by citing *Harris*'s footnote ten.[336] However, there are three reasons why neither *Harris* nor the cases interpreting it decided whether forfeiture-merits holdings are adjudications on the merits. First, *Harris* found that the state court did not make an alternative holding.[337] The sole issue in the case was whether the state court relied on the procedural bar, and the Court ruled in the negative.[338] Similarly, *Sochor*,[339] which found a plain statement of default by the state court, did not reach the issue of whether the state court could alternatively rule on the merits because it found no cause or prejudice.[340] Second, neither *Harris* nor *Sochor* had reason to decide whether "alternative holdings" were "adjudications on the merits" because both were decided before AEDPA was passed.[341]

332. See, for example, *supra* note 240 for Justice Scalia's concurrence in *Johnson*.

333. See *supra* notes 262–66 and accompanying text for a discussion of the binary situation.

334. *Brooks* found that AEDPA deference should apply to forfeiture-merits holdings. *See supra* notes 276–82 and accompanying text.

335. *See* Brooks v. Bagley, 513 F.3d 618, 624 (2008).

336. *See supra* notes 276–82 and accompanying text. *Harris* extended the *Long* plain-statement rule to habeas corpus cases. Footnote ten suggested that claims are still procedurally defaulted where the state court makes an "alternative holding." *See supra* note 206 and accompanying text.

337. *See supra* note 210–11 and accompanying text.

338. *See supra* note 210–11 and accompanying text.

339. *Sochor*, unlike *Harris*, found a plain statement of forfeiture in the state court's forfeiture-merits holding. *See supra* notes 228–29 and accompanying text.

340. See *supra* notes 228–29 and accompanying text for a discussion of *Sochor*.

341. The *Harris* court would not have found *Teague* or the 1966 statute instructive on the issue of alternative holdings. *Teague* does not involve deference or "adjudications on the merits," *see supra*

Third, *Brooks*'s interpretation of *Harris* is not supported by the *Harris* opinion when read as a whole. The purpose of *Harris*, like *Long*, was to create a rule of judicial administration that relieves federal courts from having to decide whether the state court forgave a procedural default.[342] In fact, despite Justice Kennedy's extensive discussion of safety-valve exceptions, the only instance where alternative holdings were mentioned outside of footnote ten was a single paragraph of Justice Kennedy's dissent arguing that the independent and adequate state ground doctrine has historically been limited to substantive, rather than procedural, *state* grounds.[343] Applying AEDPA deference to forfeiture-merits holdings defeats the administrative purposes of *Harris* by requiring the habeas court to determine if the state court ruled in the alternative or merely applied a safety-valve rule.[344] Indeed, the *Harris* presumption—which only applies to decisions that fairly appear to rest on federal grounds—would not serve *Long*'s administrative purposes if state courts could alternatively rule on the merits because, as the dissents in *Harris* and *Sochor* point out, a merits discussion would never indicate that the state court did not also rely on the procedural rule.[345] Moreover, *Long* tried to determine whether the state court cited federal law only as persuasive authority (as opposed to adjudicating a federal question) because it was concerned with protecting the uniformity of federal law.[346] This goal is defeated where the state court reaches the merits in the alternative.[347]

Harris allowed state courts to foreclose federal habeas review "to the extent permitted by *Sykes*."[348] But giving AEDPA deference to forfeiture-merits

note 235, and the Court has not cited the 1966 statute in interpreting the adjudication requirement under AEDPA. See *supra* note 90 and accompanying text for mention of the 1966 statute's "determination after a hearing on the merits" provision.

342. Harris v. Reed, 489 U.S. 255, 265 n.11 (1989).

343. *See supra* notes 212–223 and accompanying text. Notably, both footnote ten and the paragraph in the dissent cited *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935)), which bypassed the issue of whether the state court actually produced an alternative holding. *See supra* note 206. More importantly, Justice Kennedy ends the paragraph by saying that "where a state court *refuses to consider federal claims* owing to a criminal defendant's failure to comply with a state procedural rule that is otherwise adequate and independent, we lack authority to consider the claims on direct review." *Harris*, 489 U.S. at 272 (Kennedy, J., dissenting) (emphasis added).

344. Of course, at least part of this conundrum would be alleviated if the Court adopted the position taken in *Fleming*. However, it emphatically should *not* adopt that position because, for all of the reasons stated in Judge Clay's dissent, *Fleming v. Metrish*, 556 F.3d 520, 537–57 (6th Cir. 2009) (Clay, J., dissenting), the grounds of plain-error rulings are *procedural*.

345. Nor could the presumption be rebutted by a showing of "procedural principles to the contrary." Harrington v. Ritcher, 562 U.S. 86, 99–100 (2011). It would only be triggered if the state court applies a safety-valve that is coterminous with federal law. Applying the safety-valve raises questions of independence and of whether the default was forgiven, as the Court says in footnote eleven of *Harris*. *See supra* notes 207, 214–16 and accompanying text.

346. *See supra* notes 187–96 and accompanying text.

347. *See supra* note 196 and accompanying text. But see *infra* notes 402–06 and accompanying text for the argument that alternative holdings could be judicial dicta.

348. Harris v. Reed, 489 U.S. 255, 264 (1989). *Sykes* established the cause and prejudice standard for state prisoners. *See supra* notes 102–110 and accompanying text.

rulings would subvert the *Sykes* rationale for deferring to state procedural rules[349] and doing so would raise doubts about many other pre-AEDPA cases.[350] *Sykes* was based on the state interests served by contemporaneous objections[351] and involved federal questions, "*which were not resolved on the merits in the state proceeding* due to respondent's failure to raise them there as required by state procedure."[352] These considerations led the *Sykes* Court to hold that state rules should receive the same respect as their federal counterparts.[353] Yet there is no reason to afford state procedural rules the same respect as their federal counterparts if they serve no state interest in the case at bar and, unlike their federal counterparts, allow the state court to reach the merits anyway.[354] Even the State's brief in *Harris* argued that reaching the merits requires an exception to the forfeiture.[355] Similarly, the State's brief in *Sochor* went out of its way to say there was no merits adjudication in the state court.[356] Indeed, in *Jimenez*,[357] the Sixth Circuit interpreted *Harris* as envisioning a "binary situation . . . in which we *either* apply AEDPA deference . . . *or* refuse to review the claim because of a procedural bar,"[358] which accords with the language in *Sykes*. Accordingly, the *Brooks* court's reliance on *Harris* to support AEDPA deference is misplaced because it is not supported by *Harris*'s holding or purposes.

2. The State Courts Do Not Have the Power to Make Forfeiture-Merits Rulings

Brooks asserted that state courts have the power to make forfeiture-merits holdings.[359] In making this point, the court used the popular analogy of the *Strickland* Dilemma, by which courts justify deference on all of the issues purportedly decided in a prior case because there is no nonarbitrary reason to

349. Although *Sochor* appears inapposite to *Sykes*, nothing in *Sochor* indicates that the Court believed that the state court underwent such a thorough analysis of the merits as would negate the purposes of its procedural rules. *See supra* notes 227–234 and accompanying text.

350. *See* Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (finding that federal courts can review a claim that one state court ruled to be forfeited if another state court later ruled on the merits).

351. See *supra* notes 102–110 and accompanying text for a discussion of the scope and rationale of *Sykes*.

352. Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (emphasis added); *accord* Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980). Similarly, in *Ylst*, discussed *supra* note 224–25 and accompanying text, the Court cited *Harris* for the proposition that if one state court rules on procedural grounds but a second state court reaches the merits the claim is ripe for federal review.

353. *See supra* notes 107–08 and accompanying text.

354. See *supra* note 59–60 and accompanying text for mention of the Pennsylvania PCRA.

355. *See* Brief for Respondents, *supra* note 217, at *14.

356. *See supra* notes 232 and accompanying text.

357. *Jimenez* ruled that the *Harris* presumption survived AEDPA. Jimenez v. Walker, 458 F.3d 130, 145 (2d Cir. 2006).

358. *Id.* at 136 (emphasis added) (internal citations omitted). *See supra* note 266 and accompanying text; *see also* Harris v. Reed, 489 U.S. 255, 274 (1989) (Kennedy, J., dissenting).

359. *See supra* notes 275–76 and accompanying text.

defer to one issue instead of another.[360] However, analogizing the two prongs of *Strickland* to forfeiture-merits rulings is insufficient to justify AEDPA deference for three reasons, discussed below.

a. Not All Alternative Holdings Are Created Equal

Forfeiture-merits rulings are fundamentally different than *Strickland* alternative holdings, which are based on multiple merits grounds. Alternative holdings in the *Strickland* context are not contradictory: a petitioner's counsel can perform effectively *and* that performance can be non-prejudicial. Forfeiture-merits rulings are contradictory because a claim cannot, as a logical matter, simultaneously be in front of the court and not in front of the court.

When a court rules on procedural grounds, it rules that it is not hearing the claim because it was not properly raised.[361] Thus, we see state courts refer to forfeited claims as "not presented at all"[362] and as claims that the state court "declined to address"[363] and federal courts, such as *Jeminez*, describing a "binary situation" in which claims are *either* defaulted *or* adjudicated on the merits.[364] Despite the fact that the merits of such claims might be briefed and argued, they are still not properly before the court. While state courts have the power to rule on issues in front of them, forfeited claims are not properly in front of the court and are therefore not adjudicated.[365] If courts rule on claims that are not in front of them, there is no logical reason why noncompliance with a procedural rule would result in a forfeiture of remedies: if petitioners can still obtain a ruling from the court, they can still obtain relief. Thus, if the court heard the claim but denied a remedy on the merits, then it did not enforce the procedural rule because traditional procedural rules do not directly deny the remedy, but the ability to be heard.[366] If *Sochor* is correct in applying a procedural bar to

360. See *supra* notes 140–43 and accompanying text for an explanation of this term and a discussion of the underlying argument.

361. See *supra* notes 51–57 and accompanying text for a description of traditional procedural defaults. But see *supra* note 57 and accompanying text for a description of defaults under some modern statutes.

362. Cone v. Bell, 556 U.S. 449, 466 (2009).

363. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991); *accord* Henry v. Mississippi, 379 U.S. 443, 447 (1965).

364. See *supra* notes 266–70 and accompanying text for a discussion of this binary view.

365. See *supra* notes 50–58 and accompanying text for a description of forfeiture of remedies. Indeed, contemporaneous objection rules actually limited the court's jurisdiction under the common law. See *supra* notes 46–47 for a discussion of contemporaneous objections. Further, the concept of plain error makes no sense if the court is not precluded from reviewing claims where that rule is not invoked. *See supra* notes 46, 61.

366. *See supra* notes 50–58 and accompanying text. It is important to distinguish this situation from the mootness doctrine, which is often inapplicable to state courts. Under the mootness doctrine, a court does not (and in the case of federal courts cannot) rule on a claim where there can be no remedy. By contrast, under traditional procedural rules, there is no remedy *because* the court does not (regardless of whether it can or cannot) rule on the claim. Thus, when a court "alternatively" rules on the merits, there is no forfeiture of remedies; there is simply a denial on the merits. *Cf.* Alverson v. Workman, 595 F.3d 1142, 1153 (10th Cir. 2010) (considering the merits of a claim under § 2254(d) that

alternative rulings, then we must assume that the state court did not actually reach the merits by ignoring the operation of its own procedural rules. Accordingly, § 2254(d) should not apply to forfeiture-merits rulings because they are not adjudications on the merits.

Forfeiture-merits rulings also sidestep the arbitrariness concern in the *Strickland* Dilemma because they involve a "threshold" question.[367] Insofar as we can determine which question is the threshold question, we will know whether the secondary question was actually adjudicated because the threshold question is "analytically prior" to the secondary question.[368] When a state court such as the one in *Brooks* is presented with a constitutional claim, the threshold issue is whether the state court would consider a claim.[369] Before a court *does* rule on a claim, it must decide whether it *will* rule on that claim.[370]

The *Bell* court's treatment of counterfactuals demonstrates the threshold nature of traditional forfeiture analysis.[371] *Strickland* claims do not involve counterfactuals because the actions of counsel can prejudice petitioner even if they are not constitutionally deficient: the first prong is not a determination of what counsel *did*, but whether those actions fell below the constitutional standard, which does not need to be decided in order to decide whether counsel's actions undermined confidence in the verdict. Thus, there is no determination that needs to be hypothetically reversed in order to reach the second prong.[372] By contrast, the Second Circuit in *Bell* found that where the state court makes a plain statement ruling on the forfeiture, but reaches the merits as a counterfactual, there is no adjudication on the merits.[373] The "even if" formulation suggests that the state court *would* adjudicate the merits *if* the threshold issue of forfeiture was not determined adversely to the petitioner.

Forfeiture-merits holdings are always implicitly counterfactuals. By reaching the merits after ruling that the petitioner has forfeited the ability to receive a ruling, a state court is necessarily saying that even if petitioner were permitted to bring his claim, the court would deny it. A contrary result would mean either that the state court has ignored its procedural rules by hearing the claim[374] or that it can rule on claims that are not before it. *Sochor* refutes the former in its holding that a plain statement of forfeiture overcame the merits

was procedurally barred but raised *sua sponte* by the state court).

367. See *supra* notes 140–47 and accompanying text for a discussion of the arbitrariness problem, and *supra* notes 167–72 and accompanying text for a discussion of *Honomu*.

368. See *supra* note 312 and accompanying text for a discussion of Judge Clay's dissent in *Fleming*.

369. See *supra* notes 276–82 and accompanying text for a discussion of *Brooks*.

370. Martineau *supra* note 48, at 1032. See *supra* notes 169–71 and accompanying text for a discussion of standing doctrine.

371. *Bell* held that no AEDPA deference was due to counterfactual "even if" holdings. *See supra* notes 287–92.

372. *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

373. *See supra* note 288 and accompanying text.

374. That is, relying on an exception that it did not mention. *See supra* note 218–20 and accompanying text.

discussion.[375] The latter issue is refuted by the practical approaches to alternative holdings,[376] by the binary situation noted both pre- and post-AEDPA,[377] and by the fact that forfeitures arise because courts do not rule on, and therefore do not grant remedies to, claims not before them.[378] Accordingly, all forfeiture-merits rulings are of counterfactual nature and involve a threshold issue not implicated by the *Strickland* Dilemma.

Finally, traditional procedural rules effectively involve the same threshold question as the discretionary standing question in *Honomu*.[379] In *Gumm*, the court framed the Ohio procedural bar as "jurisdictional,"[380] but the statute actually said the "court may not *entertain*" the claim.[381] The only distinction between the Ohio statute and traditional procedural rules is discretion[382]—that is, the distinction between whether the court *may* entertain the claim and whether it *will* entertain it. Indeed, the discretionary standing question referred to in *Honomu* is extremely similar to forfeitures because both decide whether the party "may invoke the court's decisional and remedial powers."[383] Whether the court finds a lack of jurisdiction, as in *Gumm*,[384] or declines to *take* jurisdiction, as in *Brooks*,[385] *Honomu* presents a powerful argument that the result should be the same: in both cases the court *did not* hear the claim, and therefore, any ruling on the merits should be void ab initio.

Modern postconviction statutes,[386] despite appearing to allow a claim to come before the court, are interpreted as operating in the same manner as traditional rules.[387] Accordingly, there is no reason to treat them differently. Moreover, even if these postconvicition statutes only deny the ability to argue a claim, the resulting adjudications would not, by definition, be "on-the-merits" because it would not be "delivered after the court heard and *evaluated* the evidence and the parties' substantive arguments."[388] Finally, both types of

375. See Part II.C.3 for a discussion of *Harris* and *Sochor*.

376. See *infra* notes 431–40 and accompanying text for a discussion of these approaches.

377. *See supra* notes 266–70 and accompanying text.

378. *See supra* notes 52–57 and accompanying text.

379. See *supra* notes 168–72 and accompanying text for a discussion of *Honomu*'s ruling that the discretionary aspect of standing is a threshold issue that precludes an alternative holding.

380. Gumm v. Mitchell, 775 F.3d 345, 361 (6th Cir. 2014). *Gumm* held that no AEDPA deference is due to a forfeiture-merits holding if the forfeiture was "jurisdictional" under state law. *See supra* notes 293–97 and accompanying text.

381. OHIO REV. CODE ANN. § 2953.21(A)(1)(c)(4) (West 2016).

382. Compare the statute in *Gumm* with the Virginia rule discussed *supra* note 68.

383. Warth v. Seldin, 422 U.S. 490, 499 (1975). Compare *supra* note 170 and accompanying text, which discuss standing, with *supra* notes 50–58 and accompanying text, which discuss traditional forfeitures.

384. See *supra* notes 293–97 and accompanying text for a discussion of *Gumm*.

385. See *supra* notes 276–82 and accompanying text for a discussion of *Brooks*.

386. See *supra* notes 59–63 and accompanying text for a discussion of the procedural rules created by some modern postconviction statutes.

387. *See supra* notes 60–64 and accompanying text.

388. Johnson v. Williams, 133 S. Ct. 1088, 1097 (2013). See *supra* note 239 and accompanying text for a discussion of AEDPA's on-the-merits requirement.

procedural rules are still subject to the same adequacy concerns discussed below.

b. Inadequacy and Sochor v. Florida

The analogy to the *Strickland* Dilemma also fails because it ignores the fact that state procedural rules "do not necessarily prevail" in federal court.[389] Unlike either prong of a *Strickland* claim, procedural rules only bar federal review if they are adequate and actually relied upon.[390] If forfeiture-merits rulings are merits adjudications, then the state procedural rules would be inadequate because they would not be actually relied upon, and *Sochor*, which assumed one such procedural rule was adequate, would thus be wrongly decided. Furthermore, calling a forfeiture-merits ruling an adjudication on the merits would eliminate any state interests served by the procedural rule and thus render it inadequate to bar federal review.[391]

Although the Court has hinted that rules do not always need to serve all of their intended purposes and interests in every single case,[392] the Supreme Court has seemingly never upheld a procedural default that served no interest at all in the case at bar. State procedural rules are designed to ensure finality and efficiency in state proceedings, not to punitively block federal review.[393] State interests are defeated, however, if we assume forfeiture-merits holdings are carefully considered adjudications.[394] Where a court proceeds to rule on the merits of a defaulted claim, the procedural rule will only protect the state's interest in finality if the state court rules that the claim would otherwise have been meritorious absent the procedural defect. This is because claims that are denied on their merits despite the violation of the procedural rule would have been denied at the same time, in the same court, and after the same amount of review as they would have if the procedural rule did not exist at all. Efficiency is not served because summarily ruling that a claim is forfeited will almost always[395] save more time and energy than undertaking a merits determination.[396] Furthermore, the purposes of contemporaneous objection rules are not served by merely proceeding to the merits because the court still does not have the

389. Henry v. Mississippi, 379 U.S. 443, 447 (1965) (quoting Love v. Griffith, 266 U.S. 32, 33–34 (1924)).

390. *See supra* notes 33–35 and accompanying text.

391. See *supra* notes 66–69 and accompanying text for a discussion of the adequacy prong required to block federal review.

392. See *supra* note 75 for mention of *Teague v. Lane*, 489 U.S. 288 (1989).

393. *See supra* notes 71–73 and accompanying text.

394. See *supra* note 150 and accompanying text for a discussion of "fully measured judicial pronouncement[s]."

395. This may not be the case if the forfeiture rule is exceedingly complex and the merits question is obvious. But where the merits are deficient, the federal court will not grant relief anyway.

396. Plain error review is still more efficient because its higher burden makes close decisions easier, and it incentivizes compliance with the procedural rule by making the standard of review higher for those who fail to comply. See *supra* notes 177–80 and accompanying text for a discussion of safety-valve exceptions.

benefits of a developed record and factual findings.[397] If the error is not plain—that is, if it does not fall under the types of safety-valve exceptions that actually *were* discussed in *Harris* and *Sochor* [398]—then the benefits of the procedural rule are lost when the court rules on the merits as opposed to relying on a plain error exception to enforce their procedural rules. Further, a trial judge does not need protection when the appellate court alternatively rules that there was no error in the judgment below.[399] Thus, forfeiture-merits rulings can have the same substantive effect as not enforcing the procedural rule at all. Where the court proceeds to the merits, it cannot be said that the state actually relied on the procedural rule in any meaningful way, and in such cases, the procedural rule serves no state interest.[400] If forfeiture-merits rulings were actually merits adjudications, then state procedural rules, like the one in *Sochor*, which upheld the procedural bar,[401] would be potentially inadequate to bar federal review—and *Sochor* would have been wrongly decided.

If, however, courts are merely *opining* on the merits—giving less than the careful scrutiny expected of an adjudication[402]—the purposes of the procedural rules would still be effectuated. Finality would be served because it would be the procedural rule, not the half-considered merits opinion, actually causing the claim to be denied and foreclosed its future litigation.[403] Efficiency would at least be partially served because a cursory consideration of the claim requires less review of the record and less thought by the judge.[404] Thus, we can explain *Sochor* and forfeiture-merits holdings by assuming that their merits analyses are, in fact, either an application of a more burdensome safety-valve exception (making the basis of the decision procedural)[405] or dicta (not intended as a final adjudication).[406]

c. Alternative Holding Jurisprudence Is Not as Settled as the Brooks *Court Assumed*

Brooks's analogy to the *Strickland* Dilemma also fails because it is possible, under the current state of alternative holding jurisprudence, for neither of the

397. *See supra* note 74 and accompanying text.

398. See *supra* notes 221–23 and accompanying text for a discussion of Kennedy's dissent in *Harris*.

399. See *supra* note 48 for an explanation of how the contemporaneous objection rule protects trial judges.

400. See *supra* notes 66–69 and accompanying text for a discussion of the adequacy prong.

401. Sochor v. Florida, 504 U.S. 527, 534 (1992).

402. See *supra* notes 148–50 and accompanying text for a discussion of the concern of care in alternative holdings.

403. *See supra* notes 70–73 and accompanying text.

404. This issue gets to the *Brooks* court's second point, discussed *supra* note 281 and accompanying text about giving assurance to the petitioner.

405. See *supra* notes 63–64, 313 and accompanying text for a discussion of safety-valve exceptions.

406. See *supra* note 150 and accompanying text for an explanation of when a ruling should be given weight.

Strickland prongs to be adjudicated. Alternative holding jurisprudence is far less settled than the *Brooks* court's matter-of-fact language would lead one to believe, especially regarding preclusion.[407] Most courts seem satisfied with a statement that the law is "well settled" or a reference to some version of the *Strickland* Dilemma.[408] Further, the case law does not clarify when, if ever, alternative holdings are appropriate given the preference for judicial restraint.[409] This dearth in reasoning is made worse by the fact that so few courts have explicitly distinguished between the precedential and preclusive effects of alternative holdings, with most of the case law addressing only the former.[410] The proclivity of courts to conflate these issues is reflected in the uncertainty of whether judicial dicta—a concept that only relates to a statement's *precedential* value—constitutes an adjudication. The case law says almost nothing about whether and to what extent judicial dicta, holdings, preclusion, and adjudications are coterminous,[411] and as *Halpern* perfectly illustrates, the quality of being precedential is not concomitant with the quality of being preclusive.[412] With that, we are left asking whether both *Strickland* prongs, even if precedential, are actually adjudicated. It is true that AEDPA deference, like precedent and preclusion, involves one court giving deference to matters actually decided by another court. But, however "well settled" the rule favoring deference to alternative holdings may be, the cases are less clear about which type of deference courts should give to alternative holdings—precedential, preclusive, etc.—and whether alternative holdings are "adjudications on the merits" or something else.

Under their classic definitions, the distinction between holdings and adjudications was nugatory: the holding was limited to what was necessarily adjudicated.[413] But because alternative holdings and judicial dicta are by nature unnecessary, we must decide whether alternative holdings and judicial dicta, even if they operate as binding *precedent* on lower courts, actually result from an *adjudication* the way classic holdings do.[414] At present, judicial dicta, which in most cases is indistinguishable from alternative holdings, is *still* dicta.[415] By labeling state court opinions that rule on both *Strickland* prongs as judicial dicta, we can give guidance to lower courts on both *Strickland* prongs without saying that either issue was adjudicated on the merits in the present case. Similarly, when a state court rules alternatively on the merits, we do not have to consider

407. See *supra* Part II.C.1 for a discussion of alternative holdings.

408. *See supra* notes 140–41 and accompanying text.

409. *See supra* notes 163–64 and accompanying text.

410. *See supra* notes 122–29 and accompanying text.

411. *See supra* Part.II.C.1.

412. The Second Circuit in *Halpern v. Schwartz* gave alternative holdings precedential but not preclusive effect. *See supra* notes 155–56.

413. *See supra* note 120 and accompanying text.

414. *See supra* notes 122–25 and accompanying text.

415. *See supra* notes 131–34 and accompanying text. The only distinction between the two types of dicta is that judicial dicta does not always have to be sufficient. *See supra* notes 127–30 and accompanying text.

the opinion on the merits to be an adjudication. By viewing it as judicial dicta, lower state courts would receive highly persuasive authority from the higher state court on the merits for future cases[416] without transforming the opinion on the merits into an adjudication. All of this is to say that the indeterminacy of alternative holding jurisprudence allows for the *Strickland* Dilemma—resolved in favor of deference in *Brooks*[417] but resolved in favor of limited deference in *Halpern*[418]—to be resolved a third way by considering *all* alternative holdings to be judicial dicta, rather than a merits adjudication—presuming the court found a claim insufficient to warrant relief but not presuming to know the reason for that finding. This resolution would give these cases precedential value, avoiding the "strange" result mentioned in *Brooks*,[419] without making them merits adjudications.

Brooks's analogy to the *Strickland* Dilemma does not persuasively argue that forfeiture-merits rulings should receive AEDPA deference because the analogy does not fit. First, forfeiture-merits rulings cannot be adjudications on the merits unless state courts logically and practically ignore their own procedural rules. Second, the threshold nature of forfeitures sidesteps the arbitrariness problem in the Dilemma. Third, calling forfeiture-merits rulings adjudications on the merits renders the procedural rule inadequate, contradicting *Sochor*. Finally, even if the analogy to *Strickland* claims fits, the unsettled nature of alternative holding jurisprudence does not require that these rulings are adjudications.

3. AEDPA Deference Is Bad Judicial Policy

Contrary to the contention of the *Brooks* court, applying AEDPA deference to forfeiture-merits holdings is bad judicial policy.[420] The court says, without explanation, that such rulings will be desired by the state and will reassure the petitioner that he has not lost on a technicality.[421] This is perhaps the most absurd argument in the opinion. Surely the state wants a forfeiture-merits ruling. Prior to *Harris*, states used to argue emphatically in every case that the state court did not address the merits because a merits ruling would open the door to habeas review.[422] Even after *Harris*, the states would be ambivalent to a merits ruling as long as the procedural default still applied.[423] But after *Brooks*,

416. *See supra* note 146 and accompanying text. And defendants will still get their much-needed "reassurance," discussed *supra* note 281 and *infra* notes 421–25 and accompanying text.

417. *See supra* notes 278–82 and accompanying text.

418. *See supra* note 156 and accompanying text.

419. Brooks v. Bagley, 513 F.3d 618, 624 (6th Cir. 2006) (finding that it would be "strange" if only one prong of a *Strickland* claim received AEDPA deference in cases where the state court decided both prongs). *See supra* notes 119–20 and accompanying text.

420. See *supra* notes 280–81 and accompanying text for a discussion of the *Brooks* argument about "judicial practices that in the main will benefit both sides."

421. *See supra* notes 280–81 and accompanying text.

422. *See* Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981) (holding that *Sykes* does not bar review where a state court reaches the merits).

423. *See supra* notes 231–32 and accompanying text.

the states will always prefer a forfeiture-merits ruling because the states receive nothing but benefits: the forfeiture-merits ruling forecloses direct review through the independent and adequate state ground doctrine and triggers AEDPA deference if petitioner is able to show cause and prejudice.[424] The petitioner, on the other hand, gains nothing from a forfeiture-merits ruling *unless we assume that the state court overlooks the forfeiture by ruling on the merits*, a result refuted by *Harris*. Instead, the petitioner loses any opportunity for de novo review of his claim in federal court. The *Brooks* court cites no statistics or studies proving the tonic-like effect of telling a petitioner that his claim dies on a technicality *and* that no one believes his rights were infringed anyway. Moreover, assuming arguendo that the court performs some merciful deed by ruling in the alternative, the same effect would be achieved without considering the merits ruling as an adjudication. Simply permitting the state courts to *opine* on the merits without affording deference would similarly assuage the petitioner without foreclosing all opportunities of relief.[425] Finally, the opinion on the merits will only reassure the petitioner that he did not lose on a technicality if the state court finds *against* petitioner on the merits, meaning the desire to reassure a petitioner may bias the court against finding constitutional error.

One might respond that applying AEDPA deference to state court decisions *encourages* state courts to rule on the merits and thus "reassure" the petitioner that his claim was in fact meritless. This is neither true nor desirable. It is untrue because the Court has repeatedly said that state courts do not write their opinions based on what federal courts demand of them.[426] It is also untrue because, when the state court rules in the alternative, it reasonably believes that there will be *no federal review whatsoever* of the claim because of the existence of the independent and adequate state ground (unless it is unduly burdening federal rights).[427] Why would the state court want AEDPA deference if it knows that both direct and habeas review has been cut off, absent a miscarriage of justice or a showing of cause and prejudice? Moreover, unless *Fleming*[428] is wrong, (e.g., in light of *Harrington*,[429] because the basis of the state court decision was in fact procedural), there is no added incentive for a court to make an alternative holding instead of engaging in plain error review because both would get procedural and AEDPA deference. If *Harrington* does change

424. See *Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002), mentioned *supra* note 317.

425. See Part III.B.2.a for a discussion of the effect of labeling these rulings as judicial dicta. This would raise concerns about the uniformity of federal law. However, because the Supreme Court can review the de novo habeas court decision, it has the opportunity to correct any uniformity concerns that may arise.

426. See *supra* note 193 for mention of *Harrington*.

427. See *supra* Part II.A.2 for a discussion of the independent and adequate state ground doctrine.

428. *Fleming* (Sixth Circuit) applied AEDPA deference when the state court discussed the merits in the context of a safety-valve exception even though the forfeiture should not have applied at all, and the exception has a higher standard than de novo review. *See supra* notes 300–02 and accompanying text.

429. *Harrington* indicated that it is the actual grounds of the adjudication—not the opinion of the state court—that determines if AEDPA applies. *See supra* notes 271–74 and accompanying text.

Fleming, the state court should prefer the procedural deference because it precludes federal review to a greater degree than § 2254(d). Moreover, safety-valve review (1) still gives some reassurance to the petitioner that he did not lose on a technicality, and (2) creates an actual opportunity for relief, unlike alternative holdings, which are gratuitous and violate reason and judicial restraint.[430]

Forfeiture-merits rulings are undesirable for a variety of reasons. Despite being ambiguous, alternative holding jurisprudence gives us some guidance. Examining the "trustworthiness" and "practical considerations" of alternative rulings shows that at least some of the criteria for evaluating alternative holdings points away from giving forfeiture-merits rulings preclusive or even precedential effect.[431] On one hand, the forfeited claim would still be briefed and argued, and the incentive to appeal would always be present on habeas review.[432] On the other hand, the merits ruling can be sloughed off without affecting the opinion, and the opinion may be written to indicate that the merits ruling was not intended to be relied upon.[433] Perhaps the most compelling reason not to defer to these rulings is the tremendous risk that the state court did not carefully consider the merits because it could rely on the forfeiture holding.[434] Procedural defaults are comparatively easy to determine for state courts familiar with their own procedural rules, so state courts will likely be confident in the existence of a forfeiture.[435] Consequently, they will have little incentive to carefully review the claim, even assuming they have had the benefit of factual findings in the lower court.

But even this is not a safe assumption because state courts are highly unlikely to afford discovery or other fact-finding mechanisms to petitioners.[436] Factual development is notoriously difficult on habeas.[437] State discovery rules are often much harsher than the federal rules,[438] and the chance of getting discovery in the state court is reduced further when the state court believes a claim is forfeited. There would be no point in affording fact-finding for a claim the court is not going to hear. In *Wellon*, the Court remanded the case back to the circuit court precisely because of its fear that a procedural bar influenced the decision to deny an evidentiary hearing.[439] Thus, when the state appellate courts

430. See *supra* note 238 and accompanying text for a discussion of 28 U.S.C. § 2254(d). See *infra* Part II.C.1 for a discussion of safety-valve rules.

431. See *supra* note 148–50 and accompanying text for a discussion of when an opinion should be precedential.

432. *See supra* note 150 and accompanying text.

433. *See supra* note 150 and accompanying text.

434. *See supra* note 150 and accompanying text.

435. See *supra* note 204 and accompanying text for an explanation of how applying forfeitures is easier for state courts than for federal courts, which are unfamiliar with state law.

436. See *supra* note 260 and accompanying text for mention of Justice Saylor's opinion in *Keaton*.

437. See *supra* Part II.D.2 for a discussion of the evidentiary development on habeas review.

438. *See supra* note 261 and accompanying text.

439. *See supra* notes 157–62 and accompanying text.

review forfeited claims, they often do so without the benefit of evidentiary development. Often, as Justice Saylor noted in *Keaton*, state courts deny a claim on the merits without discovery because it is "speculative."[440] Consequently, petitioners could, as the dissent feared in *Fleming*, be denied de novo review of their claim in both state and federal court through no fault of their own.

For example, suppose a petitioner fails to raise a *Brady* claim on direct appeal because he did not know about the suppressed evidence. The state court may deny discovery due to the forfeiture and then alternatively rule on appeal that the claim was "speculative." The claim would be barred on direct review, and, depending on how *Pinholster* is interpreted,[441] petitioner may be unable to get discovery to show cause and prejudice for the procedural default. Even if he could get discovery to show cause and prejudice, the standard of review would be set by § 2254(d), and therefore the new evidence would not be considered in the final ruling. In such a case, the prosecutor would likely get away with breaking the law, and the petitioner would be completely denied a remedy. Thus, it can hardly be said that the petitioner "had full opportunity to be heard and was in no way, motivationally or procedurally, restricted or inhibited in the presentation of his position."[442] He may "without fault of his own [be] deprived of crucial evidence or witnesses in the first litigation."[443] Moreover, in some instances, the governing law in the state might be different than the embracing district court.[444] Finally, in contrast to plaintiffs in most civil cases, exhaustion prevents petitioners from picking which court will adjudicate their claims in the first place.[445] In any other type of case, it would be highly unusual for a court to give preclusive effect (which is very similar to AEDPA deference to state court decisions) to an alternative holding with these risks of injustice and untrustworthiness.

Giving AEDPA deference to forfeiture-merits rulings is also undesirable because it does not promote the interests of federalism. The doctrine of exhaustion, combined with the deference given to state forfeitures and factual findings,[446] are adequate to protect any state interest in finality by completely foreclosing *all* federal review, whether direct or collateral, absent the rare circumstances where petitioner can show cause and prejudice or a miscarriage of justice.[447] Accordingly, forfeiture-merits rulings accomplish nothing except

440. *See supra* note 272 and accompanying text.

441. *Pinholster* held that evidentiary hearings are not available where § 2254(d) applies. It is unclear whether discovery is similarly unavailable. See *supra* notes 258–59 for a list of various opinions regarding *Pinholster* and discovery.

442. Nycal Corp. v. Inoco PLC, 968 F. Supp. 147, 151 (S.D.N.Y. 1997) (quoting Malloy v. Trombley, 405 N.E.2d 213, 216 (N.Y. 1980)).

443. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333 (1971).

444. See *supra* Part II.A.1 for a discussion of the federal interest in the uniformity in federal law.

445. Compare *supra* note 90 and accompanying text, which discuss exhaustion, with *United States v. Montana*, 440 U.S. 147, 163 (1979), which discusses abstention.

446. See *supra* notes 90, 256–61, and accompanying text for a discussion of these doctrines.

447. *Brooks* might actually hurt state interests if petitioners are willing to skip state review in

blocking federal review in cases where the petitioner's rights were violated (prejudice) and he was denied a remedy through no fault of his own (cause).[448] Under *Brooks*, state courts can foreclose de novo review in these rare cases despite their own failure to provide or utilize adequate safeguards in circumstances that would amount to cause and prejudice if adjudicated in federal court (i.e., a finding that a petitioner's meritorious claim was denied through no fault of his own). The consequences of this failure should not be shouldered by the petitioner, especially if the federal court finds new evidence supporting his claim.

Finally, there are serious federal interests jeopardized by state courts' forfeiture-merits rulings.[449] First, the uniformity of federal law is jeopardized when unique questions are completely foreclosed from de novo review by the Supreme Court. The Supreme Court cannot review the claim on direct review of the state habeas proceedings because of the forfeiture, and it is unable to create binding precedent on the state courts under the standard of § 2254(d). Furthermore, this lack of meaningful Supreme Court review risks insulating disfavored federal claims and denying a remedy to petitioners. State courts can insulate their decisions from federal review through perfunctory statements denying the merits after finding a procedural bar. Elected state judges, having "state attachments, state prejudices, state jealousies, and state interests,"[450] could deny federal review to prisoners they believe committed particularly heinous acts by simply ruling in the alternative. These issues would be resolved by a rule requiring that if the petitioner can show cause and prejudice, he may obtain justice from the federal district courts.

C. Recommendations

The best way to resolve these issues in line with *Harris*[451] is with the following bright-line rule: where a state court's decision appears to rest on federal grounds, but there is a plain statement that the state court's decision rests on independent and adequate state procedural grounds, the federal habeas court should defer to the state procedural rule, per *Sykes*, but not apply AEDPA deference to the merits. There should be two small exceptions where only AEDPA deference, but *not Sykes* deference, would apply: where the state court explicitly forgave the default or invoked a safety-valve exception that is identical to de novo review of the federal claim.[452]

cases where they are confident that they can show cause and prejudice in federal court.

448. *See* Busby v. Dretke, 359 F.3d 708, 720 (5th Cir. 2004).

449. See *supra* Part II.A.1 for a discussion of federal interests in uniformity and providing a federal forum.

450. Martin v. Hunter's Lessee, 14 U.S. 304, 347 (1816).

451. To be clear, it is not the project of this Comment to question the efficacy of the independent and adequate state bar rule or actual holding of *Harris*.

452. *See* Foster v. Chatman, 136 S. Ct. 1737, 1746 (2016). The reason for this exception is plain: where the exception is coterminous with an adjudication on the merits, it is not independent of federal law, and federalism and comity suggest that it should be treated like a merits adjudication.

This bright-line rule would not unduly infringe on state interests for two reasons. First, the state's interest in finality would not be unduly harmed. The difference between this rule and rule in *Brooks* would only arise when the petitioner shows cause and prejudice. Where petitioners show cause, the state's interest in finality should bend to the federal interest in providing the petitioner an opportunity to litigate without the lurking specter of a procedural default. Furthermore, where the petitioner belatedly raises a *Brady* claim due to recently revealed evidence, the state's interests should receive less consideration because it was state action that prevented the petitioner from promptly bringing his claim. Moreover, the prejudice prong of a *Brady* claim ensures that review is limited to situations where the claim actually affected the outcome and diminished the reliability of earlier determinations and, consequently, the need for finality. Second, there would be no risk that the state courts were not being treated as coordinate with Article III courts. Where state courts have the discretion to bypass their own procedural rules, they can still exercise that discretion and rule on the merits. Their decisions will only be subject to review by the Supreme Court (to which the state courts are not coordinate) and the federal courts (which are strictly limited by § 2254(d)). Where state courts do not have discretion under the procedural rule, this rule presents no restrictions not already imposed by *Gumm*.

IV. CONCLUSION

Clarity in the law is most vital when the rights to life and liberty are in jeopardy. Therefore, a critical task of the federal courts must be to reconcile and clarify how civil rights claims, and specifically habeas corpus claims, will be reviewed. This task requires courts to decide under which circumstances a civil rights claim has been finally adjudicated and how much respect they can in good faith extend to state court judgments under the banner of comity and federalism. Indeed, this task involves nothing short of consolidating an entire system of jurisprudence extending far beyond habeas corpus and reaching deep into the power of courts to decide the questions before them. Federal courts, imbued with the power to interpret federal law, must resort to the tools at hand—whether they be formalistic arguments about state procedural rules or historical analyses of our federalism jurisprudence—to fill the interstices of AEDPA and ensure that petitioners receive a fair opportunity to be heard and that federal law is properly and uniformly enforced. This task is necessary if the promise of the Due Process Clause—that no state shall deprive a person of life, liberty, or property without due process—is one to which we wish to abide, if the state is to be held accountable, and if the Constitution is to have a remedy.