

# State Trial Courts as the New Champions of the Great Writ: An Argument for a Statement of Decision in the Criminal Context

By RONALD QUY TRAN\*

## Introduction

**F**OR NEARLY THREE DECADES, the Supreme Court emphasized principles of comity, federalism, and finality in its attempt to limit the availability of federal habeas corpus relief<sup>1</sup> as a collateral attack<sup>2</sup> on a state prisoner's criminal conviction and sentence.<sup>3</sup> On April 24, 1996, the Court's prayers were answered. On that date, former President

---

\* J.D. Candidate, University of San Francisco School of Law (2013); B.A. University of California, San Diego (2010). The author would like to thank Comments Editor Edward Sears for his significant, extensive, and invaluable contribution to this Comment.

1. A petition for the writ of habeas corpus can be described as follows:

[A] habeas corpus proceeding is one to ascertain whether a prisoner can lawfully be detained in custody and to secure that prisoner's release if he or she is unlawfully detained. . . . [T]he fact that the state may seek a new judgment, through a new trial or a new sentencing proceeding, is beside the point. The writ commands a sheriff, marshal or jailer to have the body of the prisoner before the issuing court at a certain time and place, together with an explanation of the cause of the imprisonment. The function of the writ is to search through all forms to the sufficiency of the cause of detention. In short, the writ forces the government to justify a decision to hold an individual in custody. Prompt resolution of prisoners' claims is a principal function of the habeas corpus procedure.

15 *CYC. OF FED. PROC.* § 86:3 (3d ed. 2006) (footnotes omitted).

2. *See generally* U.S. Const. art. I, § 9, cl. 2 (guaranteeing the privilege of the writ of habeas corpus, except in times of rebellion or invasion when the public safety requires it). The Judiciary Act of 1789 conferred habeas corpus jurisdiction upon the federal judiciary. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82. A person in custody in state prison may petition for a writ of habeas corpus. 28 U.S.C. § 2254 (2006).

3. *See, e.g.*, *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001); *Williams v. Taylor*, 529 U.S. 420, 436 (2000); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Harris v. Reed*, 489 U.S. 255, 264 (1989); *Francis v. Henderson*, 425 U.S. 536, 539 (1976). For a brief discussion of the Burger and Rehnquist Courts' stance on federal habeas review, followed by a list of decisions that outline cutbacks on habeas corpus see John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 *CORNELL L. REV.* 259, 265–70 (2006).

Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>4</sup> Although AEDPA included an array of habeas reform provisions,<sup>5</sup> § 2254(d)–(d)(1) is of particular importance, which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any 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 . . . .<sup>6</sup>

In *Williams v. Taylor*,<sup>7</sup> the Supreme Court analyzed the new standard that Congress imposed on the federal courts for reviewing a state prisoner’s conviction or sentence in federal habeas corpus cases.<sup>8</sup> The Court interpreted the language of § 2254(d)(1) as follows:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

. . . .  
[T]he meaning of the phrase “clearly established Federal law, as determined by the Supreme Court of the United States” . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision. . . . The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court’s jurisprudence.<sup>9</sup>

This standard, which requires a federal habeas court to compare the state court’s decision with Supreme Court-defined federal law, un-

4. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

5. For a general overview of AEDPA’s provisions see RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 3.2 (6th ed. 2011).

6. 28 U.S.C. § 2254(d)–(d)(1) (2006). Section 2254(d)(2) prohibits the granting of a writ of habeas corpus if the state court adjudication of the claim “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.” § 2254(d)(2). This Comment, however, is solely focused on the standard of review for state court determinations under Section 2254(d)(1). See discussion *infra* note 28.

7. 529 U.S. 362 (2000).

8. *Id.*

9. *Id.* at 412–13 (quoting 28 U.S.C. § 2254(d)(1)).

questionably constitutes a vast departure from pre-AEDPA case law.<sup>10</sup> Furthermore, even if a state court's decision is found to be "contrary to" Supreme Court precedent, relief is not automatically granted. In *Brecht v. Abrahamson*,<sup>11</sup> the Supreme Court famously held that habeas corpus relief may only be granted after determining there was error and the error had a "substantial and injurious effect or influence in determining the jury's verdict."<sup>12</sup> That is, the error must result in "actual prejudice."<sup>13</sup>

*Williams* and *Brecht* teach us that § 2254(d)(1) requires the grant of federal habeas corpus relief only if: (1) the state court's determination of a federal claim—both pure questions of law as well as mixed questions of law and fact—squarely contradicts a holding by the Supreme Court; and (2) but for this constitutional error, the habeas petitioner would have been acquitted for the offense or offenses charged.

While the Supreme Court and Congress link arms in agreement with AEDPA's standard of review, the "anti-AEDPA'ans" roar in discontent. Who, then, will be the new champion of the Great Writ?<sup>14</sup> Restricted by such a limited scope of authority to overturn a state criminal conviction, it is no wonder that scholars argue that federal courts have failed to provide meaningful relief for state prisoners.<sup>15</sup> Yet, many argue that the federal courts, empowered by the Judiciary Act of 1789, should retain a broader scope of authority over habeas

---

10. This Comment is not intended to focus on how AEDPA changed federal habeas corpus jurisprudence; however, it is worth mentioning briefly that prior to AEDPA, a federal district court did not review a state's conclusions to determine if they were "objectively unreasonable" as compared to Supreme Court precedent. Instead, the court would simply resolve the legal issues on the merits under a de novo standard of review. *Miller v. Fenton*, 474 U.S. 104, 112 (1985); *see also* *Thompson v. Keohane*, 516 U.S. 99, 107–10 & n.9 (1995) (reasoning that mixed questions of law and fact require independent federal determination); *accord* *Lambright v. Schriro*, 490 F.3d 1103, 1114 (9th Cir. 2007) (explaining that because petitioner's habeas petition was filed prior to the enactment of AEDPA, the court reviewed the claim alleging ineffective assistance of counsel, which is considered a mixed question of law and fact, de novo.).

11. 507 U.S. 619 (1993).

12. *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

13. *Id.* To provide a useful comparison, federal courts formerly applied a much stricter standard on habeas review, which required a court to declare a belief that any error was "harmless beyond a reasonable doubt" before denying relief, but now the harmless-error standard only applies to criminal convictions challenged on direct appeal. *Id.* at 622 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

14. The writ of habeas corpus is also known as the "Great Writ." *Stone v. Powell*, 428 U.S. 465, 474 n.6 (1976) (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807)).

15. *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 805–10 (2009); *see also* *infra* Part I.A.

review than AEDPA contemplates and, under various scenarios, review state prisoner's federal constitutional claims under a *de novo* standard.<sup>16</sup> This shift would revert habeas corpus jurisprudence back to the standard of review used in habeas cases prior to AEDPA.<sup>17</sup> On the other end of the spectrum lies the argument that, because from AEDPA's new deferential language Congress already signaled the demise of the more typical habeas corpus petitions, the range of cognizable claims under habeas review should be drastically narrowed.<sup>18</sup>

However meritorious these solutions may be, the AEDPA standard is here to stay. Congress expressed a deliberate intention to restrict habeas corpus review.<sup>19</sup> Further, not only has the Supreme Court vocalized its opposition to broad federal habeas relief,<sup>20</sup> it has also held that AEDPA's restricted standard of review does not violate the Suspension Clause of the U.S. Constitution,<sup>21</sup> separation of powers principles,<sup>22</sup> or federal Article III powers.<sup>23</sup>

Another school of thought emphasizes not how the federal courts' role should change, but how, under AEDPA, it is the state courts that have a newfound obligation to apply both federal *and* state

---

16. For an excellent summary of the discourse on the costs versus benefits of broad federal habeas review under variations of the *de novo* standard, see Steven Semeraro, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 907–23 (2004).

17. See *supra* note 10 and accompanying text.

18. See, e.g., Hoffman & King, *supra* note 154, at 797, 819–33 (proposing that, with three exceptions, federal habeas should be eliminated entirely for state prisoners in exchange for increased government funding to protect criminal defendants' rights earlier in the process by improving the quality of defense representation throughout the country); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 1–9 (2010) (proposing that, instead of reviewing state convictions for errors in individual cases, the role of federal habeas courts should be limited to only reviewing claims that allege systemic state violations—“those that recur in a pattern across multiple cases”).

19. See H.R. REP. NO. 104–518, at 111 (1996) (Conf. Rep.) (“This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus . . .”).

20. See Blume, *supra* note 34.

21. *Felker v. Turpin*, 518 U.S. 651, 654 (1996).

22. See *id.* at 664 (“[W]e have long recognized that ‘the power to award the writ by any of the courts of the United States, must be given by written law,’ and we have likewise recognized that judgments about the proper scope of the writ are ‘normally for Congress to make.’” (citations omitted)).

23. The Supreme Court has refused to reverse decisions by the Courts of Appeals on the ground that upholding Section 2254(d)(1) would violate Article III. See, e.g., *Green v. French*, 143 F.3d 865, 874–75 (4th Cir. 1998) (holding Section 2254(d)(1) does not unconstitutionally limit inferior courts' independent interpretive authority to determine meaning of federal law in any Article III case or controversy), *cert. denied*, 525 U.S. 1090 (1999); *Lindh v. Murphy*, 96 F.3d 856, 867–70 (7th Cir. 1996) (en banc) (same), *rev'd on other grounds*, 521 U.S. 320 (1997); *accord Duhaime v. Ducharme*, 200 F.3d 597, 601 (9th Cir. 1999).

law.<sup>24</sup> As the writ of habeas corpus still remains the last resort for state prisoners to challenge the lawfulness of their confinement,<sup>25</sup> the deferential standard of AEDPA leaves the state courts with the responsibility to identify and remedy constitutional errors as they come up at trial. A natural suggestion that follows is that state courts should exhibit their reasoning in adjudicating a state prisoner's federal constitutional claims.<sup>26</sup> As a further step in line with this obligation, Professor Steven Semeraro argues for a "Reasoning-Process Review Model" such that a federal habeas court should only defer to a state court's decision on the merits of a federal constitutional claim if the state court's reasoning process in getting to that decision indicated the court actually and correctly applied the appropriate federal law.<sup>27</sup> Otherwise, the federal court would be able to remand the case back to the state to supply a more thorough analysis, and, if the state court still refused to apply the applicable federal law, the federal courts would be free to conduct de novo review of the merits on certiorari review.<sup>28</sup>

This Comment argues that while the burden should be on the state courts to become the new champions of the Great Writ, the currently proposed solutions—whether they suggest de novo review by the federal court or the ability to remand the case to the state court for a more thorough analysis of federal constitutional law—do not provide sufficient enforcement mechanisms that could compel the state courts to more adequately apply the correct federal law in present and future cases. In addition, habeas corpus petitioners remain bound by the long process of direct and collateral review such that when the reviewing court—whether it be the higher state or federal habeas court—finally addresses the federal constitutional claims on their merits the issues are forgotten, evidence is lost, and memories have faded.

This Comment proposes that states adopt a post-trial motion or proceeding that allows a criminal defendant, after being convicted but

---

24. See, e.g., Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY'S L.J. 297, 337 (1996); Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442, 477 (1995); Ezra Spilke, Comment, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts to Exhibit their Reasoning*, 39 J. MARSHALL L. REV. 995 (2006). See also *infra* Part III.

25. See *Bowen v. Johnson*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

26. Spilke, *supra* note 24, at 1012.

27. Semeraro, *supra* note 16, at 900.

28. *Id.*

before being sentenced, to raise claims before the trial judge solely alleging constitutional violations that evolved from trial error.<sup>29</sup> Additionally, this Comment would adopt the statement of decision requirement from the civil context such that criminal trial judges would be required by statute to draft written opinions explaining their constitutional basis for denying a criminal defendant's motion for a new trial. AEDPA's scheme of (practically) unconditional deference can only be justified if the court that faced the federal constitutional issues when they first arose is held to answer for the adjudication of those issues. Only when it can be said that the state trial court appropriately followed "clearly established Federal law"<sup>30</sup> during initial trial proceedings can the goal of reducing federal habeas corpus petitions coexist with the requirement that a state prisoner only be held in custody after a lawfully-obtained conviction.

Part I will discuss the current state of federal habeas corpus and the increasing ineffectiveness of obtaining meaningful relief from constitutional errors during both collateral and direct reviews of a state criminal conviction. Part II will demonstrate how state trial courts implicitly interpret constitutional claims under AEDPA standards as established by Supreme Court precedent despite the trial's focus on state evidence laws. Part II will also detail, by specific refer-

---

29. As indicated by this proposition, the scope of this Comment will focus on "trial error," which is defined as "error which occurred during the presentation of the case to the jury." *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991). Thus, this Comment does not address challenges to a defendant's sentence which generally do not relate to events occurring during the guilt phase of the trial itself, although events occurring during trial may also affect the sentence imposed. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000) (holding that other than the fact of a prior conviction, if a fact that increases the penalty for a crime beyond the prescribed statutory maximum is not submitted to a jury *during trial* and proved beyond a reasonable doubt, a judge's finding of that fact during the sentencing phase violates due process). Additionally, this Comment will not be addressing claims that solely challenge factual findings made by a trial judge without also raising constitutional concerns. This sort of claim would be raised pursuant to Section 2254(d)(2), which is used to determine whether an appellate court, applying the normal standards of appellate review, could reasonably conclude the state court's findings were supported by the record. *See Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004). This would also exclude claims that challenge specific factual findings made by a state court, findings of which are entitled to a presumption of correctness under Section 2254(e)(1). *See* 28 U.S.C. § 2254(e)(1) (2006). Finally, this Comment will not be addressing claims based on facts that would not be found in the trial record. This not only excludes specific issues such as claims for ineffective assistance of counsel to the extent they rely on allegations of counsel's improper conduct from outside of the trial court proceedings, but it also categorically excludes claims under 28 U.S.C. § 2254(e)(2), which challenge the state court decision based on evidence presented for the first time on habeas review. *See* 28 U.S.C. § 2254(e)(2).

30. *See* 28 U.S.C. § 2254(d)(1) (2006).

ence to claims involving the improper use of propensity evidence, how a federal habeas court defers to the trial court's interpretations under AEDPA's deferential standard, thereby contributing to the overall unlikelihood of obtaining habeas corpus relief. Part III will re-emphasize the need for state courts to apply federal laws, in addition to state laws, when reviewing a state criminal conviction. Part III will also briefly summarize Steven Semeraro's proposed "Reasoning-Process Review Model" and indicate its weaknesses. While Semeraro's proposal moves federal habeas corpus jurisprudence in the right direction to the extent that it emphasizes the need to hold state courts accountable for applying proper federal constitutional law, it falls short in its proposed remedy for those state courts that failed to fulfill their obligations under the reasoning-process review standard. Part IV will identify this Comment's proposed solution, why it should be adopted, and any potential shortfalls.

## **I. The Decreasing Likelihood of Obtaining Relief After Trial**

### **A. Federal Habeas Corpus is Now an Inadequate Remedy**

An empirical study of federal habeas cases filed between 1992 and 2006 by state prisoners under AEDPA found that the number of habeas petitions have increased; both the times that elapse from state conviction to filing of the habeas petition, as well as from filing to the disposition thereof, has increased; yet, the rate at which the writ is granted has decreased.<sup>31</sup> The Vanderbilt Study appears to be the most recent and comprehensive attempt to survey the state of habeas corpus jurisprudence post AEDPA. The following section summarizes the Vanderbilt Study's findings and recommends that the writ of habeas corpus should not, as a practical matter, be relied upon. Statistically speaking, there is virtually no likelihood of obtaining relief from unconstitutional trial error on federal collateral review.<sup>32</sup> The only way to justify these numbers without sacrificing adequate review of a petitioner's constitutional right of habeas corpus is if, as this Comment ultimately concludes, the error was dispositively addressed at first sight by the initial trial court.

---

31. See generally NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 54-86 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [hereinafter VANDERBILT STUDY].

32. See *infra* note 47 and accompanying text.

It is first worth noting that AEDPA imposes a statute of limitations requirement whereby a state prisoner must seek federal habeas corpus relief within one year of the conclusion of either the direct appeal of a state judgment or the expiration of the time for seeking such review.<sup>33</sup> The statute of limitations provision was designed to reduce the time between a state court conviction and the review of that judgment in federal habeas corpus proceedings by encouraging petitioners to be prompt with the filing of their claims in federal court. However, the average period between conviction and review has actually increased from about five years before AEDPA to over six years.<sup>34</sup> Even considering the cases that properly survived the statute of limitations obstacle, the average filing period is 5.6 years, which is half a year more than the average filing period prior to AEDPA.<sup>35</sup> The Vanderbilt Study suggests the increase in filing time could be the result of an increase in the average time for direct and collateral review of the criminal judgments in state court.<sup>36</sup> Although the study indicates there is currently no empirical information available to test this hypothesis, other findings in the study tend to support the proposed explanation.<sup>37</sup> In any event, the federal circuits are split as to whether a delay in a state review process, as a threshold matter, constitutes a cognizable constitutional claim on federal habeas review.<sup>38</sup>

Habeas petitioners also face an overburdened federal habeas docket as well as a lengthy review process despite having only a dim light of hope at the end of the tunnel. Not only are there more claims raised on average in each federal habeas case, but the proportion of

---

33. 28 U.S.C. § 2244(d)(1)(A) (2006).

34. VANDERBILT STUDY, *supra* note 31, at 55.

35. *Id.*

36. *Id.*

37. *See, e.g., id.* at 54 (“Most prisoners who are convicted of felonies have served their sentences by the time their state appeals have been completed.”).

38. *Compare* Hayes v. Ayers, 632 F.3d 500, 523 (9th Cir. 2011) (citing 28 U.S.C. § 2254(d)(1) (2006)) (denying habeas relief—on a claim that a delay between a habeas petitioner’s state sentencing and the filing of his direct appeal violated right to due process—because “no ‘clearly established Federal law, as determined by the Supreme Court of the United States’ recognizes a due process right to a speedy appeal” and that the case *Barker v. Wingo*, 407 U.S. 514 (1972), established only the right to a speedy trial, not a speedy appeal), *and* Jackson v. Duckworth, 112 F.3d 878, 879–80 (7th Cir. 1997) (same as applied to claim for delay in state collateral, rather than direct, review), *with* Mims v. LeBlanc, 176 F.3d 280, 282 (5th Cir. 1999) (applying the Supreme Court’s approach to claims for violation of speedy trial under *Barker* to claims for violation of speedy appeal on habeas review), United States v. Smith, 94 F.3d 204, 207–08 (6th Cir. 1996) (same), Simons v. Beyer, 44 F.3d 1160, 1169 (3d Cir. 1995) (same), Cody v. Henderson, 936 F.2d 715, 719 (2d Cir. 1991) (same), *and* United States v. Johnson, 732 F.2d 379, 381–82 (4th Cir. 1984) (same).

cases with four or more claims raised in their habeas petition has also increased greatly.<sup>39</sup> One of the hypothesized explanations for the jump in the number of petitions with four or more claims is that many petitioners simply re-state the same claims that were raised and already disposed of earlier in their state post-conviction proceedings.<sup>40</sup> On top of this, even with all the petitions that are immediately dismissed on procedural grounds, federal courts are nonetheless reaching the merits of claims in a larger percentage of cases than they did before AEDPA.<sup>41</sup> The result is a clogged and overworked federal habeas docket in which the court is reviewing claims that have already been raised and denied on their merits by state courts.<sup>42</sup> Not surprisingly, the overall time it takes for a federal habeas court to close a habeas petition has increased on average since AEDPA.<sup>43</sup> As a result, a habeas petitioner who was convicted in a non-capital case will remain in custody for an average of one year before ever receiving a ruling from the federal court.<sup>44</sup> Nevertheless, the circuits generally agree that long delays in habeas processing do not entitle a petitioner to federal habeas relief.<sup>45</sup>

The Vanderbilt Study's most compelling finding must be that the rate at which the writ is granted by district courts has dropped.<sup>46</sup> Whereas one in 100 cases resulted in relief prior to AEDPA, the study found only seven cases in which relief was granted post-AEDPA out of a sample of 2384, a rate of only one in 284 cases.<sup>47</sup> Of particular importance, the Vanderbilt Study points to the deferential standard of review for state determinations of legal questions as one provision of

---

39. VANDERBILT STUDY, *supra* note 31, at 57.

40. *Id.*

41. *Id.* at 58.

42. This proposition is under the assumption that the petitioners had properly exhausted their claims in state court. *See infra* note 52 and accompanying text.

43. VANDERBILT STUDY, *supra* note 31, at 59.

44. *Id.*

45. *Compare* Williams v. Calderon, 52 F.3d 1465, 1483 (9th Cir. 1995) (refusing to make a determination whether a long delay in habeas processing violates due process), Hale v. Lockhart, 903 F.2d 545, 548 (8th Cir. 1990) (categorically rejecting the argument that a petitioner is entitled to federal habeas relief "merely because a federal district court is slow in adjudicating a collateral attack on his state conviction"), *and* Hassine v. Zimmerman, 160 F.3d 941, 953 (3d Cir. 1988) (holding that while petitioner did experience excessive delay in the district court's processing of petitioner's petition, which may have given rise to a due process violation, petitioner was not entitled to habeas relief), *with* Carter v. Thomas, 527 F.2d 1332, 1333 (5th Cir. 1976) (holding that a twenty-one month delay before a federal petitioner may be approved to file a formal complaint may state a claim of "extreme and unreasonable delay" upon which relief may be granted).

46. VANDERBILT STUDY, *supra* note 31, at 58.

47. *Id.*

AEDPA that may explain the lower grant rate; however, the study ultimately concludes that without also examining appellate outcomes, it is unknown whether AEDPA has reduced the overall rate of relief for non-capital habeas petitioners.<sup>48</sup> As the next section demonstrates, the state appellate process may also be a contributing factor.

## B. Direct Review: An Equally Unsatisfying Option

Habeas petitioners are not just cursed with an ineffective collateral review process. Relying on potential relief through direct review may be equally unsatisfying. Although it has long been recognized that there is no constitutional right to an appellate process for criminal defendants,<sup>49</sup> if the state has affirmatively afforded such a right “as ‘an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,’” the state has an obligation to comport with the demands of the Due Process and Equal Protection Clauses of the U.S. Constitution.<sup>50</sup> Indeed, direct review, rather than collateral review, is the principal avenue for challenging a conviction. As stated by the Supreme Court in *Brecht v. Abrahamson*:

“When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.”<sup>51</sup>

A habeas petitioner is statutorily required to exhaust his state judicial remedies, either on direct appeal or through state collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim that the petitioner seeks to raise in federal court.<sup>52</sup> Although the exhaustion requirement was created as a matter of comity,<sup>53</sup> it may likewise harm a petitioner’s chances at relief at any level of review. This Comment does not seek to expand on the literature that is already replete with criticisms on how “exhausting” this state exhaustion requirement may

---

48. *Id.* at 59.

49. *McKane v. Durston*, 153 U.S. 684, 687 (1894).

50. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

51. 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

52. *See* 28 U.S.C. § 2254(b)(1)–(c) (2006); *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

53. *Granberry v. Greer*, 481 U.S. 129, 133–34 (1987).

become for a habeas petitioner.<sup>54</sup> It is worth mentioning, however, that most prisoners who were convicted of felonies have already served their sentences by the time their state appeals have been completed.<sup>55</sup> This presents an especially troublesome issue given that once they have served their sentences, former prisoners are no longer entitled to habeas relief under AEDPA.<sup>56</sup>

Moreover, the potential for erroneous decisions on state appeal, and consequently the criminal defendant's ability to avoid fundamental unfairness, may be greater than one would feel comfortable admitting. To begin, state appellate courts are heavily overburdened.<sup>57</sup> As the volume of appeals increases, so does the use of procedural shortcuts such as screening procedures, eliminating oral arguments, and truncating appellate opinions.<sup>58</sup> These shortcuts, however, can have devastating effects on the court's ability to properly review the constitutionality of a state defendant's criminal conviction.<sup>59</sup> Problems arise not only when state appellate courts review a trial court's records, but additional concerns surface when they are forced to make their own

---

54. See, e.g., Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN L. REV 1197 (1995) (noting the federal courts' inconsistent application of the state exhaustion requirement of AEDPA and recommending that they adopt a flexible approach to determining whether to dismiss a habeas petition for failure to exhaust state remedies as opposed to a strict rule requiring prisoners to petition the state courts in all instances).

55. VANDERBILT STUDY, *supra* note 31, at 54 (citation omitted).

56. 28 U.S.C. § 2254(a) (2006) (“[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in *custody* pursuant to the judgment of a State court . . .” (emphasis added)). While the petitioner may still be entitled to a writ of error coram nobis, which affords a remedy to attack a conviction and sentence even after a petitioner has served his or her sentence and is no longer in custody, see *United States v. Morgan*, 346 U.S. 502, 503–05 (1954), an analysis of such a remedy is beyond the scope of this Comment.

57. JUD. ADMIN. DIV., AM. BAR ASS'N, STANDARDS RELATING TO APPELLATE COURTS 2 (1994) (“The appellate courts of virtually all American jurisdictions now confront an enormous increase in their workloads.”).

58. Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 390 (1991).

59. *Id.* (“While these procedures can have some beneficial effect on the speed with which appeals are processed, they can also impinge upon, or even eviscerate, the defendant's right to appeal.” (footnote omitted)); *but see* JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS* ix–xii (2002) (arguing that despite the assumption that increasing caseloads have impinged on judges' abilities to bestow justice, certain organizational features of the appellate courts allow the courts to maintain an effective balance between the traditional image of individual judicial decision-making and the judges' growing interdependence on their court staff to increase the number of cases decided without sacrificing the ability to effect justice).

factual findings.<sup>60</sup> Despite the potential for error, a defendant's conviction might never be reviewed by the state's highest court since discretionary review is rarely granted.<sup>61</sup> Once these factual findings are made, with or without a state supreme court's check on the appellate court's work, AEDPA's deferential standard once again comes into play to solidify the conviction.<sup>62</sup>

The slim likelihood of obtaining relief at the federal level, coupled with the deficient qualities of the state appellate courts, contributes in large part to the lower grant rate of federal habeas corpus relief.

## II. When in Doubt: Defer, Defer, Defer

A state prisoner can only obtain federal habeas relief on the ground that he is in custody in violation of the U.S. Constitution or federal law.<sup>63</sup> Habeas petitioners often raise claims alleging federal constitutional violations that arose from conduct that occurred during their daily state trial proceedings.<sup>64</sup> By characterizing their claims under this type of language, petitioners attempt to transform their arguments into a cognizable federal habeas claim. Yet, since they were faced with juries comprised of state citizens who are instructed on state laws by state judges making state evidentiary rulings after hearing arguments from state attorneys, one can imagine the amount of petitions that are denied as not cognizable in a federal habeas proceeding because the claim only states a violation of state law. Indeed, the Supreme Court recently stated with unequivocal clarity, "it is only non-compliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."<sup>65</sup> The Court's

---

60. Leonard N. Sosnov, *No Mere Error of State Law: When State Appellate Courts Deny Criminal Defendants Due Process*, 63 TENN. L. REV. 281, 311 n.150 (1996).

61. See, e.g., *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (stating that the state appellate court decisions in Minnesota and Florida are usually "the end of the road" (quoting *Williams v. Wainwright*, 452 F.2d 775, 776 (5th Cir. 1971)), *abrogated on other grounds by O'Sullivan v. Boerckel*, 526 U.S. 838, 842-46 (2004).

62. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981) (pre-AEDPA case holding that Section 2254(d) requires deference by federal courts to factual determinations of all state courts without making any distinction between factual determinations of a state trial court and those of a state appellate court).

63. 28 U.S.C. § 2254(a) (2006).

64. *But see* VANDERBILT STUDY, *supra* note 31, at 26-27 (finding that from a survey of 1837 non-capital cases, nearly one in five cases did *not* challenge the underlying state judgment at all, and from a survey of 1521 non-capital cases, at least twenty-one percent of them raised challenges to their sentence alone).

65. *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (per curiam).

statement is undisputable, and rightfully so. As one scholar noted, “[w]hen it comes to state law issues, where the state courts have particular expertise in their legal structure and have greater experience with the issues than the federal courts, there is an increased need for hesitation before declaring the state court action unconstitutional.”<sup>66</sup> Further, a petitioner may not “transform a state-law issue into a federal one merely by asserting a violation of due process.”<sup>67</sup> If the law were construed otherwise, all claims raised in state court would be cognizable on collateral review, and the value of comity would depreciate.

While the above comments have often been used, in one form or another, in conjunction with the standard under § 2254(d)(1),<sup>68</sup> they incorrectly assume the existence of some sharp, easily distinguishable divide between what may only be recognized as a state law claim and what may ultimately amount to a violation of the U.S. Constitution. This is a superficial characterization that cannot always be so construed, especially given the nature of criminal trials, in which legal adversaries constantly dispute the constitutionality of depriving a person of their right to liberty. There is always the potential that a trial error in a criminal proceeding could become so egregious that it amounts to a constitutional violation. Of course, this is not to say that state trial judges are inept or lack the ability to detect, understand, and apply federal constitutional principles while they preside over the criminal trial. Rather, the concern is trial judges may not be as mindful of Supreme Court precedent, as required under § 2254(d)(1), when making determinations of state law. Of course, it is common understanding that the role of a trial court is to act as the trier of fact and the appellate court to review for legal error:

[A] presumed competence extends to appellate judges of any appellate court because of their limited and focused role. Also, unlike trial judges, appellate decisions are made in a calm, reflective atmosphere. Appellate judges have the benefit of group decision-

---

66. Sosnov, *supra* note 60, at 307–08.

67. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996).

68. See, e.g., Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) (“Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 2254(d)(1) (2006) (stating that a petition for a writ of habeas corpus shall not be granted unless it violated “clearly established *Federal law*” (emphasis added)).

making with the combined thinking and exchange of ideas among several judges.<sup>69</sup>

Still, in deciding whether a state conviction violates the U.S. Constitution, a federal habeas court often gives due deference to the state trial court's determination of federal constitutional issues as they come up during the heat of trial.<sup>70</sup> This deference persists despite a trial court's primary focus on state law issues.

#### A. Are Trial Judges' State Evidentiary Rulings Concerned with Federal Constitutional Law?<sup>71</sup>

According to the Vanderbilt Study, almost twenty percent of the non-capital cases surveyed included at least one challenge to a trial-phase rule admitting or excluding evidence other than a confession or a statement and other than a ruling based on the Fourth Amendment.<sup>72</sup> Though the number of federal habeas cases that involve a

---

69. Sosnov, *supra* note 60, at 308 (footnotes omitted). With that said, however, there is still the concern for erroneous decisions on direct review. See *supra* Part I.B.

70. Of course, it is true that the state court "decision" to which Section 2254(d)(1) applies, and accordingly, which a federal habeas court reviews, is the "last reasoned decision" of the state court, which necessarily refers to the decisions of the state's higher courts, not the lower trial court. See *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991). However, as recognized by the Ninth Circuit, "[a]lthough 'AEDPA generally requires federal courts to review one state decision,' if the last reasoned decision adopts or substantially incorporates the reasoning from a previous state court decision, we may consider both decisions to 'fully ascertain the reasoning of the last decision.'" *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (quoting *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005)). This may also involve a trial court's reasoning of a constitutional issue that was presented at trial. Furthermore, it is safe to say state prisoners petition to the federal courts for relief only because the reviewing state courts found either that the trial court did not commit any constitutional error at trial, or that the court did not commit error of sufficient magnitude to warrant reversal. Cf. *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011) (reviewing a state court's one-sentence order denying relief and noting "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits" as part of a threshold requirement before Section 2254(d)(1) can apply). Otherwise, there would not be any point to petition to the federal courts if the state courts had already found reversible error. In any event, this shows that the trial court's own determination of whether trial error rose to federal constitutional dimension is of sufficient influence to warrant careful analysis thereof.

71. Although this Comment concerns only state-level trials governed by state rules of law, the following section will detail a number of evidentiary provisions under the Federal Rules of Evidence because most states have adopted them in whole or in part. See 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, NOTE T (Joseph M. McLaughlin ed., 2d ed. 1997) (stating that forty-two states have adopted rules patterned on the Federal Rules of Evidence, and nine jurisdictions have not adopted rules based on the Federal Rules of Evidence, but that the rules have nonetheless influenced the law of evidence in many of those jurisdictions).

72. VANDERBILT STUDY, *supra* note 31, at 29.

challenge to a state trial court's evidentiary ruling is high, the number of grants of relief remains insignificant. This is likely because the failure to comply with state rules of evidence is not subject to federal habeas review, thereby implying a federal court's deference to the trial court's determination thereof, unless: (1) a specific constitutional guarantee is violated;<sup>73</sup> or (2) the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process.<sup>74</sup> In *Jammal v. Van de Kamp*,<sup>75</sup> the Ninth Circuit held that only if the jury may not draw permissible inferences from the evidence can its admission violate due process under either standard.<sup>76</sup> The following section demonstrates that although state judges preside over criminal trials as governed by state rules of evidence, they will necessarily make rulings that relate to the same federal laws noted above with which a federal habeas court is concerned under § 2254(d)(1).

To the extent a trial judge is required to make an evidentiary ruling based on an isolated review of the evidence under *Jammal*, there is little cause for concern. When a trial judge is confronted with the obligation to make a quick ruling on an objection to the admission of evidence, the judge is very well capable of analyzing, by sole reference to state law, the relevance and admissibility of the evidence, its purpose in trial (i.e., whether it is intended to prove the truth of the matter asserted), and, most importantly, its effect on the jury.<sup>77</sup> Indeed, the judge may provide the jury with a limiting instruction to admonish them on the appropriate purpose for which evidence is ad-

---

73. See *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

74. See *Hill v. U.S.*, 368 U.S. 424, 428–29 (1962); accord *Coningford v. Rhode Island*, 640 F.3d 478, 484 (1st Cir. 2011); *Wheeler v. Thaler*, 347 F. App'x 981, 982 (5th Cir. 2009); *Steward v. Workman*, 270 F. App'x 736, 739 (10th Cir. 2008); *Bey v. Bagley*, 500 F.3d 514, 519–20 (6th Cir. 2007); *Bucklew v. Luebbbers*, 436 F.3d 1010, 1018 (8th Cir. 2006); *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999).

75. 926 F.2d 918 (9th Cir. 1991).

76. *Id.* at 920; accord *Rasheed v. Moore*, No. Civ. 03-2036(FLW), 2006 WL 319299, at \*6 (D.N.J. Feb. 9, 2006).

77. Accordingly, as one scholar noted, a flexible system such as the Federal Rules of Evidence, which provides substantial discretion to trial judges, rather than a more detailed and restrictive evidence code, promotes:

[T]ruth as well as rules that allow judges to consider all the legal issues and factual evidence, the unique emotional aura of the trial, the jurors' intelligence, and the peculiar identities of the parties, . . . [and] can [also] accommodate a trial judge's cumulative assessment of the total prejudice injected into a particular trial against one or both litigants.

Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 460 (1989).

mitted,<sup>78</sup> an instruction which jurors are presumed to follow.<sup>79</sup> When such a curative instruction is issued, a court presumes the jury disregarded inadmissible evidence and no due process violation occurred.<sup>80</sup> So far, there are no federal constitutional implications that would merit close habeas corpus analysis.

When counsel objects to the admissibility of evidence, however, the trial judge is likely to focus his attention on the evidence in isolation rather than contemplate its effect on the entire trial. A trial judge's limited focus in this sense *does* present a problem for habeas petitioners because on habeas corpus review, the admissibility of evidence is not only reviewed individually, as is the case when presented to the judge at trial, but it is also evaluated in relation to all of the evidence collectively.<sup>81</sup> A federal habeas court conducts this form of analysis in order to determine the evidence's influence on the jury's ultimate verdict pursuant to *Brecht v. Abrahamson*.<sup>82</sup> To this extent, the trial judge may no longer elicit sympathy for having to deal with evidentiary disputes firsthand and making determinations thereof on the spot; although a daunting task, it is generally only excusable on direct review.<sup>83</sup> Thus, one may argue that state trial judges are not in the proper position, as compared to a reviewing court, to determine the constitutionality of a conviction on the basis of an evidentiary challenge before the criminal defendant is placed into custody.

On the other hand, even the Supreme Court in *Brecht* acknowledged that state courts have "a superior vantage point from which to evaluate the effect of trial error."<sup>84</sup> To illustrate, the trial judge is likely

---

78. See, e.g., FED. R. EVID. 105 ("If the court admits evidence that is admissible . . . for a purpose—but not . . . for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

79. See *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (Absent "extraordinary situations," the Court "presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instruction given them").

80. See *Greer v. Miller*, 483 U.S. 756, 766 & n.8 (1987).

81. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (analyzing trial error "in light of the record as a whole.").

82. See *id.* at 637.

83. Under the Federal Rules of Evidence, evidentiary rulings are analyzed by appellate courts under a limited "harmless error" rule, which acknowledges that some evidence rulings are inherently difficult calls in part because a trial court must make evidence rulings quickly, and which cautions appellate courts to "give trial courts some right to be wrong." Mengler, *supra* note 774, at 426-27; see also FED. R. EVID. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party . . .").

84. *Brecht*, 507 U.S. at 636.

to have access to information about evidence that the jury will hear in subsequent testimony and can thus predict its prejudicial effect on the jury before it is formally presented at trial. For example, motions in limine are brought before the trial begins and enlighten the trial court on the specific nature of any allegedly objectionable evidence before it is ever presented to the jury.<sup>85</sup> Moreover, the grant or denial of a motion in limine does not constitute a final ruling on the admissibility of the evidence; rather, it is interlocutory in nature such that it is only a preliminary expression of the court's opinion as to the admissibility of the evidence.<sup>86</sup> Thus, the trial judge is informed of the potentially admissible evidence in advance and need not make any hasty evidentiary determinations until the parties first receive a preliminary decision from the trial judge on the issue and only after evidence is later presented at trial. The court may even adjust a prior ruling on a motion in limine during the course of the trial in the event unanticipated evidence is presented.<sup>87</sup> The authority to rule on motions in limine rests on the inherent power of the trial judge to avoid the impact of unfairly prejudicial evidence upon the jury and to take any precautions necessary to guarantee a fair trial for all parties.<sup>88</sup> This example suggests that it is not outside the role of the state trial judge to rule on the admissibility of evidence based on its potential effect on the jury's ultimate verdict, and consequently, its effect on a defendant's constitutional rights to a fair trial under *Brecht*.

Additionally, trial judges have access to information about evidence that has already been presented and which is then used to form the basis of their analysis in later evidentiary rulings. Rule 403 of the Federal Rules of Evidence, for example, authorizes a trial court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice" or by considerations of trial efficiency.<sup>89</sup> Although the Supreme Court acknowledged in *Holmes v. South Carolina*<sup>90</sup> that well-established rules of evidence, such as Rule 403, are generally permitted,<sup>91</sup> the Court first noted that decisions to exclude evidence are inherently connected to, and thus may adversely affect, a criminal defendant's constitutional rights:

---

85. FRANCIS C. AMENDOLA ET AL., 22A C.J.S. *Criminal Law* § 613 (2006).

86. *Id.*

87. *See id.*

88. *Id.* at §§ 613, 615.

89. FED. R. EVID. 403.

90. 547 U.S. 319 (2006).

91. *Id.* at 326.

“[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” This latitude, however, has limits. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” This right is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’”<sup>92</sup>

State trial judges implicitly render decisions that affect a defendant’s right to have a criminal conviction free from reversible prejudice under *Brecht*, even when they focus only on rules to exclude evidence under state evidence law. This is because they are constantly mindful of the totality of evidence that has already been presented at trial. For example, balancing the probative value of evidence against its prejudicial effect requires the trial judge to look at other evidence already admitted against the party, in addition to the evidence in question, before the trial judge can exclude evidence pursuant to Rule 403.<sup>93</sup> Another factor that a trial judge considers is the cumulative effect of his Rule 403 rulings against one party and, consequently, whether the judge excluded an equal amount of evidence under the same rule against the other party.<sup>94</sup> In both instances, state trial judges, similar to a federal habeas court under *Brecht*, make rulings with respect to one piece of evidence as it relates to other evidence and its prejudicial effect on the jury.

Of course, the *Brecht* standard looks only to the jury’s ultimate verdict, not just one line of similar evidence.<sup>95</sup> Still, whether evidence is viewed in isolation or in connection with other evidence, trial judges are expected to maintain the fair trial guaranteed by the Fourteenth Amendment when making all evidentiary rulings. Nonetheless, as the following section demonstrates, a federal habeas court is unlikely to address claims challenging the admission of potentially preju-

92. *Id.* at 324 (citations omitted).

93. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5215 (1st ed. 1982) (“In assessing prejudice, the court must look at other evidence in the case as well as the proffered evidence.”).

94. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:12 (3d ed. 2007) (“[T]he trial judge should be evenhanded in administering Fed. R. Evid. 403. . . . If a judge excludes evidence offered by one party in the exercise of her discretion under Fed. R. Evid. 403, then she should act in a similar fashion respecting similar evidence offered by the other side.”); *see also In re Bendeclin Litig.*, 857 F.2d 290, 321 (6th Cir. 1988) (no abuse of discretion in excluding evidence under Rule 403 as to one party because trial court administered its Rule 403 rulings “evenhandedly”).

95. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

dicial evidence and will therefore leave it in the hands of the state trial court to ensure a trial-level evidentiary error does not amount to a due process violation.

**B. No Relief Without “Clearly Established Federal Law”: A Closer Look at Propensity Evidence**

In *O’Neal v. McAninch*,<sup>96</sup> two years after the Supreme Court decided *Brecht*, the Court clarified the *Brecht* requirement by explaining that on federal habeas review, the relevant inquiry in assessing the magnitude of prejudice from a state trial error is, “Do I, the judge, think that the error substantially influenced the jury’s decision?”<sup>97</sup> If, pursuant to the *O’Neal* inquiry, the court is convinced the error did not sufficiently influence the jury, or had only a slight effect, the verdict and the judgment should stand.<sup>98</sup> If, however, the record is so evenly balanced that a conscientious judge is in “grave doubt” as to whether an error had a substantial and injurious effect or influence on the jury’s verdict pursuant to the *Brecht* standard, the judge must assume the error was not harmless, and the petitioner must win.<sup>99</sup>

This type of “narrow circumstance” occurred in *O’Neal*, which prompted the Court to vacate the judgment and remand the case back to the lower court for further proceedings.<sup>100</sup> The dispute in *O’Neal* involved a confusing jury instruction that had the potential to mislead the jury.<sup>101</sup> The *O’Neal* inquiry may also be relevant to the analysis of “propensity evidence.” Rule 404(a) of the Federal Rules of Evidence forbids the use of character evidence to prove any conduct in conformity therewith: “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>102</sup> Propensity evidence has been held excludable for the following reasons:

(1) [S]uch evidence lacks probative value, (2) it diverts the jury’s attention from the merits of the case by inducing it to punish or reward a party for being good or bad in general, (3) adverse character evidence saddles one involved in legal proceedings with disabilities due to previous misconduct, (4) such evidence violates a social commitment to the thesis that each person remains mentally

---

96. 513 U.S. 432 (1995).

97. *Id.* at 436 (internal quotations omitted).

98. *Id.* at 437.

99. *Id.* at 435–37.

100. *Id.* at 437, 445.

101. *Id.* at 435.

102. FED. R. EVID. 404(a)(1).

free and autonomous at every point in his life, and (5) it is a senseless product of history.<sup>103</sup>

The prohibition of propensity evidence bears particular relevance to the *Brecht* standard's focal inquiry into the evidence's effect or influence on the jury's verdict. This is because "[e]ven if the prosecution fails to prove the charged offense beyond a reasonable doubt, jurors may well convict not because they believe the defendant is guilty of the current charges, but because he appears to be a person of bad character."<sup>104</sup> Finally, even if a loophole<sup>105</sup> applies to the general rule against the use of propensity evidence, the trial court still has discretion to exclude such evidence pursuant to Rule 403's balancing test because it may still create undue prejudice.<sup>106</sup> Even though the evidence might otherwise be admissible under a specified rule, and the jury is properly instructed to consider it only for that limited purpose, the jury nonetheless may not be able to follow the instruction.<sup>107</sup> As a result, the jury is likely to view the evidence improperly as character evidence that necessarily proves the defendant's propensity to commit the instant crime.<sup>108</sup>

Indeed, the Supreme Court implied in dicta that the admission of evidence of prior crimes or other bad acts may amount to a violation of due process under the right facts.<sup>109</sup> In *Alberni v. McDaniel*,<sup>110</sup> the petitioner followed the same reasoning in arguing before the Ninth Circuit that the admission at trial of his past violent actions and explosive temper constituted improper propensity evidence that violated his due process rights.<sup>111</sup> To support his contention, the petitioner argued "[th]e Supreme Court established a general principle that evi-

---

103. 1 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 4:18 (15th ed. 1997) (internal quotations omitted).

104. *Id.*

105. See, e.g., FED. R. EVID. 404(b) ("Evidence of a crime, wrong, or other act is not admissible to prove [propensity, but t]his evidence may be admissible for another purpose . . .").

106. See 1 BERGMAN & HOLLANDER, *supra* note 103, at § 4:11 ("Rule 403 applies to all types of evidence.").

107. *Id.* at § 4:38.

108. *Id.*

109. See *Marshall v. Lonberger*, 459 U.S. 422, 438–39 & n.6 (1983). The dissent in *Marshall* more explicitly argued that the risk of prejudice alone from admitting a prior conviction—provided the jury was given a proper limiting instruction—does not necessarily outweigh its probative value under a balancing of the interests as to one set of facts, but this was to be distinguished from another set of facts in which the admission of a prior conviction, in addition to other present risks of prejudice, might tip the balance and compromise a specific federal right. *Id.* at 439 n.1 (Brennan, J., dissenting).

110. 458 F.3d 860 (9th Cir. 2006).

111. *Id.* at 863.

dence that ‘is so extremely unfair that its admission violates fundamental conceptions of justice’ may violate due process.”<sup>112</sup> The Ninth Circuit court recognized “every circuit, in cases decided prior to the enactment of AEDPA, has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair.”<sup>113</sup> Given the unanimity of the courts of appeals’ positions on the issue of whether the admission of propensity evidence could ever violate due process, the court in *Alberni* described petitioner’s argument as “somewhat attractive.”<sup>114</sup> Thus, a state trial judge’s incorrect evidentiary ruling—that a particular piece of evidence was *not* being used to prove a propensity to commit a specific act—may very well satisfy the prejudice standard under *Brecht*.

On the other hand, a habeas petitioner must first prove the existence of a constitutional error under § 2254(d)(1) *before* a federal habeas court can analyze whether any error had a “substantial and injurious effect or influence in determining the jury’s verdict” under *Brecht*.<sup>115</sup> If the rule were the other way around, a district court could grant relief on prejudice grounds before ever determining whether the claim amounted to a federal constitutional error under AEDPA. That said, it bears repeating that a federal habeas petitioner cannot obtain relief unless, before establishing prejudice, he first proves the state court’s adjudication of his federal claim was “contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States. . . .”<sup>116</sup> As the statutory language makes clear, § 2254(d)(1) restricts the source of “clearly established” law to the Supreme Court’s jurisprudence.<sup>117</sup> In the absence of Supreme Court precedent that squarely addresses the specific legal issue raised by the habeas petitioner, however, there is

---

112. *Id.* at 864 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

113. *Id.* at 865–66 (citing cases from the First through the Eighth and the Tenth and Eleventh Circuits).

114. *Id.* at 866.

115. *Cf., e.g., Penry v. Johnson*, 532 U.S. 782, 795–96 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)) (addressing harmless issue only for the sake of argument *after* holding state-court decision was not contrary to or an unreasonable application of Supreme Court precedent); *Dillard v. Roe*, 244 F.3d 758, 767 n.7 (9th Cir. 2001) (refusing to apply *Brecht* analysis because no constitutional violation occurred).

116. 28 U.S.C. § 2254(d)(1) (2006) (emphasis added).

117. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also* § 2254(d)(1).

no “clearly established Federal law” for purposes of AEDPA as to that issue.<sup>118</sup>

As to the admission of evidence, the Supreme Court has not made a clear ruling on whether irrelevant or overtly prejudicial evidence violates the U.S. Constitution.<sup>119</sup> In *Estelle v. McGuire*,<sup>120</sup> the Supreme Court denied a habeas petition challenging a conviction for the murder of the petitioner’s daughter despite the petitioner’s argument that the jury instruction regarding evidence of the child’s prior injuries constituted a propensity instruction.<sup>121</sup> After holding there was no reasonable likelihood that the jury considered the evidence of prior injuries as propensity evidence, the Court concluded, “[b]ecause we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.”<sup>122</sup>

In response to the Supreme Court’s ambiguity, the Ninth Circuit in *Alberni v. McDaniel*<sup>123</sup> ultimately concluded that a petitioner’s due process right—with respect to the right to exclude improper propensity evidence—is not “clearly established” under AEDPA and therefore cannot form the basis for federal habeas relief.<sup>124</sup> The First, Second, Third, Sixth, and Tenth Circuits have unanimously agreed with this reasoning.<sup>125</sup>

Thus, even if the improper admission of evidence was so prejudicial that it may have rendered the entire trial fundamentally unfair, some district courts may deny the claim simply because the Supreme Court has not established a clear holding on the issue. What remains, then, is the state trial court’s own determination of a state-law issue, which may very well have evolved into a due process violation. Despite the potential for reversible error, a trial court’s determination of a

---

118. See, e.g., *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (requiring Supreme Court precedent to “squarely address the issue”); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (denying relief as to one issue because the Court never “required” the state courts to apply particular case law to that issue).

119. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).

120. 502 U.S. 62 (1991).

121. *Id.* at 74–75.

122. *Id.* at 75 n.5.

123. 458 F.3d 860 (9th Cir. 2006).

124. *Id.* at 866–67.

125. See *Coningford v. Rhode Island*, 640 F.3d 478, 484–85 (1st Cir. 2011); *Minett v. Hendricks*, 135 F. App’x 547, 553 (3d Cir. 2005); *Vanwoudenberg v. Booher*, 150 F. App’x 760, 761–62 (10th Cir. 2005); *Johnson v. Greiner*, 56 F. App’x 38, 39 (2d Cir. 2003); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

constitutional issue remains untouched in this respect since the Supreme Court expressly reserved the question open in *Estelle v. McGuire*.

### III. The Emphasis is on the States: A Review of the Reasoning-Process Review Model and its Shortfalls

The above sections all point toward the need for state courts to conscientiously and openly apply federal law when reviewing a criminal defendant's conviction. The following section argues that Steven Semeraro's approach to federal habeas corpus jurisprudence in his article, *A Reasoning-Process Review Model for Federal Habeas Corpus*,<sup>126</sup> is correct to the extent it encourages a state court's attention to federal issues. However, it falls short in several respects in its ultimate proposal that the federal habeas court should be able to remand the case back to the state courts for fuller consideration of the applicable federal constitutional law.

After criticizing the Supreme Court's objective-reasonableness standard under AEDPA as an incoherent standard for evaluating a state court ruling on a federal constitutional question,<sup>127</sup> Semeraro worried that a confused habeas court interpreting the standard under § 2254(d)(1) would re-examine the merits of a state court decision no matter how thorough a state judge's opinion may be.<sup>128</sup> This would then cause state judges to put little effort into analyzing the federal issue, knowing that the federal court will take care of the rest regardless of whether or not the state court's result is correct.<sup>129</sup> Semeraro concluded the section by arguing for a test that both satisfies AEDPA's call for deference to reasonable state court applications of federal law and fulfills the constitutional mandate that state courts thoroughly and reasonably apply federal law.<sup>130</sup> To the extent Semeraro argues federal habeas courts give deference to state court decisions under inappropriate circumstances while emphasizing the concern that state courts are not appropriately applying federal law, Semeraro is absolutely correct.

Semeraro's solution can be summarized as a two-step inquiry for the federal habeas courts to follow. First, did the state court cite all

---

126. Semeraro, *supra* note 16.

127. Semeraro, *supra* note 16, at 923–25.

128. *Id.* at 925.

129. *Id.* at 925–26.

130. *Id.* at 926–27.

applicable federal law?<sup>131</sup> Second, did the state court demonstrate a thorough understanding and analysis of federal law?<sup>132</sup> If either question is answered in the negative, the federal habeas court could identify the weakness and remand the case back to the state court with directions to more properly apply the correct federal law.<sup>133</sup> Semeraro argues that by ensuring the state courts actively engage in federal constitutional jurisprudence while also supplying the reasoning behind such application, the reasoning-process model would better justify the deference afforded to the state court's opinion under AEDPA.<sup>134</sup>

The reasoning-process model, however, raises a number of concerns. First, Semeraro recognizes that initially, federal habeas courts will often have to return cases back to the state courts.<sup>135</sup> However, he quickly disposes of the worry with a sentence-long assurance that, sooner or later, state courts will get frustrated with the time-consuming remands and end up complying with the new standard.<sup>136</sup> Unfortunately, there is no prediction how long the remand phase will last. It is more likely, then, that the remedy will only prolong the time it takes for a habeas petitioner to receive a final determination as to the constitutionality of his custody. Furthermore, even if the federal habeas court accompanied its remand order with instructions identifying how the state court erred, the proposed solution would nonetheless contribute to the overburdened state appellate court system.<sup>137</sup> Finally, and most importantly, Semeraro's solution does nothing to compel the state trial judge, who initially faced the constitutional issue at trial,<sup>138</sup> to justify his rulings on federal constitutional grounds.<sup>139</sup> A better solution would allow a court to dispose of the issues at the outset.

---

131. *Id.* at 927–28.

132. Semeraro, *supra* note 16, at 928.

133. *Id.* at 929.

134. *Id.* at 941.

135. *Id.* at 929.

136. *Id.*

137. *See supra* note 57 and accompanying text.

138. *See supra* Parts II, II.A.

139. When Semeraro used the proceeding in *Ramdass v. Angelone* to illustrate how the reasoning-process review test would differ from existing habeas practice he concluded a federal habeas court applying the standard would return the case to the state *supreme* court to apply the applicable federal law, leaving the trial court's role unchanged. Semeraro, *supra* note 15, at 930–33.

#### IV. The Civil Statement of Decision Applied to Criminal Trials

While Semeraro's proposal moves federal habeas corpus jurisprudence in the right direction by suggesting that state courts supply a federal habeas court with a written record that accurately details their identification, understanding, and analysis of federal constitutional issues, Semeraro falls short by failing to propose a solution that would address the potentially unconstitutional implications of trial error as they first arise. The new focus for meaningful habeas corpus review must be at the trial level.

##### A. The Proposal Defined

First, this Comment encourages state legislatures to adopt a post-trial motion and proceeding that allows a criminal defendant, with respect to a motion for new trial, to raise claims before the initial trial judge alleging that what would have normally only constituted a state-level trial error had actually evolved into a federal constitutional violation. The post-trial motion should be raised independently of any state claims so that criminal defendants do not merely tack on a constitutional violation to every state law claim.<sup>140</sup> Second, a written statement of decision should be statutorily required for trial court determinations of constitutional issues that are raised in the post-trial motions for new trial. Thus, if on collateral review the court sees the state trial judge adjudicated the motion on the merits under the applicable federal law, and the state court affirmed the decision on appeal, the federal habeas court could reach the disposition of a petitioner's claim much more quickly. If the federal court unequivocally agreed with the trial court's written opinion, it could perhaps even summarily deny the habeas petition.

The proposal that state trial judges should be held accountable for addressing constitutional issues in written form is not the same as Semeraro's reasoning-process review. Semeraro's approach seeks to encourage a state's higher courts to pay attention to constitutional issues, but it does nothing to change the role of the lower trial courts.<sup>141</sup> Indeed, this solution represents a vast departure from all currently proposed solutions in the sense that it emphasizes the need to scrutinize a trial judge's role in habeas corpus jurisprudence. Additionally, Semeraro's approach is distinguishable because it proposes a

---

140. See *supra* note 67 and accompanying text.

141. See *supra* notes 137-39 and accompanying text.

federal court should defer to a state's decision-making process in lieu of AEDPA's current objective-reasonableness standard.<sup>142</sup> Similarly, this Comment's solution is distinguishable from Professor Bator's approach in his article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, in which he argues that federal courts should not consider the merits of a federal constitutional claim if the defendant had a fair opportunity to be heard on his claims in the state courts.<sup>143</sup> Both Semeraro and Bator propose the standard of review under AEDPA should change. To the contrary, this Comment argues for a written statement of decision of a trial judge's determinations of federal constitutional claims so that the standard of review under AEDPA, as it is applied in its current and unchanged state, will be viewed by the legal community as a more acceptable resolution of constitutional claims that are raised pursuant to § 2254(d)(1).

#### **B. The Utility of a Criminal Statement of Decision Process and its Proposed Application**

Currently, in the criminal context, it is uncommon for state trial judges to put any legal determinations in writing, but instead they communicate their rulings orally so that it may be transcribed by a court reporter. In the civil context, however, judges are often required to issue a written statement of their decision. In California, this is required under section 632 of the California Code of Civil Procedure.<sup>144</sup>

There is little reason why a similar procedure cannot be adopted in the criminal context with respect to questions of federal constitutional law. If states adopt a similar limitation as to the time for which a

---

142. Semeraro, *supra* note 16, at 926–27.

143. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

144. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision.

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.

CAL. CIV. PROC. CODE § 632 (West 2012).

defendant may request a statement of decision, as well as a requirement that the requesting party identify with sufficient particularity the specific constitutional issues for which the statement of decision is requested, the post-trial motion will be able to narrowly define the issues for the trial judge in a way that would prevent any excessive delays or unnecessary compromises in judicial resources. A defendant's failure to comply with the specified rules would result in a waiver of the right to request a statement of decision.

At the very minimum, state trial courts cannot refuse to hear a federal constitutional claim even if the state legislature has yet to recognize it as a cognizable post-trial claim in a statute. For example, California enumerates nine grounds for ordering a new trial.<sup>145</sup> Although the statute expressly limits the grant of a new trial to the listed grounds only,<sup>146</sup> the California Supreme Court in *People v. Fosselman*<sup>147</sup> held "the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law."<sup>148</sup> The California Supreme Court explained the state legislature does not have the power to limit this constitutional obligation by failing to enumerate such claims in its statute.<sup>149</sup> The Court bolstered its analysis by noting the undeniable fact that "trial judges are particularly well suited to observe courtroom performance and to rule on" the constitutionality of such performances "in criminal cases tried before them."<sup>150</sup> Finally, and of particular importance to this Comment, the Court stated that "in appropriate circumstances justice will be expedited by avoiding appellate review, or *habeas corpus* proceedings, in favor of presenting the [constitutional issue] . . . to the trial court as the basis of a motion for new trial."<sup>151</sup> Because neither the state trial court nor the legislature may wholly prevent a criminal defendant from raising a constitutional issue during trial-level proceedings,<sup>152</sup>

---

145. CAL. PENAL CODE § 1181 (West 2012).

146. *See id.* ("[T]he court may . . . grant a new trial in the following cases *only* . . . ." (emphasis added)).

147. 659 P.2d 1144 (Cal. 1983).

148. *Id.* at 1150.

149. *See id.*

150. *See id.*

151. *See id.* (emphasis added).

152. They can, however, place restrictions on the availability of motions for new trial in the interest of efficiency and finality, such as requiring a defendant to first raise the issue by way of an objection during trial. *See, e.g.,* Commonwealth v. Chase, 741 N.E.2d 59, 64 (Mass. 2001). This rule applies even when the claim is "one of constitutional dimension." *Id.* ("[E]ven when a claim is one of constitutional dimension, a defendant who has had a fair opportunity to raise it may not belatedly invoke that right to reopen a proceeding that has already run its course." (citation and internal quotation marks omitted)).

state legislatures should incorporate this Comment's proposal in their statutes to promote a speedy, yet fair, administration of justice.

There are also a number of strategic opportunities available in the statement of decision process for both prosecutors and defendants. First, the parties and the judge, who actually participated in the trial and are most familiar with the issues, will be in the best positions to argue and adjudicate, respectively, whether a particular trial error amounted to a constitutional violation. More importantly, as one scholar noted, "[t]he Statement of Decision process provides for an interaction between court and counsel regarding what a statement should include."<sup>153</sup> In California's statement of decision process, for example, the court can assign the task of preparing a proposed statement of decision to one of the parties, typically the prevailing party.<sup>154</sup> Once the proposed statement of decision has been served upon the parties, any party may file objections to the statement.<sup>155</sup> The term "objection," however, does not mean the statement of decision process is a means for challenging the court's reasoning.<sup>156</sup> Rather, it alerts the court to any omissions or ambiguities in the statement.<sup>157</sup> Counsel may even argue for any alternative theories of the issues or request a direct statement from the court that the court has not reached those issues, which may then be raised later on direct or collateral review.<sup>158</sup> In response to any objections, the trial court may amend the statement of decision.<sup>159</sup>

Applying California's statement of decision process to the instant proposal, the prosecution would be able to draft the statement of decision in a way that unambiguously resolves all the issues in favor of affirming the constitutionality of the conviction. In response, the defense may choose whether or not to file an objection.<sup>160</sup> In the event an objection is raised, the prosecution can urge the court to resolve

---

153. Robert H. O'Brien, *The Success of Delay Reduction in the Civil Trial Courts*, L.A. LAW., Mar. 2002, at 64, 65.

154. Robert A. Olson & Anne W. Braveman, *Strategic Opportunities in the Statement of Decision Process*, THE VERDICT, 2nd Quarter 2005, at 42, 43.

155. CAL. R. CT. 3.1590(g) (West 2006).

156. Olson & Braveman, *supra* note 154, at 44.

157. *Id.*

158. *Id.* at 45.

159. *Id.* at 44.

160. Olson and Braveman argue it is to the losing party's benefit *not* to vocalize any objections because if the trial court does not resolve any challenged omissions or ambiguities, the party eliminates the risk that any adverse rulings are construed against that party. *Id.* at 44–45. The same considerations would be applicable to the instant proposal with respect to the criminal defendant.

the objection by suggesting a precise manner in which the court may amend the statement of decision in a way most favorable to the prosecution. The result is a perfectly framed disposition of the constitutional concerns the parties had just disputed with the issues still fresh in their minds.

### C. A Response to Anticipated Criticisms

One may argue this proposed solution is neither practical nor constitutionally required. The sole purpose of the trial process is to determine facts showing guilt or innocence, not to resolve questions of law. Because a state trial judge's primary responsibility is to administer criminal law and procedure, it may be difficult to contemporaneously and dispassionately enforce a defendant's federal constitutional rights.<sup>161</sup> Reviewing courts, on the other hand, are created to ensure a second, more remote, decision-maker is "convinced that the conviction was in accord with law."<sup>162</sup> Additionally, the Supreme Court held it is not necessary for the state's highest court to accompany the denial of relief with a statement of its reasoning,<sup>163</sup> nor is it even required for the court to cite federal precedent.<sup>164</sup> If this is true with respect to the highest state court, it most certainly cannot be constitutionally required for a trial court to be held to such high expectations. Still, a trial judge's rulings to evidentiary challenges are inevitably tied to notions of due process and the right to fair trial. Because there is always the risk that a violation of a state law of evidence could be of sufficient magnitude to trigger federal constitutional concerns, state trial judges should be cognizant of these issues whether or not it is constitutionally required of them.

One may also argue that the trial judge who initially made the evidentiary ruling in question will not be so willing to admit his decision was inconsistent with the Constitution, even if true; hence the need for post-conviction review from a different decision-maker.<sup>165</sup> The response to such a pessimistic view of a trial judge's ability to comport with constitutional principles is that new constitutional rules should not be designed with the evil judge in mind:

---

161. Semararo, *supra* note 16, at 916 & n.85.

162. *Evitts v. Kentucky*, 469 U.S. 387, 404 (1985).

163. *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011).

164. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) ("Avoiding [reversal under AEDPA] does not require citation of our cases—indeed, it does not even require *awareness* of our cases . . .").

165. *See supra* note 162 and accompanying text.

Rulemaking is about ordering society in the best way possible. Even if rulemaking is not grounded entirely on hope for a better way, it proceeds, as it should, on the assumption that people charged with implementing the rules will do so in a responsible way. Moreover, no . . . rules can impede a trial judge bent on mistreating a litigant. Particularly in the context of an ongoing trial, a biased judge can abuse a litigant in a variety of subtle and largely unreviewable ways. The judge's demeanor, tone of voice, and facial expressions toward the party and the jury, as well as toward the party's counsel and witnesses, can poison that person in the jurors' minds. A trial judge also can mistreat a litigant by intentionally reaching erroneous rulings. . . . The losing litigant, however, is forced to undertake a costly appeal and second trial, often before the same judge. No rules, however detailed, can prevent unethical trial judges from treating litigants unfairly.<sup>166</sup>

A more optimistic, and in fact, realistic, view of the court system is that state courts are actually not so hostile to federal law:

Today, isolated examples of state defiance of federal law remain, but systematic breakdowns have not occurred for some time. At least one study suggests that continued state hostility to federal constitutional rights can no longer be presumed. And particularly with respect to criminal procedure, the state courts have overwhelmingly come to adopt federal law as their own. A decade ago, Joseph Hoffman and William Stuntz concluded that "[t]he historical tension between state and federal law . . . has been almost completely eliminated in the criminal procedure context." "[I]n an important sense," they found, "the law of the Fourth, Fifth, and Sixth Amendments—our detailed, national Code of Criminal Procedure—today 'belongs' to state courts as much as it does to their federal counterparts. . . . [S]tate courts deal with federal criminal procedure law the same way federal courts do—as the sole source of detailed rules that govern their criminal dockets."<sup>167</sup>

The state trial judge may now have something tangible to point to in the event his rulings are criticized on constitutional grounds. As to the prosecutor, he may have guaranteed that his efforts to prove guilt beyond a reasonable doubt are now secured and supported by the U.S. Constitution. Finally, the criminal defendant may be comfortably assured that the trial judge was held accountable for any trial rulings that may have risen to the level of an unconstitutional violation, to which a federal habeas court would have given deference years later.

---

166. Mengler, *supra* note 77, at 465 (footnotes omitted).

167. Semeraro, *supra* note 16, at 912 (footnotes omitted).

## Conclusion

Not only are state trial judges constitutionally mandated to follow federal law,<sup>168</sup> but at the very least this proposal will force the same judge who first faced the alleged error to justify his rulings on constitutional grounds and in written form. One must also not forget the Supreme Court's longstanding principles of comity, federalism, and finality.<sup>169</sup> As Justice O'Connor so eloquently described: "In criminal trials [the States] hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."<sup>170</sup> This Comment supports these principles.

Many critics will maintain that the proposed solution will not change AEDPA's standards, increase the grant rate of federal habeas corpus relief, or encourage the Supreme Court to expand its "clearly established" jurisprudence. This is conceded. Indeed, federal habeas corpus may never change. However, with a process that grants a criminal defendant a means to raise constitutional claims at the outset of the alleged violation, coupled with the requirement for a written, well-reasoned statement of the state trial judge's vindication of those federal constitutional issues, the proposed solution should help quell any worry that a state prisoner's custody is in violation of the U.S. Constitution.

---

168. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

169. See *supra* note 4 and accompanying text.

170. *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

