

CONSTITUTIONAL RETROACTIVITY IN CRIMINAL PROCEDURE

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Abstract: The “watershed” doctrine gives prisoners a constitutional basis to reopen their cases based on a new due process protection that would have made a difference had it been announced before their appeals were exhausted. The Supreme Court has imposed nearly impossible conditions, however, for any new rule of criminal procedure to apply retroactively to a final conviction or sentence. No such rule can be backdated unless it enhances not only the accuracy of criminal verdicts, but also “our very understanding of the bedrock” tenets of fairness in criminal trials. The Court refers to rules that satisfy both these requirements as “watersheds.” In the quarter-century since it established this doctrine, the Court has denied the accuracy-and-fairness credentials to every one of the dozens of new rules it has characterized as procedural and whose watershed status it has considered. Scholarly consensus accordingly casts watershed doctrine as exceptional, esoteric, and insignificant.

This Article challenges that consensus. We use the dynamic concentration model of game theory to show how watershed doctrine counteracts the structural undersupply of constitutional due process rules. The Court maintains too small a caseload to scrutinize more than a fraction of due process violations or specify every such procedural demand. That institution is accordingly ill equipped to rein in the punitive tendencies of elected state judges who owe their jobs to electorates that tend to value crime prevention more than defendants’ rights. Watershed doctrine potentially mitigates this enforcement problem by creating an extreme, if low-probability, threat of repealing scores of final convictions. By issuing a single new watershed rule, the Court can mandate sweeping retrials or release of prisoners into the public. This existential threat provides an overlooked reason why state courts might insulate their states’ criminal procedures against Supreme Court incursions. To achieve the desired insulation, state courts can create constitutional safe harbors by trying to align their procedures with watersheds they project the Court might announce in the future. Indirect support for this theory comes from our comprehensive study of the hundreds of watershed decisions that state courts have issued since 1989. We narrowed this list down to the 228 controlling decisions about whether to backdate distinct due process rules across different

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jurisdictions. Our analysis found that twenty-seven, or more than one in nine, of these decisions inflate the retroactivity rights of criminal defendants.

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INTRODUCTION

The “watershed” doctrine of constitutional retroactivity has since its inception lived in the margins of criminal procedure. It was born in the Supreme Court’s 1989 decision *Teague v. Lane*.¹ *Teague* set forth narrow conditions under which constitutional change in the rules of criminal procedure would have the dramatic consequence of requiring the retrial, resentencing, or release of any prisoner whose conviction or punishment became final before that new protection was announced.² This extraordinary kind of due process rule—whose repercussions reach farther than any in our criminal or constitutional law, so rare that one like it has never been recognized—is what the Supreme Court has referred to as a “watershed.”³

The Court’s recent decision in *Montgomery v. Louisiana*⁴ brought into sharp relief the Court’s reluctance to apply that rule directly. Henry Montgomery had been in prison since 1963, sentenced to die there under the mandatory life sentence he received for a murder conviction when he was seventeen.⁵ Nearly fifty years later, the Court, in *Miller v.*

1. 489 U.S. 288 (1989).

2. *Id.* at 306–10.

3. *See, e.g., id.* at 311.

4. ___ U.S. ___, 136 S. Ct. 718 (2016).

5. *State v. Montgomery*, 181 So. 2d 756, 757 (La. 1966).

Alabama,⁶ established a new rule that the Eighth Amendment ban on “cruel and unusual punishment” entitles juveniles to individualized sentencing for life incarceration without the possibility of parole.⁷ In *Montgomery*, the Court applied that rule to individuals like the petitioner, whose convictions and sentences had been finalized (even long) before its 2012 announcement in *Miller*. That rule’s retroactive application means that, in states like Louisiana, Michigan, and Pennsylvania with significant numbers of juvenile homicide offenders, more than 1000 prisoners once condemned for life must now be considered for parole. Hamstrung by its previous refusals to recognize newly announced rules as watersheds, however, the Court was forced to reach this result by “rewriting” *Miller*’s procedural mandate as substantive.⁸

Under the watershed doctrine, a new due process right⁹ applies to final convictions only when that protection manifestly improves the accuracy of convictions and does no less than “alter our understanding of the *bedrock procedural elements*.”¹⁰ The retroactive application of these so-called watershed rules benefits not only defendants facing trial or appealing guilty verdicts, but also those who have exhausted their appeals.¹¹ A defendant whose conviction and sentence has become final can invoke this doctrine in any habeas proceeding or other suit for post-conviction relief.¹² When backdating that due process reform casts doubt on whether a prisoner’s guilty verdict was accurate or whether his trial

6. ___ U.S. ___, 132 S. Ct. 2455 (2012).

7. *Id.* at 2471.

8. *Montgomery*, 132 S. Ct. at 743 (Scalia, J., dissenting). For a sustained argument that *Miller* is a watershed, see Beth Caldwell, *Miller v. Alabama as a Watershed Procedural Rule: The Case for Retroactivity*, 10 HARV. L. & POL’Y REV. ONLINE S1 (2015). On why the *Montgomery* majority’s characterization of *Miller* conflicts with the Supreme Court’s previous formulations of what distinguishes a rule of criminal law as “substantive” as opposed to procedural, see *infra* notes 20–25, 206–20 and accompanying text.

9. We use the broad conception of due process that includes not only the Fifth and Fourteenth Amendments’ protections, but also the Sixth Amendment’s guarantees of fair trial: the defendants’ right to confront prosecution witnesses, to secure compulsory process, and to have a trial by jury. See generally Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (analyzing due process as a bundle of rights); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957) (same). See also Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 339 (1987) (“By 1868, due process had come to connote a certain core procedural fairness when government moved against a citizen’s life, liberty, or property.”).

10. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

11. See *infra* notes 38–46 and accompanying text.

12. See *infra* notes 52–72 and accompanying text.

was fair, the court must order a retrial or exonerate the defendant immediately.¹³

The Supreme Court has so narrowed such “watershed” rules, however, that the doctrine is highly exceptional.¹⁴ Over the past quarter-century since *Teague*, the Court has refused to confer watershed status on even one new rule of constitutional criminal procedure among the dozens it has announced.¹⁵ The only rule that would have qualified, the Court has said, is the right to assistance of counsel.¹⁶ This rule was first announced in *Gideon v. Wainwright*,¹⁷ long before *Teague*, and the Court has characterized this rule’s unique centrality to “basic due

13. See *infra* text accompanying notes 86–99 and accompanying text.

14. See *infra* notes 100–07 and accompanying text.

15. *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (denying watershed retroactivity to new procedural rule requiring cross-examination for inculpatory testimonial statements); *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (same); *Beard v. Banks*, 542 U.S. 406, 417–18 (2004) (denying watershed retroactivity to new procedural rule barring capital sentencing schemes that require juries to disregard mitigating factors not unanimously found); *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (denying watershed retroactivity to new procedural rule that aggravating factors which make a defendant eligible for the death penalty must be proved to a jury rather than a judge); *Tyler v. Cain*, 533 U.S. 656, 669–70 (2001) (declining an invitation to interpret as retroactive the prohibition on giving jurors instructions that they could understand as allowing conviction without proof beyond a reasonable doubt); *O’Dell v. Netherland*, 521 U.S. 151, 167 (1997) (denying watershed retroactivity to new procedural right to inform a sentencing jury contemplating capital punishment that defendant is not a future danger because he is ineligible for parole); *Lambrix v. Singletary*, 520 U.S. 518, 539–40 (1997) (refusing to apply retroactively the rule that invalid aggravating circumstances cannot be weighed in capital sentencing); *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (denying watershed retroactivity to new procedural rule that prosecutors must give adequate notice of the evidence the state intends to use in the sentencing phase); *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995) (per curiam) (denying watershed retroactivity to new procedural rule that defendants who flee after conviction retain a right to appeal); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (denying watershed retroactivity to proposed double jeopardy rule that would have prevented state from again seeking to have defendant sentenced as persistent felony offender on retrial following reversal of his sentence); *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (denying watershed retroactivity to new procedural rule forbidding jury instructions that allow murder convictions without consideration of diminished mental state); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (denying watershed retroactivity to new procedural rule proscribing jury instructions that bar a sentencing jury to consider mitigating evidence); *Butler v. McKellar*, 494 U.S. 407, 416 (1990) (denying watershed retroactivity to new procedural rule barring police-initiated interrogation following a suspect’s request for counsel); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (denying watershed retroactivity to new procedural rule that new rule that bars trial courts from “telling the jury to avoid any influence of sympathy”); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (denying watershed retroactivity to new procedural rule forbidding “the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant’s capital sentence rests elsewhere”).

16. *E.g.*, *Whorton*, 549 U.S. at 418–19; *Beard*, 542 U.S. at 417–18; *O’Dell*, 521 U.S. at 167; *Gray*, 518 U.S. at 170; *Parks*, 494 U.S. at 495.

17. 372 U.S. 335, 343–45 (1963) (holding that indigent criminal defendants are constitutionally entitled to counsel at the government’s expense).

process” as “unlikely . . . to emerge” again.¹⁸ Accordingly, not a single prisoner since *Teague* has, by judgment of the Supreme Court, benefited from a constitutional reform that took hold after direct review of his case, no matter how profound that reform had been and whether it would have enhanced the conviction’s accuracy if it were to apply at trial or on appeal. Those reforms offer no grounds for relief after a conviction becomes final under the verboten due process regime that has, if even one day later, been authoritatively declared constitutionally deficient.

It is hardly surprising that the *Montgomery* Court, in declaring *Miller* retroactive, refused to classify that rule’s individualized sentencing guarantee as a watershed.¹⁹ The futility of such watershed recognition explains the majority’s strained holding that *Miller* is not a due process rule at all.²⁰ The *Miller* rule is more plausibly characterized as procedural and not substantive. It does not place “primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”²¹ or particular “persons covered by the statute beyond the State’s power to punish.”²² Instead, it “mandates only that a sentencer follow a certain *process*.”²³ Justice Scalia elaborated on this in his dissent:

[T]he majority opinion quotes passages from *Miller* that assert such things as “mandatory life-without-parole sentences for children ‘pos[e] too great a risk of disproportionate punishment’” and “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” But to say that a punishment might be inappropriate and disproportionate for certain juvenile offenders is not to say that it is unconstitutionally void. All of the statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable: to deter life sentences for certain juvenile offenders. On the issue of whether *Miller* rendered life-without-parole penalties unconstitutional, it is impossible to get past *Miller*’s unambiguous statement that “[o]ur decision does not

18. *Teague v. Lane*, 489 U.S. 288, 313; *see also Whorton*, 549 U.S. at 417; *Beard*, 542 U.S. at 417; *O’Dell*, 521 U.S. at 167; *Gray*, 518 U.S. at 170; *Parks*, 494 U.S. at 495.

19. *See infra* notes 199–11 and accompanying text.

20. For conflicting state court decisions, *see infra* note 212.

21. *See Teague*, 489 U.S. at 307 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

22. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citing *Parks*, 494 U.S. at 494–95; *Teague*, 489 U.S. at 311).

23. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2471 (2012) (emphasis added).

categorically bar a penalty for a class of offenders” and “mandates only that a sentencer follow a certain process . . . before imposing a particular penalty.” It is plain as day that the majority is not applying *Miller*, but rewriting it.²⁴

The *Montgomery* majority reached a just result for the wrong reason. Justice required that the constitutional rule announced in *Miller* apply retroactively to prisoners who did not get the benefit of that rule by the time that their sentences were finalized. But the reason underlying this intuition is not that a right to individualized sentencing places particular conduct or persons beyond the power to punish. Rather, it is that *Miller* afforded juvenile defendants a fundamentally important due process protection. But justice and the *Teague* doctrine sail apart: *Teague* jurisprudence closed this avenue off to the Supreme Court majority in *Montgomery*, insofar as it could not plausibly hold that *Miller* was as important as *Gideon*, marked off as the only watershed. The Court’s “rewriting” of the *Miller* rule from procedural to substantive made that constitutional holding retroactive through the back door that its *Teague* jurisprudence left open.²⁵

The Court’s cramped interpretation of the watershed doctrine has pushed due-process retroactivity to the margins of constitutional criminal procedure. The *Teague* decision does not even appear in several leading textbooks of criminal procedure,²⁶ and those that do cite it give watershed doctrine cursory treatment.²⁷ The handful of scholarly articles

24. *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 743 (2016) (Scalia, J., dissenting) (footnote omitted) (citations omitted) (internal quotation marks omitted).

25. See *infra* notes 204–18 and accompanying text.

26. E.g., RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* (3d ed. 2011); JOSEPH G. COOK, PAUL MARCUS & MELANIE D. WILSON, *CRIMINAL PROCEDURE* (7th ed. 2009); PHILIP E. JOHNSON & MORGAN CLOUD, *CONSTITUTIONAL CRIMINAL PROCEDURE: FROM INVESTIGATION TO TRIAL* (4th ed. 2005); ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE C. HERBERT, *CONSTITUTIONAL CRIMINAL PROCEDURE* (4th ed. 2010); RUSSELL L. WEAVER ET AL., *CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES* (5th ed. 2013).

27. E.g., NEIL P. COHEN & DONALD J. HALL, *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS* 844 (2d ed. 2000) (declining to specify the two exceptions to the *Teague* bar on retroactivity); JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 1391–92 (4th ed. 2010) (briefly questioning watershed rules); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS* 1603 (12th ed. 2009) (providing a single paragraph of the Court’s discussion of watershed rules); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 28.6, at 1371–72 (5th ed. 2009) (explaining that most “new rules fail [*Teague*’s second] exception because they are not sufficiently fundamental, and are less ‘sweeping’ than *Gideon*”); ARNOLD H. LOEWY, *CRIMINAL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 1462–63 (3d ed. 2010) (including *Teague* excerpts from Justice White’s concurrence and Justice Brennan’s dissent); ARTHUR R. MILLER & CHARLES A. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* 1450–54 (2d ed. 2003) (discussing only *Teague*’s definition of “new” rules and not its exceptions to

that address this doctrine make clear that they consider it obscure and inoperative.²⁸

This Article argues that the universally-perceived irrelevance of the watershed doctrine misses its fundamental role in constitutional criminal procedure. The Article uses the dynamic concentration model of game theory to show how this doctrine quietly encourages courts to align their state's criminal procedures, beyond existing protections, with projections about the more generous vision of trial fairness that those protections represent.²⁹ Watershed doctrine, by threatening to repeal

nonretroactivity); MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM* 995 (5th ed. 2009) (noting the watershed exception in a sentence); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE: CASES AND COMMENTARY* 27–28 (9th ed. 2010) (discussing watersheds merely as a subsidiary of AEDPA doctrine); JAMES J. TOMKOVICZ & WELSH S. WHITE, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF* 965 (7th ed. 2012) (citing *Teague* without noting its core holding, let alone its watershed doctrine); LLOYD L. WEINREB, *CRIMINAL PROCESS: CASES, COMMENT, QUESTIONS* 1227–28 (7th ed. 2004) (noting the watershed exception without discussion); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 29.06, at 913 (5th ed. 2008) (noting the “near impossibility of meeting *Teague*’s second exception”).

28. See, e.g., Roger D. Branigin III, *Sixth Amendment—The Evolution of the Supreme Court’s Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128, 1147 (1990) (“The theoretical structure that the [*Teague*] plurality constructed . . . ultimately collapses in the absence of any substantive content.”); Lyn S. Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court’s Doctrine*, 35 N.M. L. REV. 161, 196 (2005) (describing the watershed doctrine as “an exception so narrow that no case—not one—from 1989 to 2004 has been found to fall within it”); Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433, 2434–35 (1993) (acknowledging criticism that watershed doctrine “produce[d] a largely toothless habeas”); Ezra D. Landes, *A New Approach To Overcoming the Insurmountable “Watershed Rule” Exception to Teague’s Collateral Review Killer*, 74 MO. L. REV. 1, 2 (2009) (“On fourteen occasions the Court has been asked to determine whether or not a new rule is watershed. All fourteen times the Court has found the rule not to be watershed.”); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 374–75 (1991) (“The *Teague* exceptions do little . . . because they apply only to crimes so offbeat and punishments so cruel that they are beyond the constitutional pale, and to primitive pre-incorporation-era due process violations featuring lynch mobs, corrupt prosecutors, and cops with rubber hoses.”); Christopher M. Smith, Note, Schiro v. Summerlin: *A Fatal Accident of Timing*, 54 DEPAUL L. REV. 1325, 1362 (2005) (“Fifteen years of *Teague* jurisprudence . . . have attached a stigma of futility to [retroactivity] arguments.”); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2391 (1993) (arguing that *Teague*’s “new rule” jurisprudence “would be utterly bizarre if it were not so obviously contrived . . . in service of political objectives”).

29. Watersheds play no significant role in the federal system because the Supreme Court dictates rules and hears appeals. See U.S. CONST. art. III, § 1, *interpreted in* *McNabb v. United States*, 318 U.S. 332, 340–47 (1943), and *Johnson v. United States*, 318 U.S. 189, 198–99 (1943) (authorizing the Supreme Court to set forth rules of evidence and procedure for federal courts); Rules Enabling Act of 1934, 28 U.S.C. § 2072(a) (2012) (“[The Supreme Court has] the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”). Based on the Rules Enabling Act, the Court promulgated both

scores of finalized convictions with a single judicial decision, helps protect criminal defendants in real, profound, and heretofore unrecognized ways.

Here is why: constitutional criminal procedure suffers from the structural undersupply of legal norms that protect defendants. The Supreme Court has just nine justices and a busy docket. Few of the eighty or so cases it hears every year concern the fairness of criminal trials. As a result, the Court can codify only a handful of due process principles to govern the myriad distinct criminal procedures adopted by police and prosecutors in the fifty-one American jurisdictions. The Court's limited workforce ill equips it to detail the meaning of those principles or scrutinize but a fraction of state court decisions that implicate them. So the Court has trouble overseeing the provision of justice for the accused nationwide.

Watershed retroactivity fills these gaps. Under this doctrine, a verdict that undermines the basic fairness and accuracy of criminal convictions risks repeal even when it does not run afoul of established constitutional precedents. This poses the threat that every prisoner whose conviction conflicts with a new watershed rule is entitled to acquittal or at least retrial. If state courts were to deny a prisoner these post-conviction remedies, he could petition for habeas relief in a federal court that would be forced to quash his guilty verdict. All similarly situated prisoners would have their convictions reversed too.

That watersheds are rare makes their extreme repercussions unlikely. Yet their aftermaths of wholesale retrials or even mass exoneration are grave enough for state courts to fear. By threatening broadscale release of potentially dangerous criminals, watershed doctrine tends to counteract state judges' incentives to convict. These punitive incentives stem from state judges' reliance, as elected officials, on voting citizens who tend to scorn judges who let prisoners go free.³⁰ Judicial election

the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.2, at 5–6 (2009) (describing enactment of Federal Rules of Evidence).

30. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 700, 727–28 (1995); Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQ. 107, 107 (1988); Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising, and State Supreme Court Justices' Decisions in Criminal Cases*, SKEWED JUSTICE, skewedjustice.org [https://perma.cc/277S-KQDN] (last visited Feb. 10, 2015); *see also* John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 87–89 (1986) (describing a media campaign that succeeded in unseating three California Supreme Court Justices for being soft on crime); Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U.

scholars find that even in politically progressive jurisdictions, “voters typically perceive the courts as too lenient in dealing with criminal defendants” and that criminal justice is among the most powerful “judicial issues that opponents can raise against sitting judges.”³¹ Consequently, “all judges are effectively forced either to adjudicate tough(er) on crime or risk losing office.”³² Despite all good-faith efforts and intentions, state judges operating under such pressures may be tempted to take advantage of the Supreme Court’s inability to review many cases at the expense of due process rights in areas not yet covered by constitutional precedent.

The watershed threat attaches a high risk to this self-serving strategy. When state courts rely on a criminal procedure that the Supreme Court subsequently outlaws by a watershed rule, they might become responsible for a flood of retrials and the sprawling release of convicted prisoners into the public. This rebuke would make the courts look bungling at best, thus unfit to serve: their constituents would perceive them as incapable of devising procedures that dependably separate guilty criminals from defendants who are innocent.

To avoid this extreme, if unlikely, repercussion, state courts must bring their criminal procedures into line with their best guess of how due process jurisprudence will develop in the Supreme Court. By forcing state judges to enforce trial protections that align with the Court’s projected vision of fairness for the accused, watersheds help the shorthanded Court to more effectively govern constitutional criminal procedures across the country.

This dynamic tracks the famous chess adage, “the threat is stronger than the execution.”³³ The mere existence of the grave watershed threat

L. Rev. 1101, 1109–12 (2006) (citing studies that suggest that “judges who wish to be reelected might give defendants harsher sentences than they would in a world without continual scrutiny by the electorate”).

31. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 34–35 (2003); see also Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988) (“Every judge’s campaign slogan, in advertisements and on billboards, is some variation of ‘tough on crime.’”); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287 (2008) (“Given the political unpopularity of criminal defendants as a group and the unique salience of crime in the public perception of judicial behavior, incumbent judges may be most vulnerable when their opponents are able to characterize them as soft on crime.”); Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57, 79 (1985) (calling criminal law “a lightning rod in judicial campaigns”).

32. Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 317 (2010); see *id.* at 365–68 (citing studies to support this proposition).

33. This principle was articulated by celebrated grandmasters Savielly Tartakower and Aron

pushes state courts to manage their *own* criminal procedures in a way that makes the actual execution of watersheds unrequired. However unlikely the Supreme Court is to drop the watershed bomb, that possibility still drives state courts to eschew rules that conflict with that Court's more generous vision of fairness to the accused and invoke state and federal constitutional law to block legislative initiatives that run afoul of that vision. Thus, the Supreme Court will almost never find it necessary to establish a watershed rule for criminal trials. The threat alone is enough.³⁴

Economists call this enforcement method “dynamic concentration.”³⁵ Take the proverbial Lone Ranger facing an angry mob that seeks to lynch a prisoner the Ranger must protect. The Ranger is down to one bullet in his revolver and the mob knows it. The Ranger saves the prisoner by telling the mob: “[w]hoever takes the first step forward, *dies*.”³⁶ His threat to kill one of the mobsters, given their inability to coordinate, enables the Ranger to rein in more of them than his limited enforcement capacity would otherwise make possible.³⁷ The Supreme Court's ability to repeal errant state court decisions is like the Ranger's to restrain the mob. Just as the Ranger's single-bullet threat effectively constrains the mob, so the watershed doctrine might allow the Court to keep state courts in check by threatening extreme, even if unlikely, repercussions for wielding unfair practices against the accused.

Supreme Court precedent warrants denying watershed status to new constitutional rules of criminal procedure. But we analyzed all 358 watershed decisions issued by state courts between inception of this doctrine in February 1989, when *Teague* was decided, and July 2015. This examination reveals a striking proportion—one out of nine—that

Nimzowitsch. *See generally* ARON NIMZOWITSCH, *MY SYSTEM* (Lou Hays ed., 1991).

34. For a similar game-theoretic legal insight originating from chess, see Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 441 & n.38 (2000) (using the first-mover disadvantage called “zugzwang” to explain guilty suspects' interrogation predicament).

35. *See* MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 49–65 (2009).

36. *Id.* at 55.

37. *See id.* at 176–77 (explaining that this method of enforcing the law can be particularly effective against drug gangs); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 26, 37–39 (2009) (recommending dynamic concentration method for securing police compliance with civil rights); Winston Harrington, *Enforcement Leverage When Penalties Are Restricted*, 37 J. PUB. ECON. 29, 43–48 (1988) (recommending dynamic concentration method for environmental-protection enforcement and developing formal analysis of that method); Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325, 363–74 (2014) (analyzing dynamic concentration as a method for enforcing tax code).

grants retroactive application to new due process rules. And in the absence of any new constitutional protection tantamount to the right to counsel, not a single state court decision during that period could of course interpret as non-watershed a rule that might have qualified for that status.

Various factors might contribute to this number of watershed inflations. For example, judges or their electorates might favor defendant rights. Alternatively, overworked judges might misapply *Teague*, confused why the Supreme Court would bother talking about a watershed doctrine that can never be satisfied. Among such explanations, a particularly interesting one has been overlooked: state judges do not consider watersheds as an empty threat. This Article examines the extent to which state judges seek to minimize the toll that the imposition of watershed status by the Supreme Court would take on their professional reputations and state systems of criminal justice.

Our argument unfolds in three parts. Part I spells out the puzzling redundancy of the watershed doctrine. Part II uses the dynamic concentration model of game theory to explain the doctrine's role as a quiet watchdog of constitutional criminal procedure across the states. Part III presents our analysis of all watershed cases decided in the state courts—these cases appear in the Appendix. We conclude by showing how this dynamic theory of constitutional enforcement supports sound predictions for criminal justice in the states.

I. THE RETROACTIVITY PUZZLE

The Warren Court expanded criminal defendants' constitutional rights to a degree not seen before or since. By incorporating the Fourth, Fifth, and Sixth Amendments through the Due Process Clause of the Fourteenth Amendment, it afforded criminal defendants a range of new protections against state governments. The Court interpreted the Constitution to require that police warn criminal suspects of certain rights;³⁸ to prohibit incriminating inferences from silence;³⁹ and to exclude from the trial evidence obtained by the government in violation of the Constitution.⁴⁰

38. *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing arrest warnings). The Court declined to apply *Miranda* retroactively and limited it to trials that began after the decision was announced. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966).

39. *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying right-to-silence to states).

40. *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to states). The Court declined to apply this rule retroactively to cases that were final at the time the Court decided *Mapp*. *Linkletter v. Walker*, 381 U.S. 618 (1965), *overruled by* *Griffith v. Kentucky*, 479 U.S. 314, 322

Because these constitutional protections were new, some—indeed many—defendants had been convicted under what would now constitute a constitutional violation. For defendants whose cases were still on direct appeal, newly announced rules automatically apply. Their cases thereby demand, if not outright acquittal, at least a retrial to determine whether such violation was harmless. But it was far less clear whether those new rules would benefit defendants who had, by the time the new rule was announced, been denied relief by all appellate courts.

Defendants who exhaust their direct appeal process can still seek collateral relief under state post-conviction⁴¹ and federal habeas corpus review.⁴² Whether new procedural rules would apply on collateral review loomed over the Warren revolution in criminal defendants' rights.⁴³ Would defendants whose convictions had become final before the announcement of these new rights receive the rights' benefit in a habeas proceeding?⁴⁴ Defendants have interests in their having had a trial that comports with the Constitution under same protections afforded to similarly situated defendants.⁴⁵ Society, on the other hand, has a strong interest in leaving undisturbed a trial process that was constitutional at the time it was carried out and in avoiding the costs of retrial for police, prosecutors, judges, and victims.⁴⁶

(1987).

41. 28 U.S.C. § 2254(b)–(c) (2012).

42. U.S. CONST. art. 1, § 9, cl. 2; 28 U.S.C. § 2254(a) (providing that a federal court may “entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States”).

43. John Hart Ely, a Warren clerk, argued that this revolution in criminal rights was driven less by concerns for procedural justice than it was by conceptions of equality among citizens and would-be defendants. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 172 (1980).

44. A criminal verdict becomes *final* “where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.” *Linkletter*, 381 U.S. at 622 n.5.

45. Under our current retroactivity laws, even capital defendants sentenced in a manner that plainly violates the Constitution are not entitled to retrial on collateral review and may be put to death. *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled in part on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Justice Brennan explained these perverse consequences: “[t]his extension [of *Teague* to capital sentencing] means that a person may be killed although he or she has a sound constitutional claim that would have barred his or her execution had this Court only announced the constitutional rule before his or her conviction and sentence became final.” *Id.* at 341 (Brennan, J., concurring in part and dissenting in part).

46. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1764–67 (1991) (discussing cost of retroactivity within a law of remedies framework); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1084–94 (1997) (noting prudential considerations that argue

A. Linkletter's *Balancing Test*

The Warren Court confronted these competing interests in 1965. In a landmark decision, *Linkletter v. Walker*,⁴⁷ the Court considered whether to give retroactive effect in habeas proceedings to the exclusionary rule announced in *Mapp v. Ohio*.⁴⁸ The Court held that a new rule would apply retroactively only when the protection it gives defendants outweighs its adverse impact on the states that relied on the old regime in their administration of justice.⁴⁹ The Court clarified that adverse consequences of the new rule's retroactive application for the states are a function of how firmly entrenched the old rule was and how many convictions courts would have to reverse or reopen by uprooting that rule.⁵⁰ After accounting for these factors, the Court declined to apply the *Mapp* rule to cases pending in federal habeas.⁵¹

The *Linkletter* Court had no occasion to consider whether the same balancing test would apply on direct appeal.⁵² Ten years later, in *Stovall v. Denno*,⁵³ it answered the question in the affirmative.⁵⁴ Courts should apply the same balance of state and defendant interests on direct appeal, it held in *Denno*, refusing to attach any “overriding significance”⁵⁵ to the distinction between “convictions now final . . . and convictions at various stages of trial and direct review.”⁵⁶ *Linkletter*'s interest-balancing model of retroactivity—applicable on direct review too—prevailed for over twenty years.⁵⁷ During that period, it spurred criticism from scholars and jurists.⁵⁸

both for and against retroactivity of laws); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1097–1100 (1999) (developing a decision-time model of retroactivity that would apply to new civil rules).

47. 381 U.S. 618 (1965).

48. 367 U.S. 643 (1961).

49. See *Stovall v. Denno*, 388 U.S. 293, 300–01 (1967); *Linkletter*, 381 U.S. at 636–38.

50. See *Linkletter*, 381 U.S. at 637.

51. See *id.* at 638.

52. See *id.* at 627.

53. 388 U.S. 293 (1967).

54. *Id.* at 300–01.

55. *Id.* at 300.

56. *Id.*

57. See Fallon & Meltzer, *supra* note 46, at 1743–46.

58. See *Linkletter v. Walker*, 381 U.S. 618, 642 (1965) (Black, J., dissenting) (criticizing the majority for “perpetrat[ing] a grossly invidious and unfair discrimination against Linkletter simply because he happened to be prosecuted in a State that was evidently well up with its criminal court docket”); *Teague v. Lane*, 489 U.S. 288, 303 (1989) (“[C]ommentators have ‘had a veritable field day’ with the *Linkletter* standard, with much of the discussion being ‘more than mildly negative.’”

Most influential among *Linkletter*'s critics was the distinguished federal courts scholar, Paul Mishkin.⁵⁹ Mishkin would apply new rules automatically on direct review; treating appellants differently from defendants who had not yet been convicted, he argued, would fetishize the timing of trial procedures.⁶⁰ Thus, newly announced rules should automatically be given full effect for any defendant whose conviction had not yet become final.⁶¹ On collateral review, Mishkin would grant retroactivity for new rules that enhance the accuracy of criminal convictions.⁶² This measure would serve "the prime function of habeas corpus . . . to secure individual freedom from unjustified confinement."⁶³ Professor Mishkin explained this principle in the following words:

Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. For to continue to imprison a person without having first established to the presently required degree of confidence that he is not in fact innocent is indeed to hold him, in the words of the habeas corpus statute, "in custody in violation of the Constitution." On this basis, habeas corpus would assess the validity of a conviction, no matter how long past, by any current constitutional standards which have an intended effect of enhancing the reliability of the guilt-determining process.⁶⁴

These views helped convince Justice Harlan that he should not have joined the *Linkletter* majority. Justice Harlan embraced Mishkin's approach to direct appeals in a pair of dissents criticizing *Linkletter*'s balancing test he himself had voted to adopt just a few years prior. In *Desist v. United States*,⁶⁵ Justice Harlan complained that *Linkletter*'s refusal to automatically apply the rules it announced to pending cases on

(citing Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 (1975)); Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 12–24 (2009) (discussing critiques of *Linkletter*).

59. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

60. *Id.* at 77.

61. *Id.* at 77–78.

62. *Id.* at 101–02.

63. *Id.* at 79.

64. *Id.* at 81–82 (footnote omitted).

65. 394 U.S. 244 (1969).

direct appeal invited the Justices, by virtue of which case they agree to hear, to “pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.”⁶⁶ Relief would be granted to the one prisoner whose case the Justices had granted certiorari to, but denied to the other who was convicted at the same time, in the same constitutionally defective manner. “[A]ll ‘new’ rules of constitutional law,” Justice Harlan opined, “must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the ‘new’ decision is handed down.”⁶⁷ After a defendant’s conviction had become final, Justice Harlan worried that retroactive application would beget never-ending relitigation of guilty verdicts whenever a new rule was announced.⁶⁸ So he would preserve the stability of convictions on collateral review by declining to apply procedural rules that had not been available to a defendant prior to his habeas petition.⁶⁹

Fifteen years after Harlan’s dissents, the Supreme Court vindicated his criticism of *Linkletter*’s approach to direct review. In *Griffith v. Kentucky*,⁷⁰ the Court gave the benefit of new rules to defendants who had not exhausted their appeals.⁷¹ The Court ruled unambiguously that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”⁷² This holding spoke only of defendants who had not yet completed the appellate process. Intentionally or not, *Griffith* said nothing about the retroactive application of new rules for convictions that had already become final.

B. *Teague and the Watershed*

The Supreme Court addressed this issue two years later in *Teague v. Lane*.⁷³ That seminal case jettisoned *Linkletter*’s balancing test and set up a new retroactivity doctrine that has endured ever since. Under

66. *Id.* at 258 (Harlan, J., dissenting).

67. *Id.* As Justice Harlan later elaborated, to announce new rules left inapplicable on direct review would “restructure artificially those expectations legitimately created by extant law.” *Mackey v. United States*, 401 U.S. 667, 680–81 (1971) (Harlan, J., concurring in part and dissenting in part).

68. *Desist*, 394 U.S. at 261–62 (Harlan, J., dissenting).

69. *Mackey*, 401 U.S. at 687–88 (Harlan, J., concurring in part and dissenting in part).

70. 479 U.S. 314 (1987).

71. *Id.* at 314.

72. *Id.* at 322–23.

73. 489 U.S. 288 (1989).

Teague, the Supreme Court declared that a new rule of constitutional criminal procedure always applies to direct review of a prisoner's conviction. But that rule is never backdated on collateral review—unless, that is, that rule of constitutional criminal procedure is so important as to constitute a “watershed.”⁷⁴

The case presented the federal habeas petition of Frank Teague, an African-American man convicted by an all-white jury and sentenced to more years in jail than he had to live.⁷⁵ During jury selection, the prosecutor had used all of his peremptory challenges to strike black jurors.⁷⁶ Teague was denied relief by state and federal courts up to the highest level.⁷⁷ On appeal to the United States Supreme Court, Teague's case presented two retroactivity questions. The first is whether his habeas petition could benefit from the new rule against unlawful discrimination in jury selection that the Court announced in *Batson v. Kentucky*.⁷⁸ The Court had already determined that *Batson* marked an unequivocal break from the previous standard in *Swain v. Alabama*⁷⁹ that allowed prosecutors to exercise peremptory challenges on the basis of race.⁸⁰ The Court had little trouble concluding that *Batson*'s new bar on race-based elimination of prospective jurors did not apply to a conviction and sentence like Teague's that had become final.⁸¹

More difficult and important is the second question: whether the “fair cross section” requirement set forth in *Taylor v. Louisiana*⁸² extends beyond the jury pool to the seated jury.⁸³ In *Teague*, the Court refused even to reach its merits, however. From the reasons for this refusal, watershed doctrine was forged. A plurality of the Court declined to address the scope of the “fair cross section” requirement for a procedural reason: namely, that however unrepresentative the jury that convicted Teague, the right he sought to vindicate would not do him any good because he had already exhausted his appeals.⁸⁴ Justice O'Connor,

74. *Id.* at 313–14.

75. *Id.* at 292.

76. *Id.* at 292–93.

77. *Id.* at 294–95.

78. *Id.* at 295–96.

79. 380 U.S. 202 (1965).

80. In *Allen v. Hardy*, 478 U.S. 255 (1986), the Court found that *Batson* constituted a clear break with precedent and declined to apply *Batson* to cases that were final when *Batson* was decided. *Id.* at 259–60.

81. *Teague*, 489 U.S. at 296.

82. 419 U.S. 522 (1975).

83. *Teague*, 489 U.S. at 299–300.

84. *Id.* at 316.

writing for Chief Justice Rehnquist and Justices Scalia and Kennedy, characterized Teague's "fair cross section" claim as a would-be new rule that could not in any event be applied to defendants like him whose convictions had already become final.⁸⁵

Teague established that "[r]etroactivity is properly treated as a threshold question" that courts must address before considering whether there exists a potentially applicable new rule of constitutional criminal procedure.⁸⁶ The plurality defined as "new" any rule that "imposes a new obligation on the States or the Federal Government" whose "result was not *dictated* by precedent existing at the time the defendant's conviction became final."⁸⁷ The Supreme Court later clarified that

the source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.⁸⁸

The *Teague* Court reaffirmed its holding from *Griffith* that these new rules of constitutional criminal procedure apply automatically to defendants whose convictions or sentences had not yet become final.⁸⁹ So after *Griffith* and *Teague*, prisoners who have direct appeals still available to them get the full benefit of constitutional rules that had not yet been announced when they were convicted and sentenced.

Justice O'Connor also made clear that the point of applying new rules retroactively on direct review was not to purge trials of all constitutional error.⁹⁰ Rather, it was to deter the most egregious kinds of police or prosecutorial abuses: when it happens, for example, "that the proceeding was dominated by mob violence; that the prosecutor knowingly made

85. *Id.* at 301.

86. *Id.* at 300.

87. *Id.* at 301 (emphasis in original). Justice Brennan argued that this definition of "new" rules sweeps too broadly:

[f]ew decisions on [direct] appeal or collateral review are "*dictated*" by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case more than one way. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be "*dictated*" by prior decisions.

Id. at 333 (Brennan, J., dissenting) (emphasis in original).

88. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

89. *Teague*, 489 U.S. at 304.

90. *Id.* at 312.

use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.”⁹¹ Courts could adequately deter such abuses, in the plurality’s view, by assuring that both trials and appeals adhere to the constitutional rules in effect at the time.⁹² For that reason, Justice O’Connor wrote, new rules of constitutional criminal procedure need not apply retroactively to finalized convictions.⁹³

To this general bar on the retroactive application of constitutionally required rules of due process, *Teague* carved out a single, narrow exception.⁹⁴ Among all new procedural rules, it held, the only ones that apply retroactively on collateral review are “watersheds.”⁹⁵ To qualify as a “watershed,” the plurality explained, a rule of criminal procedure must be instrumental to the fairness of trials and the accuracy of convictions.⁹⁶ With respect to trial fairness, a “watershed” must do no less than “alter our understanding of the *bedrock procedural elements*” essential to the fairness of the proceeding.⁹⁷ And for the accuracy of convictions, the Court has clarified that “it is not enough to say that the rule is aimed at *improving* the accuracy of trial or that the rule is *directed toward* the enhancement of reliability and accuracy in some sense.”⁹⁸ A new rule of constitutional criminal procedure acquires the “watershed” status required for it to apply retroactively only when it repairs a systemic and intolerably grave danger of wrongful conviction.⁹⁹

Faithful to this restrictive view, the Supreme Court has repeatedly

91. *Id.* at 313 (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J. dissenting) (footnotes omitted)).

92. *Id.*

93. *Id.* at 304, 312–13.

94. *Id.* at 310–12. *Teague* also exempted retroactive application of new rules that the Constitution requires that make “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Id.* at 311 (citation omitted). These *substantive* rules—about which crimes are unconstitutionally vague, for example, or which punishments are cruel and unusual—still apply under *Teague* when a defendant has exhausted the remedies available to him on direct review of his case by the time that new rule is announced. *Id.*

95. *Id.*

96. *Id.* at 313–14.

97. *Id.* at 311 (emphasis in original) (quoting *Mackey*, 401 U.S. at 693). The Court has since elaborated these kinds of transformative rules must bring about no less than “a profound and ‘sweeping change.’” *Whorton v. Bockting*, 549 U.S. 406, 421 (2007) (quoting *Beard v. Banks*, 542 U.S. 406, 418 (2004)).

98. *Whorton*, 549 U.S. at 418 (emphasis added) (citations omitted) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

99. *Teague*, 489 U.S. at 311. The watershed doctrine set forth by the plurality was affirmed by a majority of the Supreme Court later that year in *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

maintained that no “new rule . . . falls under this exception” unless it “alter[s] our understanding of the bedrock procedural elements” in ways the Court has “yet to find.”¹⁰⁰ The Court clarified this singularly exacting standard recently in denying watershed status to the Sixth Amendment suppression of inculpatory testimonial statements by witnesses that the defendant has not had opportunity to cross-examine.¹⁰¹ According to the Court,

[t]hat a new procedural rule is “fundamental” in some abstract sense is not enough. Instead, in order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we again have looked to the example of *Gideon*, and we have not hesitated to hold that less sweeping and fundamental rules do not qualify.¹⁰²

The plurality Justices in *Teague* did not indicate any new due process rule that could rise to the bedrock level of *Gideon*’s right to counsel and achieve watershed status.¹⁰³ “We believe it unlikely,” they wrote, that any such “components of basic due process [will] emerge.”¹⁰⁴ True to its word, in all the years since the watershed exception was established in 1989, the Court has “yet to find a new rule that falls under the second *Teague* exception.”¹⁰⁵ It has denied watershed status to every one of the sixteen new rules of constitutional criminal procedure it has considered within that doctrine.¹⁰⁶ Nor has the Court given clues about what, if any,

100. *Beard* 542 U.S. at 417–18 (emphasis omitted) (internal quotation marks omitted).

101. *See Whorton*, 549 U.S. at 412–13 (discussing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

102. *Id.* at 421 (citations omitted) (first quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004); then quoting *Beard*, 542 U.S. at 418).

103. The indigent felony defendants’ entitlement to a state-funded attorney under *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the rule so central to the “noble ideal” of criminal justice, *id.* at 344, that Attorney General Robert Kennedy declared that it altered “the whole course of American legal history,” Robert F. Kennedy, *The Department of Justice and the Indigent Accused*, 47 J. AM. JUD. SOC. 182, 182 (1964). *See* Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 811 (1992).

104. *Teague*, 489 U.S. at 313; *see also* Justin F. Marceau, *Gideon’s Shadow*, 122 YALE L.J. 2482, 2488–89 (2013) (“*Gideon*, the Court has repeatedly told us, concerns the quintessential example of a right that safeguards the accuracy and innocence-protecting function of the trial. Indeed, although *Gideon* was decided long before the current retroactivity doctrine was announced, the Court has described *Gideon* as ‘the only case that th[e] Court has identified as qualifying under this exception.’ Thus, by relying on *Gideon* in the *abstract*—that is, the rhetoric of *Gideon* as a pillar of accuracy and fairness—the Court has curtailed the content of other rights in *reality*.” (alterations in original) (footnote omitted) (quoting *Whorton v. Bockting*, 549 U.S. 406, 419 (2007)).

105. *Beard*, 542 U.S. at 417.

106. *See Teague*, 489 U.S. 288 (declining watershed status to fair-cross section requirement);

new constitutional rules could ever qualify for retroactive effect.¹⁰⁷

Watershed doctrine is a mystery. It enables defendants to seek post-conviction relief in the refuge of newly announced constitutional rules not available to them at the time of their trials and appeals.¹⁰⁸ Yet the

Marceau, *supra* note 104, at 2489–90 (“A range of other rights have come before the Supreme Court after *Teague*, and in every single case the Court deemed the right nonretroactive because it was less important than the accuracy- and innocence-protecting values served by *Gideon*. Notably, the Court has even developed a familiar, explicitly *Gideon*-centered formula for the *Teague* analysis: “[w]hatever one may think of the importance of [the right in question], it has none of the primacy and centrality of the rule adopted in *Gideon*.”); *supra* note 15 (citing cases); *supra* notes 82–85 and accompanying text.

107. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court clarified that state courts are free to expand the defendants’ entitlement to retroactive application of changes in constitutional criminal procedure beyond *Teague*. *Id.* at 288–89; *see, e.g.*, *State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009) (“*Danforth* therefore allows us to apply either the *Teague* test for full retroactivity or a state constitutional test so long as the state test is at least as comprehensive as the federal test.”); *Colwell v. State*, 59 P.3d 463, 470 (Nev. 2002) (“*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions. In other words, we may choose to provide broader retroactive application of new constitutional rules of criminal procedure than *Teague* and its progeny require.”). The overwhelming majority of state courts, however, have decided to decline the invitation and have aligned with *Teague*. *See, e.g.*, *Rhoades v. State*, 233 P.3d 61, 65–66 (Idaho 2010) (collecting cases); *Lasch, supra* note 58, at 42–43 n.306–07 (same). Only the Alaska, Florida, Michigan, and Missouri supreme courts have adopted the less restrictive balancing approach of *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967). *See Smart*, 202 P.3d at 1136 (explaining that the Supreme Court identified three criteria for retroactive application that it borrowed “from those the Supreme Court discussed in *Linkletter v. Walker*”); *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) (“We continue to apply our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*.”); *People v. Maxson*, 759 N.W.2d 817, 822 (Mich. 2008) (reaffirming balancing test akin to *Linkletter–Stovall* approach); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003) (preferring *Linkletter–Stovall* approach to *Teague*). Applications of these alternative approaches are still influenced, however, by *Teague*’s constitutional minimum. *See Jason Mazzone, Rights and Remedies in State Habeas Proceedings*, 74 ALB. L. REV. 1749, 1763 (2011) (“[E]ven when state courts take up *Danforth*’s invitation and depart from *Teague*, *Teague* still casts a shadow.”). Every jurisdiction other than these four outliers has explicitly adopted the *Teague* approach to watershed retroactivity for the same reason that forty-two states have adopted the Federal Rules of Evidence: namely, existing federal standards are convenient to adopt and provide safe harbor to protect against constitutional challenges. *See, e.g., Rhoades*, 233 P.3d at 69 (“When contrasted with the *Linkletter* approach, it is evident that *Teague* provides a simpler and more predictable test for determining whether decisions are given retroactive effect. The *Teague* approach advances an important interest: the finality of judgments.”); *Siers v. Weber*, 851 N.W.2d 731, 742 (S.D. 2014) (“By applying the *Teague* test for retroactivity, this Court can better address concerns for finality, consistency, and uniformity—all by way of a simpler, more straightforward test. Moving forward, we therefore adopt the *Teague* rule.”).

108. The vindication of the watershed rights requires convicted prisoners to file a timely habeas petition pursuant to 28 U.S.C. § 2241(a), (c)(3) (2012). The habeas statute requires them to make a claim that “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2244(b)(2)(A). Any such petition must be filed within one year from the date “on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” *Id.* § 2244(d)(1)(C). The

Supreme Court's promise of retrospective protection is improbable by design. Its demands of *Gideon*-like fundamental fairness and ultimate accuracy erect hurdles so high that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception."¹⁰⁹ What could make sense of a retroactivity doctrine so superfluous and inoperable that virtually no new rules of constitutional criminal procedure will ever apply retroactively? Indeed, why have a watershed doctrine at all?¹¹⁰

II. THE WATERSHED THREAT EXPLAINED

Constitutional law imposes robust limits on police searches, seizures, arrests, and interrogations.¹¹¹ These limits include the right to silence,¹¹² *Miranda* warnings,¹¹³ protection of bodily privacy and integrity against unreasonable intrusions,¹¹⁴ and the probable cause¹¹⁵ and "reasonable suspicion" requirement for stops and pat-down searches of suspects.¹¹⁶ For criminal trials, constitutional law sets up an equally solid structural protection of defendants that entitles them to have an attorney,¹¹⁷ be prosecuted only once for the same offense,¹¹⁸ be tried by impartial

limitations period starts running from the date on which the Supreme Court initially recognized the new constitutional right rather than from the date on which the right became applicable retroactively. *Dodd v. United States*, 545 U.S. 353, 357–59 (2005). Attorneys should thus stay apprised of new developments in constitutional criminal procedure, bearing in mind the statutory limitation on successive habeas petitions under 28 U.S.C. § 2244(b)(2)(A). *See Tyler v. Cain*, 533 U.S. 656, 662–64 (2001) (interpreting 28 U.S.C. § 2244(b)(2)(A) as prohibiting successive habeas petitions that rely on a new rule of constitutional law not expressly identified as a "watershed" by the Supreme Court). We thank Catherine Struve for drawing our attention to these limitations.

109. *Beard*, 542 U.S. at 417.

110. *See Fallon & Meltzer, supra* note 46, at 1817 ("Equally troubling is the narrowness of the exceptions to *Teague*'s rule barring consideration of new law claims. The first of these—for new constitutional decisions immunizing primary conduct—is unexceptionable. But the Court's stringent limitation of the second exception to rules that both implicate concerns of fundamental fairness and benefit the innocent restricts federal habeas corpus more sharply than would any of the leading models. Indeed, it requires simultaneous satisfaction of the kinds of standards that both the 'innocence matters' and the 'process' views would impose."); *supra* notes 26–28 (citing sources).

111. *See LAFAYE ET AL., supra* note 27, §§ 2.1–2.3, at 53–60 (describing constitutionalization of criminal procedure).

112. *Id.* § 6.5, at 366–67 (outlining suspect's right to silence during an interrogation).

113. *Id.* at 367–69 (outlining *Miranda* rules).

114. *Id.* § 3.5, at 205–14 (specifying bodily integrity and privacy protections against unreasonable searches).

115. *Id.* § 3.3, at 163–81 (detailing probable cause requirements).

116. *Id.* § 3.8, at 239–54 (specifying "reasonable suspicion" requirement for stops and frisks).

117. *Id.* § 11.1, at 579–83 (outlining defendants' right to counsel).

118. *Id.* § 25.1, at 1201–14 (specifying defendants' protection against double jeopardy).

jurors,¹¹⁹ see the prosecution's evidence before trial,¹²⁰ call witnesses,¹²¹ cross-examine the prosecution witnesses,¹²² and choose not to testify.¹²³

In stark contrast to these protections before and during trial, constitutional law does very little to secure the accuracy of convictions after trial.¹²⁴ It merely requires that guilt be proven “beyond a reasonable doubt”¹²⁵ and that government does not deliberately try to convict an innocent person.¹²⁶ The Supreme Court has done very little to translate these “due process” requirements into specific accuracy promoting rules.¹²⁷ For example, it has set no express constitutional prerequisites for convicting defendants based on potentially unreliable or prejudicial evidence like visual identifications, prior crimes, accomplice testimony, confessions, and forensic statistics.¹²⁸ Nor has it formulated constitutional standards for the kinds of evidence that prosecutors can use at sentencing hearings.¹²⁹

This undersupply of constitutional norms has an easy explanation. The one Supreme Court, with just nine Justices who sit for nine months before summer, hears just about eighty cases a year.¹³⁰ The myriad questions of constitutional criminal procedure that await authoritative decree take up a small proportion of the Court's docket. Accordingly, the Court is able to scrutinize only a relatively insignificant—and consequently unrepresentative—fraction of state court decisions that convict and punish criminal defendants. Under these constraints, the Court cannot rigorously regulate the accuracy and fairness of guilty

119. *Id.* § 22.1, at 1068–70 (outlining defendants' right to trial by jury).

120. *Id.* § 20.1, at 953–58; *id.* § 24.3, at 1143–54 (detailing defendant rights to pretrial discovery of information).

121. *Id.* § 24.3, at 1155–57 (outlining defendants' right to call witnesses and present evidence).

122. *Id.* § 24.4, at 1159–61 (outlining defendants' right to cross examine prosecution witnesses).

123. *Id.* § 24.5, at 1161–66 (outlining defendants' right not to testify).

124. See Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 86–91 (2008) (discussing general absence of constitutional standards for evidence selection).

125. *Id.* at 83–84.

126. *Id.* at 87–89.

127. *Id.* at 86–90.

128. *Id.* at 90–91.

129. See, e.g., *United States v. Umaña*, 750 F.3d 320, 346–48 (4th Cir. 2014), *reh'g en banc denied*, 762 F.3d 413 (4th Cir. 2014) (holding that defendants' Sixth Amendment protection against inculpatory testimonial hearsay applies only at trial and does not apply in sentencing proceedings, even in capital cases).

130. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: SUPREME COURT OF THE UNITED STATES—CASES ON DOCKET, DISPOSED OF, AND REMAINING ON DOCKET 1 tbl.A-1 (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf> [<https://perma.cc/N2GZ-CWVB>].

verdicts. All it can do is impose structural limits on the criminal trial and police powers. And so this is just what it did.

The Supreme Court has set forth only two “due process” mandates that enhance accuracy of convictions: it ruled that the prosecution must prove all elements of the alleged crime beyond a reasonable doubt;¹³¹ and it also enjoined the government from knowingly relying on false or manufactured inculpatory evidence.¹³² These precedents are monumental. Yet, they tell just part of our constitutional criminal procedure story. The Court has supplemented these precedents with two residual rulings on constitutional criminal procedure to which casebooks and articles give short shrift. First, constitutional “due process” is an open-ended standard that the Court continues to fashion.¹³³ Second, the Court retains the power to accord watershed status to any new rule of due process that enhances the accuracy of convictions and fundamental fairness of trials.¹³⁴ We now proceed to identify watershed doctrine’s role in the Supreme Court’s design of constitutional criminal procedure. This inquiry will illuminate the watershed puzzle.

A. *The Economics of Law Enforcement*

Consider a policymaker whose task is to design and implement laws under severe constraints. The policymaker can formulate but a small number of legal commands for many diverse activities of any certain kind; and society’s limited enforcement resources afford just a few opportunities to implement these commands by comparison to the far greater incidence of conduct in the real world that those commands implicate. How can the policymaker operating under such constraints hope to discourage legal violations? The standard answer is that she can use the enforcement method that might be called a “magnified sweep.” Specifically, the policymaker can compensate for the enforcement deficit by formulating broad standards, as opposed to carefully articulated rules, and impose harsh penalties on those who violate such standards.¹³⁵ This method will deter many violations even when the law-

131. Stein, *supra* note 124, at 83–84.

132. *Id.* at 87–89.

133. *Id.* at 86 (describing “due process” doctrine as Supreme Court’s “floating threat” to invalidate state laws); *see also* Michigan v. Bryant, 562 U.S. 344, 350 n.13 (2011) (“[T]he Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of . . . unreliable evidence.”).

134. *See* Teague v. Lane, 489 U.S. 288, 311 (1989).

135. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563–64 (1992) (explaining benefits of standards); Gary S. Becker, *Crime and Punishment: An Economic*

enforcer imposes the harsh penalties only once in a while. The prospect of paying those penalties will make violations disadvantageous for those who consider them.¹³⁶

This enforcement method will not always work properly, however, because flexible standards are applied unpredictably.¹³⁷ Actors subject to an ambiguous standard whose violation triggers harsh penalties will steer away from *any* conduct that *might* fall within the standard's scope.¹³⁸ As a result, actors will forego some socially beneficial activities that the policymaker does not want to suppress.¹³⁹ When the value of those activities exceeds the value of implementing the policymaker's commands, the magnified sweep loses appeal as a way of securing compliance with the law.¹⁴⁰ Under such circumstances, the policymaker must look for other enforcement methods.

One of these is "strategic enforcement."¹⁴¹ Under this method, the policymaker openly commits to penalizing only the worst or most rampant violators of the chosen standard with severe punishment.¹⁴² All other violators go scot-free.¹⁴³ This strategy forces potential violators into a cascaded retreat: to avoid being identified as the worst offenders, and thereby incurring the extreme penalties, every violator will scale down deviations from the policymaker's standard.¹⁴⁴ Violators will repeat this correction to readjust their conduct to the lesser deviations of others, thus bringing the conduct of all into greater conformity with the policymaker's standard.¹⁴⁵ This enforcement method seeks to avoid the cost of suppressing socially beneficial activities incurred by the magnified sweep method.¹⁴⁶ However, it will avoid these costs only

Approach, 76 J. POL. ECON. 169, 180–85 (1968) (explaining benefits of enhanced punishments when enforcement costs are high).

136. Becker, *supra* note 135, at 180–85.

137. See Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 167, 174–75 (2015) (analyzing unpredictability and other vices of standards); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966–67, 981 (1984) (explaining how vague standards chill beneficial conduct).

138. Calfee & Craswell, *supra* note 137, at 981.

139. *Id.*

140. *Id.*

141. See generally Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010).

142. *Id.* at 22–24.

143. *Id.*

144. *Id.* at 10–11, 20–21.

145. *Id.* at 10–11.

146. *Id.*

when the measure for worst-violator is clear to all. Both the policymaker who comes up with the law and the actors who are subject to its provisions must have a common metric for identifying the severity of violations.¹⁴⁷ Absent such a metric, actors would not be able to identify the “worst” benchmark from which to scale down their activities.¹⁴⁸ Furthermore, because the “strategic enforcement” method utilizes the tournament mechanism,¹⁴⁹ it will also become ineffectual when prospective violators strike a workable agreement to make their violations indistinguishable from each other.¹⁵⁰

Another method of enforcing the policymaker’s commands is called “dynamic concentration.”¹⁵¹ Like strategic enforcement more generally, this method relies on an extreme penalty that the policymaker delivers on rare occasions that involve violation of its standard, while condoning all other violations.¹⁵² Actors can still count on their low probability of being punished, but here the policymaker takes care to sort punishable violations under the chosen standard.¹⁵³ Whereas strategic enforcement depends on actors’ uncertain knowledge and expectations about each other’s conduct to avoid being the worst violator, what distinguishes dynamic concentration is its distinct reliance on sorting deviations from the standard.¹⁵⁴ As under strategic enforcement, here too the policymaker will impose an extreme penalty sparingly, delivering it only to those violators who deviate grossly from its chosen standard.¹⁵⁵ But under this dynamic concentration method, an actor need not be objectively the worst violator to become eligible for that penalty.¹⁵⁶ Whether or not he will incur the penalty will depend on the enforcer’s decision rather than the violators’ tournament-based self-selection.¹⁵⁷

B. *The Dynamic Concentration Model*

In light of the Supreme Court’s enforcement constraints, which of

147. *Id.* at 26.

148. *Id.*

149. *Id.* at 11, 26.

150. *Id.*

151. *Id.* at 21 & n.37.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. See KLEIMAN, *supra* note 35, at 49–65; *supra* note 37 (citing sources).

these three methods is best suited to implement its vision of fair trial? As we mentioned earlier, this vision encompasses not only the express “due process” precedents that the Court had managed to work out, but also—indeed, primarily—the implications of those precedents that it has not yet been able to articulate. Assuming that the Court is interested in seeing its constitutional protections against wrongful convictions implemented, how should it incentivize uncooperative state courts to realize its vision of fair trial, as opposed to theirs? Should it use the magnified sweep, strategic enforcement, or dynamic concentration to ensure that state processes for policing and prosecution satisfy constitutional obligations? What would these methods look like in the present context?

Begin with the magnified sweep. Under this method, broad standards promulgated by the Court encompass open-ended norms of due process.¹⁵⁸ Correspondingly, the repercussions the Court would use to respond to norm violations would include the quashing of convictions. This enforcement method suffers from two intractable problems: implementation costs and over deterrence. An underspecified due process standard would require reviewing a number of cases that well exceeds the Court’s working capacity. This overextension would make it impossible for the Court to implement its vision of fair trial in practice. Worse, the Court’s decisions to grant certiorari to certain petitions but not hear cases brought by other similarly situated defendants would often be unprincipled or outright arbitrary.¹⁵⁹ Furthermore, in order to avoid having their guilty verdicts reversed, state courts would have to systematically expand defendants’ due process rights. Some of these expansions would afford defendants rights beyond those protections that the standard was designed to cover. This prophylactic tendency would also expand the scope of constitutional due process to many guilty defendants whom the courts would be forced to acquit.

The Supreme Court would fare no better using strategic enforcement. This method’s implementation would face two different problems. First, as we already noted, “due process” embodies too many different kinds of trial norms to hope to specify a meaningful portion in advance. Ranking the relative severity of state courts’ departures from those norms is even more difficult, if not impossible. Thus, there is no objective metric the Court can use to identify the worst violations of due process. Nor is there any clear or uniform metric state courts can use to steer away from the

158. *See supra* note 135.

159. *Cf. supra* notes 65–67 and accompanying text.

“worst violation” zone. Moreover, strategic enforcement would also incentivize state courts to copy each other’s decisions in a way that makes it difficult for the Supreme Court to sort among them in order to identify the worst violators.¹⁶⁰

All this leaves the Court with only one viable option: the “dynamic concentration” method. The Court needs to formulate an aggressive penalty for state courts that deviate from its vision of fair trial, which it will impose only under extreme circumstances unidentified in advance. The best penalty that comes to mind here is watershed: the reversal of all guilty verdicts preceded by a trial that grossly deviates from the Court’s understanding of due process. State courts will not ignore this penalty. It may instead give them a reason to project the Supreme Court’s vision of fair trial and align their decisions with that vision.

State courts cannot afford massive reopening of criminal convictions followed by acquittals of defendants some, if not many, of whom are factually guilty. Because state judges risk paying with their careers and prestige if they allow it to happen, they may try to eliminate the watershed’s probability, however low it may be.¹⁶¹ The best way to do so is to align the state’s criminal procedures with the Supreme Court’s understanding of due process. To secure this alignment, state courts would not only comply with the settled constitutional precedents but would also try to predict the directions those precedents might take in the future. We estimate that some of these projections will overprotect criminal defendants’ due process rights, but not to the same degree as under the magnified sweep. This process will operate in a way that tends to secure the functionality and uniformity of our constitutional criminal procedure.

To see how dynamic concentration unfolds here, consider a state court that anticipates the expansion of defendants’ Sixth Amendment protection against ineffective assistance of counsel.¹⁶² Specifically, the state court believes that the Supreme Court will categorize a defense counsel’s failure to raise an objection against inadmissible inculpatory evidence as ineffective assistance.¹⁶³ Moreover, because defendants’

160. Cf. Victoria A. Saker, *Federalism, The Great Writ, and Extrajudicial Politics: The Conference of Chief Justices, 1949–1966*, in *FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS* 131, 131 (Harry N. Scheiber ed., 1992) (discussing an organization of state chief judges formed in 1949 to wage “a 15-year crusade to trim the habeas jurisdiction of the federal courts”).

161. See *infra* notes 172–73173 and accompanying text.

162. See *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1388 (2012) (expanding defendants’ Sixth Amendment protection against ineffective assistance of counsel to plea bargains).

163. For the current state of the law, see *Kimmelman v. Morrison*, 477 U.S. 365, 384–85 (1986)

protection against ineffective assistance of counsel is arguably as important as their right to counsel under *Gideon*, there is a chance that the Supreme Court will declare that new protection a watershed.¹⁶⁴

These projections suggest that the lower court will best serve its reputational interests and criminal justice if it establishes a rule expanding the definition of “ineffective assistance” to include a defense attorney’s failure to object to inadmissible inculpatory evidence. Failure to create such a rule would pile up the number of convicted defendants whose attorneys did not make the requisite objections. The Supreme Court’s subsequent holding that the ineffective assistance doctrine protects such defendants as a watershed would lead to their mass exoneration and release. Under this scenario, the state court would face public accusations of institutional failure that kept innocent defendants in jail and guilty ones from being retried under constitutional procedures after their convictions have been quashed.¹⁶⁵ These accusations would damage not only the court’s reputation, but also confidence in the state’s criminal justice system as a whole. While the state court might try to shift the blame to the United States Supreme Court’s pro-defendant policies, it is hard to tell how convincing the state court’s constituents would find that excuse. Forestalling the watershed threat by expanding defendants’ protection against ineffective assistance is the state court’s safer strategy. Because the damage to its reputation would be substantial, even irreparable, this strategy may prevail even when that threat’s probability is very low.

This justification of watershed doctrine is theoretical rather than empirical. We argue that it helps explain why the doctrine works the way it does.¹⁶⁶ Dynamic concentration theory uncovers the important

(“failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel”; yet, when an attorney fails “to file a timely suppression motion, not due to strategic considerations” but because he is unprepared, he will deny the defendant effective assistance); *United States v. Rogers*, 41 F.3d 25, 35 (1st Cir. 1994) (holding that defense counsel’s failure to object to evidence of the defendant’s prior crimes did not constitute ineffective assistance); *Mason v. Scully*, 16 F.3d 38, 44 (2d Cir. 1994) (holding that defense counsel’s failure to object to nontestifying codefendant’s hearsay statement that clearly violated the Confrontation Clause constituted ineffective assistance); *Comer v. Parratt*, 674 F.2d 734, 736 (8th Cir. 1982) (holding that defense counsel’s failure to object to incriminating statements induced by questionable police methods was a tactical decision not violating the customary skill-and-diligence standard).

164. *See supra* notes 13–18 and accompanying text. The Supreme Court clearly regards the protection against ineffective assistance as a bedrock principle of due process. *See infra* note 221 and accompanying text.

165. *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 33 (1978) (emphasizing criminal defendant’s interest in the double-jeopardy context in the finality of an acquittal).

166. *Cf.* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 349–56 (2007)

role that watersheds have in constitutional design. Our claim is not that the Supreme Court had this justification in mind when it decided *Teague v. Lane* or other watershed cases. Nor is it that state courts are uniformly inimical to protecting the rights of criminal defendants or institutionally opposed to the Supreme Court's vision of fair trial. Indeed, some of those courts have interpreted their state constitutions to afford robust protections against erroneous conviction¹⁶⁷ and open fruitful constitutional dialogue with the Supreme Court.¹⁶⁸ State courts still have powerful incentives, however, to serve the majoritarian interest in convicting and punishing as many guilty criminals as it can even when it erodes innocent defendants' protection against wrongful conviction.¹⁶⁹ The watershed doctrine counteracts this pernicious motivation.

III. STATE COURT DECISIONS: 1989–2015

Does the watershed threat influence state court decisions in the way our theory predicts? Does it actually motivate judges to afford procedural rights to criminal defendants whose convictions have become final? These empirical questions are undeniably important, but we are unable to give them a direct answer. Answering these questions directly would require impracticably close study of the many thousands of appellate decisions that implicate criminal procedure across all state courts. An alternative might be to sample those decisions in a reliable way. This strategy will not work either because "fair trial" norms embody an exceedingly large variety of factors that play greater and smaller roles across very different decisions. Which among those decisions are "representative" and which are not is accordingly very difficult, if not impossible, to tell.

For these reasons, we decided to focus on a more modest question: do state courts take watersheds seriously? To answer this question, we comprehensively examined every state court decision that addressed the

(explaining that valid explanatory theories of judge-made rules need to uncover contextual convergence between judges' decisions and social good, and need not match judges' stated and unstated intents).

167. See Stein, *supra* note 124, at 116–19 (identifying and discussing state courts' policies overprotective of defendants' rights).

168. *Id.* at 116 (observing that, at times, "the Supreme Court and state courts do not simply divide rule-making power [in the field of evidence and procedure]. Rather, they share constitutional governance through coordination and dialogue in the atmosphere of mutual respect"). See generally Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035 (1977).

169. See *supra* notes 30–31 and accompanying text.

retroactivity of constitutional criminal procedure rules in the twenty-six years since *Teague*.¹⁷⁰ Our study was qualitative. We closely analyzed the holdings and logic of 358 state court decisions that invoked watershed doctrine to determine whether the courts' grants and denials of retroactivity rights embody commitment to the level of due process set by the United States Supreme Court. We found that state courts' watershed decisions exceed this baseline.

A. “*Looking into the Crystal Ball*”

Our analysis of state courts' watershed decisions sheds new light on a critical dynamic in constitutional criminal procedure. The expansion of due process rights for criminal defendants takes a high toll on state courts. By and large, state judges owe their jobs and prestige to election by voters.¹⁷¹ That voters tend to value crime prevention more than defendants' rights incentivizes state courts to cater to these punitive preferences.¹⁷² The dynamic concentration model predicts that the watershed threat mitigates this incentive. This theory anticipates that state courts would heed watersheds for two reasons. Because state courts care about their reputation, they would try to protect it against the Supreme Court's rulings that publicly reverse their precedents.¹⁷³ More crucially, as noted earlier, state courts cannot afford institutional failures

170. Federal courts deal with watersheds too, but we excluded their dispositions from our study for two reasons. First, federal judges are appointed and not elected, and so do not face the same punitive motivations that state judges do. Second, federal judges answer only to the Supreme Court that determines federal rules and hears federal appeals. So they have very different reasons to avoid reversals and the reputational damage incurred within the federal system. Accordingly, federal courts perform a largely ministerial role under watershed doctrine. See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.4, at 743–50 (2d. ed. 1994); cf. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (clarifying that “AEDPA and *Teague* inquiries are distinct” such that “a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state”).

171. See, e.g., G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 70 (2012) (noting that “nine states selected their state supreme court justices in partisan elections, thirteen in nonpartisan elections, and fifteen through a system of merit selection in which justices run in retention elections after their initial appointment”).

172. See generally Alma Cohen et al., *Judicial Decision Making: A Dynamic Reputation Approach*, 44 J. LEGAL STUD. S133 (2015) (demonstrating that elected state judges try to cater to voters' preferences).

173. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 586–87 (8th ed. 2011) (arguing that judges tend to be highly sensitive to having their decisions reversed by a higher court); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1271 (2005) (observing that judges care about their reputation and “do not like to be reversed, even though a reversal has no tangible effect on a judge's career if he is unlikely to be promoted”).

that publicly discredit their ability to determine guilt and innocence.

State courts are also interested in insulating their states' systems of criminal procedure against interventions, criticism, and dictates from outside. State courts have several reasons to expand retroactivity rights. Those reasons include the following: avoiding wholesale reopening of criminal convictions for retrial, avoiding release or resentencing on conditions imposed by the Supreme Court, and fending off accusations portraying the judges as oblivious to the plight of arguably innocent defendants. All of these reasons could encourage state courts to apply the new rules of criminal procedure with more frequency than they did under *Teague*. This preemptive strategy allows state courts to exercise greater control over their systems of criminal procedure and protect their stature and reputation.

State courts thus account for the possibility a new rule *might* become a watershed. They do so when they cite in support of granting watershed retroactivity preemptively that the Supreme Court, though it has never granted watershed status itself, referred to a new rule in dicta as a “bedrock principle,”¹⁷⁴ or “tells us we deal with ‘constitutional protections of surpassing importance.’”¹⁷⁵ Indeed, some state courts credited their watershed conferral—explicitly—to what, “[l]ooking into the crystal ball[,] . . . we think that the Supreme Court will hold” in the future.¹⁷⁶ These references suggest that the watershed threat is a credible one despite its low probability.

The original analysis here identified 358 state court decisions that mention “watershed” rules over the twenty-six-year period between February 22, 1989, when *Teague* was decided, through July 31, 2015. From this initial sample, we set aside decisions in which “the issue of retroactive application” was “unnecessary to the determination of an appeal” because “failure to apply [the rule] would constitute only harmless error.”¹⁷⁷ This study also left out cases in which the rule at issue had been announced before the underlying conviction was final, thus making watershed analysis irrelevant,¹⁷⁸ and those that considered

174. *People v. Encarnacion*, No. 5804/95, 2005 WL 433252, at *8 (N.Y. Sup. Ct. Feb. 23, 2005) (quoting *Crawford v. Washington*, 541 U.S. 36, 42 (2004)).

175. *People v. Beachem*, 740 N.E.2d 389, 397 (Ill. App. Ct. 2000) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000)).

176. *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014).

177. *Clark v. State*, 2001 ND 9, ¶ 9, 621 N.W.2d 576, 579.

178. *See, e.g., People v. McDade*, 836 N.W.2d 266, 275–276 (Mich. Ct. App. 2013); *O'Meara v. State*, 679 N.W.2d 334, 339–40 (Minn. 2004); *State v. Elmore*, 2009 Ohio 3478, ¶¶ 25–28, 912 N.E.2d 582, 589–90.

watershed retroactivity in a concurrence or dissent, but not in a majority opinion.¹⁷⁹ To avoid double-counting, omitted from the final list were all retroactivity decisions that had been preceded by an earlier court ruling within the same state.¹⁸⁰ Among these overlaps were sixteen cases that *granted* watershed retroactivity.¹⁸¹ Where the earlier state decision was not binding, the ultimate figures were made conservative by excluding just grants of watershed status, but not denials.

This analysis of the remaining 228 watershed cases reveals a considerable proportion—27 decisions, one in every nine—that inflate Supreme Court doctrine by retroactively apply new procedural rules in ways that manifestly diminish *Teague*'s exacting requirements.¹⁸² The Court has made clear that due process retroactivity is only appropriate in the “extremely narrow” class of rules that enhance both the fairness of criminal trials and the accuracy of guilty verdicts as profoundly as *Gideon*'s guarantee of counsel.¹⁸³ The Court has indeed rejected “every claim that a new rule satisfied the requirements for watershed status.”¹⁸⁴ Faithful implementation of watershed doctrine thus demands denying retroactive application to virtually every newly announced rule of constitutional criminal procedure.¹⁸⁵ Yet, more than *one in nine*

179. *See, e.g.*, *State v. Armstrong*, 93 P.3d 1076, 1083–84 (Ariz. 2004) (Jones, C.J., concurring in part, dissenting in part); *Monlyn v. State*, 894 So. 2d 832, 840 (Fla. 2004) (Cantero, J., concurring); *Commonwealth v. Abraham*, 62 A.3d 343, 354–55 (Pa. 2012) (Castille, C.J., concurring); *Swazo v. State*, 800 P.2d 1152, 1153–54 & n.4 (Wyo. 1990) (Urbigkit, C.J., dissenting).

180. *See, e.g.*, *Kriebel v. State*, 219 P.3d 1204, 1207 (Idaho Ct. App. 2009); *Oken v. State*, 786 A.2d 691, 694 (Md. 2001); *Commonwealth v. Reed*, 2014 PA Super 280, 8, 107 A.3d 137, 141.

181. *See infra app.*, tbl. 2.

182. *Compare infra app.*, tbl.1, *with infra app.*, tbl.3.

183. *Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

184. *Id.*

185. Counted as alignments with *Teague* were cases that declined a rule's retroactive application despite expanding watershed doctrine. This happens when a court, while refusing retroactivity in a particular case, loosens the strictures of the watershed test relative to *Teague* in a way that makes it easier for subsequent courts to find a new rule retroactive under that relaxed standard. For example, the Nevada Supreme Court in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), declined to apply retroactively the procedural rule that jurors and not judges must find the facts required to impose a sentence of death. *Id.* at 474 (applying retroactivity doctrine to the rule the Supreme Court set forth in *Ring v. Arizona*, 536 U.S. 584 (2002)); *see also id.* at 473 (“[W]e believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state.”). That court explicitly declined to recognize any fairness requirement for new procedural rules on collateral review, making clear that “if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.” *Id.* at 472. If that rule “establish[ed] a procedure without which the likelihood of an accurate conviction is seriously diminished,” the court explained, “then the rule applies” retroactively, whether or not, as *Teague* requires, it implicates the fundamental fairness of criminal

watershed decisions by state courts enlarge the scope of defendants' retroactivity rights. These decisions have backdated fourteen new rules—eleven announced by the United States Supreme Court under the federal Constitution and three by state supreme courts under their respective state constitutions.¹⁸⁶ And not a single watershed decision has refused retroactive effect to a due process rule that would be afforded that status under *Teague*.¹⁸⁷ In light of state courts' punitive pressures,

trials: “we do not distinguish a separate requirement of ‘bedrock’ or ‘watershed’ significance.” *Id.* This kind of decision, while denying retroactivity to the rule under consideration in the immediate case, tends to expand the meaning of “watersheds.” These cases did not, nonetheless, count as inflations of the watershed doctrine under our analysis.

186. *See, e.g.*, *Acra v. State*, 105 So. 3d 460, 466–67 (Ala. Crim. App. 2012) (applying retroactively the new rule announced in *State v. Adams*, 91 So. 3d 724 (Ala. Crim. App. 2010), barring requirement that sex offenders provide address at which they would reside following release from prison); *In re Gomez*, 199 P.3d 574, 577 (Cal. 2009) (declaring watershed the due process rule announced in *Cunningham v. California*, 549 U.S. 270 (2007), which barred the imposition of an upper term sentence under sentencing scheme based on judicial fact-finding); *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 52–55, 982 N.E.2d 181, 197–98 (declaring watershed the new rule announced in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), which barred sentencing policies that mandate, for juvenile homicide offenders, a punishment of life in prison without the possibility of parole); *People v. Rush*, 757 N.E.2d 88, 100 (Ill. App. Ct. 2001) (declaring watershed the new due process rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which required that any fact except for recidivism that increases a defendant's statutory maximum sentence must be proved to a jury beyond a reasonable doubt), *vacated*, 796 N.E.2d 1048 (Ill. 2003); *People v. De Jesus*, No. 10335/98, 2010 WL 5300535, *9 (N.Y. Sup. Ct. Dec. 24, 2010) (declaring watershed the new due process rule announced in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which required that criminal defense attorneys must advise non-citizen clients about the deportation risks of a guilty plea); *People v. Dobbin*, 791 N.Y.S.2d 897, 900–02 (Sup. Ct. 2004) (declaring watershed the new due process rule announced in *Crawford v. Washington*, 541 U.S. 36, 59 (2004), which forbid the admission of statements by declarants who did not testify at trial); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003) (en banc) (declaring watershed the new due process rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), which required a jury to find the aggravating factors necessary for imposing the death penalty); *Ramirez v. State*, 2014-NMSC-023, ¶ 2, 333 P.3d 240, 246 (declaring watershed the new due process rule announced in *State v. Paredes*, 101 P.3d 799 (N.M. 2004), which required attorneys to advise noncitizen clients of the immigration consequences of guilty pleas); *State v. Zuniga*, 444 S.E.2d 443, 446–47 (N.C. 1994) (declaring watershed the new due process rules announced in both *Mills v. Maryland*, 486 U.S. 367 (1988), which forbid holdout juror from prevent the others from considering mitigating evidence, and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which barred a sentencing scheme that made it likely jurors would think unanimity required for them to consider any particular circumstance as mitigating); *Talley v. State*, 640 S.E.2d 878, 882 (S.C. 2007) (declaring watershed the new due process rule announced in *Alabama v. Shelton*, 535 U.S. 654 (2002), which extended right to counsel to defendants who received suspended sentences); *Darden v. State*, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *9–10 (Tenn. Crim. App. Mar. 13, 2014) (declaring watershed the new due process rule announced in *Van Tran v. State*, 66 S.W.3d 790, 811 (Tenn. 2001), which prohibited the execution of intellectually disabled defendants); *Brewer v. State*, No. 1179, 1991 WL 21605, at *4 (Tenn. Crim. App. Feb. 22, 1991) (declaring watershed the new due process rule announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), which barred jury instructions creating a presumption of malice that has the effect of shifting the burden of proof to the defendant).

187. We would have counted as inappropriate refusals for example, a state's constitutional rule of

this expansion of defendants' retroactivity protections confirms our theory that state courts try to align their criminal procedure decisions with their projection of the Supreme Court's vision of fair trial.

B. *Crawford and Miller*

A couple examples help illustrate the ways that state courts respond to the watershed threat given uncertainty about whether the Supreme Court will backdate a new due process rule. Consider the expansion of defendants' confrontation rights in *Crawford v. Washington*.¹⁸⁸ *Crawford* barred the admission of testimonial inculpatory statements made by declarants not available for cross-examination.¹⁸⁹ Federal courts have overwhelmingly refused to apply that rule to finalized convictions.¹⁹⁰ Their view has received the Supreme Court's approval in the *Whorton v. Bockting*¹⁹¹ decision that denied watershed status to *Crawford*. Prior to *Bockting*, however, multiple state courts have declared the rule a watershed.¹⁹² For instance, in *People v. Watson*,¹⁹³ the New York supreme court held that the defendant was entitled to retroactive application of *Crawford*.¹⁹⁴ Emphasizing the presumptive

criminal procedure that, like *Gideon*, expanded access to the guarantee of counsel in serious cases.

188. 541 U.S. 36 (2004).

189. *Id.* at 54.

190. *See, e.g.*, *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327, 335–36 (2d Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219, 1226–27 (10th Cir. 2004). *But see* *Bockting v. Bayer*, 399 F.3d 1010, 1020–21 (9th Cir. 2005), *rev'd sub nom.* *Whorton v. Bockting*, 549 U.S. 406 (2007).

191. *See Whorton*, 549 U.S. at 419 (“In *Gideon*, the only case that we have identified as qualifying under this exception, the Court held that counsel must be appointed for any indigent defendant charged with a felony. When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high. The new rule announced in *Gideon* eliminated this risk. The *Crawford* rule is in no way comparable to the *Gideon* rule. The *Crawford* rule is much more limited in scope, and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound.” (citations omitted)); *id.* at 422 (“[T]he rule announced in *Crawford*, while certainly important, is not in the same category with *Gideon*. *Gideon* effected a profound and ‘sweeping’ change. The *Crawford* rule simply lacks the ‘primacy’ and ‘centrality’ of the *Gideon* rule, and does not qualify as a rule that “alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” (citations omitted)).

192. *See People v. Encarnacion*, No. 5804/95, 2005 WL 433252, at *8 (N.Y. Sup. Ct. Feb. 23, 2005) (“The *Crawford* decision altered a bedrock procedural element of constitutional criminal procedure.”); *People v. Dobbin*, 791 N.Y.S.2d 897, 905 (Sup. Ct. 2004) (holding that the new *Crawford* rule “involves the same ‘bedrock procedural element which implicates the fundamental fairness and accuracy of the trial’”).

193. 827 N.Y.S.2d 822 (Sup. Ct. 2007).

194. *Id.* at 826–35 (discussing retroactive application of the rule announced in *Crawford*).

unreliability of testimonial hearsay¹⁹⁵ and “unique, and essential, role that cross-examination plays in the fact-finding process,”¹⁹⁶ the state court categorized the confrontation requirement as “one of the exceedingly few new rules of constitutional criminal procedure which . . . must be applied retroactively to cases which have already become final.”¹⁹⁷ That state court nowhere addressed whether this requirement rose to the magnitude of *Gideon*. Nor did it explain how *Crawford* “alter[ed] our understanding of the bedrock procedural elements essential to the fairness of the proceeding.”¹⁹⁸

A more recent example is the important new rule that the Supreme Court announced in *Miller v. Alabama*.¹⁹⁹ This constitutional rule bans sentencing schemes that require life in prison without the possibility of parole for juvenile homicide offenders.²⁰⁰ The Court ruled that the Eighth Amendment entitles any such offender to an individualized sentencing hearing that will determine his eligibility to life without parole.²⁰¹ There is a strong moral argument why *Miller* should apply retroactively. If it does not, thousands of prisoners currently serving a sentence of life without parole for crimes they committed as juveniles will spend the overwhelming part of their lives behind bars without ever having had consideration of any individual factors that might mitigate in favor of at least the possibility of parole before death.²⁰² A defendant whose finalized conviction took place under a system that mandated the most severe punishment imposable on a juvenile was indeed “denied a ‘basic precept of justice,’” as one court put it, “by not [affording] any consideration of his age from the circuit court in sentencing.”²⁰³

195. *Id.* at 834 (internal quotation marks and citation omitted).

196. *Id.* at 833.

197. *Id.* at 832.

198. See *Teague v. Lane*, 489 U.S. 288, 311 (1989); *Brown v. Uphoff*, 381 F.3d 1219, 1226–27 (10th Cir. 2004); *People v. Edwards*, 101 P.3d 1118, 1123 (Colo. App. 2004); *Kriebel v. State*, 219 P.3d 1204, 1207 (Idaho 2009).

199. ___ U.S. ___, 132 S. Ct. 2455 (2012).

200. *Id.* at 2463–75.

201. *Id.*

202. See Elizabeth Calvin, “*When I Die . . . They’ll Send Me Home*”: Youth Sentenced to Life in Prison Without Parole in California, an Update, HUMAN RIGHTS WATCH (Mar. 1, 2012), <http://www.hrw.org/node/105473/section/2> [<https://perma.cc/FR4X-KNNZ>] (estimating that as of January 2008, 2570 people nationwide were serving life without parole sentences for crimes they committed as minors).

203. *People v. Williams*, 982 N.E.2d 181, 196–97 (Ill. App. Ct. 2012); cf. *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) (“[I]f ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose unconstitutional punishment on some

This compelling moral argument helps to explain the Supreme Court's decision to make *Miller* retroactive in *Montgomery v. Louisiana*.²⁰⁴ But it does not bring *Miller* close to *Gideon*.²⁰⁵ In *Miller*, the Court made clear that its “decision does not categorically bar a penalty” of life without parole for a juvenile or add a new element the state must prove before issuing such punishments: “it mandates only that a sentencer follow a certain *process* . . . before imposing [that] penalty.”²⁰⁶ *Miller* “merely shifts ‘decisionmaking authority’ [from the legislature to the judiciary] for the imposition of a life-without-parole sentence on a juvenile homicide offender.”²⁰⁷ This focus on sentencing does not implicate the accuracy of conviction.²⁰⁸ Nor does requiring individualized sentencing for juvenile offenders confronting life without parole prohibit that punishment for minors.²⁰⁹ All it does is “[alter] the permissible methods by which the State can exercise its continuing power to punish juvenile homicide offenders by life imprisonment without the possibility of parole.”²¹⁰ This constitutional reform obligated states only to change the means in which they issue the very same penalty that most jurisdictions had already been imposing.²¹¹ For these reasons, *Miller* is far from being as constitutionally significant as *Gideon*'s benchmark guarantee of counsel to the indigent.

Nonetheless, nineteen state courts had, prior to *Montgomery*, applied *Miller* retroactively and vacated final sentences on collateral review.²¹²

persons but not others, an intolerable miscarriage of justice.”).

204. ___ U.S. ___, 136 S. Ct. 718 (2016); see *supra* notes 20–25 and accompanying text.

205. See *State v. Tate*, 2012-2763, p. 16–17 (La. 11/5/13); 130 So. 3d 829, 841 (holding that *Miller* is not a watershed rule), *cert. denied*, 134 S. Ct. 2663 (2014), *abrogated by* *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016); *Commonwealth v. Reed*, 2014 PA Super 280, 10, 107 A.3d 137, 143 (same).

206. *Miller*, 132 S. Ct. at 2471 (emphasis added).

207. *People v. Carp*, 852 N.W.2d 801, 826 (Mich. 2014); see also *id.* at 821–32 (explaining why the *Miller* rule is procedural not substantive).

208. See, e.g., *Williams v. State*, 183 So. 3d 198, 214–16 (Ala. Crim. App. 2014).

209. See, e.g., *Geter v. State*, 115 So. 3d 375, 378 (Fla. Dist. Ct. App. 2012); *State v. Huntley*, 2013-127, p. 12–13 (La. App. 3 Cir. 7/10/13); 118 So. 3d 95, 103; see also *supra* notes 21–22 and accompanying text.

210. *Chambers v. State*, 831 N.W.2d 311, 328–30 (Minn. 2013).

211. See *id.* at 329–31; *State v. Tate*, 2012-2763, p. 16–17 (La. 9/5/13); 130 So. 3d 829, 841, *cert. denied*, 134 S. Ct. 2663 (2014), *abrogated by* *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016); *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013).

212. See *In re Wilson*, 182 Cal. Rptr. 3d 774, 790–91 (Ct. App. 2015), *superseded by* 346 P.3d 26 (Cal. 2015); *In re Willover*, 186 Cal. Rptr. 3d 146, 156 (Ct. App. 2015), *superseded by* 351 P.3d 328 (Cal. 2015); *Casiano v. Comm’r of Corr.*, 115 A.3d 1031, 1037, 1042–43 (Conn. 2015), *cert. denied sub nom.* *Semple v. Casiano*, 136 S. Ct. 1364 (2016); *People v. Davis*, 2014 IL 115595, ¶ 39, 6 N.E.3d 709, 722; *People v. Arrieta*, 2014 IL App (2d) 130035-U, ¶ 15; *People v. Luciano*, 2013 IL

App (2d) 110792, ¶ 53–62, 988 N.E.2d 943, 953–59; *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 22, 998 N.E.2d 185, 195; *State v. Ragland*, 836 N.W.2d 107, 115–17 (Iowa 2013); *State v. Simmons*, 2011-1810, p.1–2 (La. 10/12/12); 99 So. 3d 28, 28 (per curiam); *Diatchenko v. Dist. Atty. for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013); *Commonwealth v. Halbert*, No. 1988-14286, 2013 WL 5529328, at *2–3 (Mass. Super. Ct. July 16, 2013); *Jones v. State*, 2009-CT-02033-SCT (¶ 18) (Miss. 2013), 122 So. 3d 698, 703; *Branch v. Cassady*, No. WD 77788, 2015 WL 160718, at *8–9 (Mo. Ct. App. Jan. 13, 2015), *cause ordered transferred to Mo. Sup. Ct.* (Mar. 31, 2015); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb.), *cert. denied* *Nebraska v. Mantich*, 135 S. Ct. 67 (2014); *Petition of State of N.H.*, 103 A.3d 227, 236 (N.H. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014), *cert. denied*, 135 S. Ct. 2379 (2015); *Ex parte Maxwell*, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014). All but two of these decisions have strained to avoid reaching the watershed question at all. The exceptions are *Casiano*, 115 A.3d at 1037, 1042–43, and *People v. Williams*, 2012 IL App (1st) 111145, ¶ 56, 982 N.E.2d 181, 197–98. The other seventeen all recharacterize the *Miller* rule as more substantive than it is procedural, and accordingly applicable on collateral review without resort to any determination of its watershed status. *See, e.g., Arrieta*, 2014 IL App (2d) 130035-U, ¶ 14–15 (noting that the court “continue[s] to find [the] reasoning sound” in its earlier determination, and that it does “not need to address whether [Miller] also fell into the second exception”); *Luciano*, 2013 IL App (2d) 110792, ¶¶ 60–63 (noting that “a different panel of the First District Appellate Court determined that *Miller* in fact stated a watershed rule of criminal procedure sufficient to qualify under the second *Teague* exception” but “express[ing] no opinion” about that holding or “the merits of the State’s arguments regarding the second *Teague* exception”); *Mantich*, 842 N.W.2d at 731; *Aiken*, 765 S.E.2d at 575 (explaining that “[w]e need not consider whether *Miller*’s holding constitutes a watershed rule because we find it is substantive and thus meets *Teague*’s first exception”). That the Supreme Court reinforced this mischaracterization of that rule as “substantive” in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 723 (2016), does not change things. *See supra* notes 5–8, 19–25. These *Miller* cases were counted as inflations of *Teague* because they backdated *Miller* under conditions of uncertainty about the watershed threat. They misclassified that procedural rule as “substantive” for reasons given above. *See supra* notes 207–19212 and accompanying text. That the Supreme Court has formulated retroactivity rights as extending to rules of “primary, private individual conduct” makes it clear that these “backdoor watersheds” defy *Teague v. Lane*, 489 U.S. 288, 307 (1989). By contrast, counted as alignments with *Teague* were many other cases from the initial sample that granted retroactivity rights based on the genuinely substantive, as opposed to procedural, nature of the rule in question. *See, e.g., Duncan v. State*, 925 So. 2d 245, 253 (Ala. Crim. App. 2005) (retroactively applying the new rule announced in *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibited the execution of offenders who were juveniles when their crimes were committed); *Charles v. State*, 287 P.3d 779 (Alaska App. 2012) (granting retroactive application to the new state rule announced in *Doe v. State*, 189 P.3d 999 (Alaska 2008), which held that the requirements of the sex offender registration act constitute “punishment” for purposes of the state constitutional ex post facto clause); *Jacobs v. State*, 835 N.E.2d 485, 488–90 (Ind. 2005) (applying retroactively the new rule announced in *Ross v. State*, 729 N.E.2d 113 (Ind. 2000), which prohibited double enhancement of misdemeanor handgun violations by virtue of prior convictions and habitual offender classification); *State v. Whitehorn*, 2002 MT 54, ¶ 42, 50 P.3d 121, 129 (applying retroactively the new substantive rule announced in *State v. Guillaume*, 1999 MT 29, 975 P.2d 312 (1999), which held that application of weapons enhancement statute to a felony offense requiring use of a weapon violated state constitutional protection against double jeopardy). A good illustration is the rule announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), which bars the execution of mentally retarded persons. *Atkins* set forth a substantive rule that regulates, as *Teague* put it, “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” rather than a procedural one that regulates, in just the way that *Miller* does, “the manner of determining the defendant’s culpability.” *Teague*, 489 U.S. at 307. For *Teague*-aligning cases that backdate the *Atkins* rule as substantive rather than procedural, see *Clemons v. State*, 55 So. 3d 314, 319–20 (Ala.

The Connecticut Supreme Court held precisely as the United States Supreme Court ought to have in *Montgomery*, namely, “that the rule announced in *Miller* is a *watershed* rule of criminal procedure that must be applied retroactively.”²¹³ That state Court acknowledged that “the United States Supreme Court has narrowly construed this second exception and, in the twenty-six years since *Teague* was decided, has yet to conclude that a new rule qualifies as watershed.”²¹⁴ That *Miller* focuses “on the *process* by which juveniles can be sentenced to life without parole” led the court to reason that “*Miller* announced a *procedural* rule.”²¹⁵ This much is uncontroversial. More difficult to understand is how its citation to a dissenting opinion supports its inference that “the individualized sentencing prescribed by *Miller* is ‘central to an accurate determination’” under *Teague*.²¹⁶ It is true that “failing to consider youth and its attendant characteristics creates a risk of disproportionate punishment in violation of the eighth amendment.”²¹⁷ But this does not prove the necessary conclusion that *Miller* “implicates the fundamental fairness of a juvenile sentencing” tantamount to *Gideon*.²¹⁸

What could explain why so many state courts have relaxed the watershed doctrine?²¹⁹ The data can be interpreted in a number of ways. Despite the prevailing punitive pressures, some state judges might simply misinterpret *Teague* or choose to strengthen the retroactivity rights of criminal defendants. Confusion or defiance might be able to explain a few cases as well. Neither of these explanations, however, can account for why courts in *one in nine* of these cases—across so many different jurisdictions, and for so many different procedural rules—have relaxed the clear-cut requirements for what constitutes a watershed. If misinterpretations alone explained this result, one might expect the errors to go in both directions, as with judicial leniency at the margins.

Crim. App. 2003); *State v. Dunn*, 2001-KA-1635, p. 25 n.21 (La. 11/1/02); 831 So. 2d 862, 882 n.21; *Johnson v. State*, 102 S.W.3d 535, 539 n.12 (Mo. 2003); and *Pickens v. State*, 1969 OK CR 55, ¶9, 74 P.3d 601, 602 (Okla. Crim. App. 2003).

213. *Casiano*, 115 A.3d at 1037 (emphasis added).

214. *Id.* at 1038.

215. *Id.* at 1041 (emphases added).

216. *Id.* at 1042 (citing *Saffle v. Parks*, 494 U.S. 484, 507 (1990) (Brennan, J., dissenting)).

217. *Id.*

218. *Id.*

219. As explained previously, state courts have discretion to abandon the *Teague* standard for a more forgiving approach to retroactivity. Yet the overwhelming majority of those courts have not. Indeed, all but seven states have explicitly adopted *Teague*'s watershed retroactivity doctrine. See *supra* note 107 and accompanying text.

Yet we see only inflations of this doctrine. What makes sense of these one-sided findings and the watershed puzzle more generally, we have argued, is the dynamic concentration theory of limited-resource enforcement.

CONCLUSION

This Article refutes the conventional wisdom that portrays watershed doctrine as futile. It showed that this doctrine plays an important role in our constitutional criminal procedure. Its low-probability but extreme threat of repealing scores of convictions gives reason for state courts to align their decisions with the more generous due process system that existing precedents project into the future. The resulting safe harbor compensates for the Supreme Court's inability to scrutinize every decision by state courts or to specify each demand of constitutional criminal procedure.

This watershed incentive to align state criminal procedures with a broader vision of due process softens the critique that *Teague* offers defendants no protection.²²⁰ This theory supports a prediction, for example, that state courts may soon start remodeling their criminal sentencing procedures by enacting stringent admissibility standards for prosecution's evidence. The Supreme Court has in two recent and far-reaching decisions declared that factually undistorted sentencing decisions are as critical to fairness in the criminal process as accurate determination of guilt.²²¹ This appreciation may accordingly lead state courts to anticipate that many, if not all, constitutional prerequisites of fair trial will carry over to the sentencing stage and that some might apply retroactively.²²²

220. See, e.g., Entzeroth, *supra* note 28, at 195; Fallon & Meltzer, *supra* note 46, at 1816–17 (1991); Linda Meyer, “*Nothing We Say Matters*”: *Teague and New Rules*, 61 U. CHI. L. REV. 423, 423–24 (1994).

221. See *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1407 (2012) (“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”); *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1388 (2012) (extending the right to effective assistance of counsel to plea bargaining and rejecting the claim that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining” because “[t]hat position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas” (citing *Frye*, 132 S. Ct. at 1407)).

222. One of those changes might be a ban on testimonial inculpatory hearsay statements from declarants who did not testify, where that hearsay might lead to an imposition of the death penalty or another aggravated sentence on the convicted defendant. See, e.g., *United States v. Umaña*, 750

The watershed dynamic revealed here suggests broader implications as well. Retroactive constitutional remediation can benefit society in areas beyond criminal investigation and trial. The Supreme Court's limited working capacity forces it to ration the production of precedents in ways that shape the substance of the Court's constitutional decisions.²²³ Implementation of the watershed mechanism in the domain of civil rights especially, for example, would enable the Court to ease this tension between rationing and substance.²²⁴

F.3d 320, 360–68 (4th Cir. 2014) (Gregory, J., dissenting), *reh'g en banc denied*, 762 F.3d 413 (4th Cir. 2014) (opining that Sixth Amendment bans such statements); *see also* Note, *Criminal Procedure—Confrontation Clause—Fourth Circuit Finds No Right to Confrontation During Sentence Selection Phase of Capital Trial*, 128 HARV. L. REV. 1027, 1033–34 (2015) (arguing that the Eight Amendment's prohibition of cruel and unusual punishment, if not the Sixth Amendment, calls for suppressing testimonial inculpatory hearsay statements tendered in support of capital punishment when defendant cannot cross-examine declarant).

223. *See generally* RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 133–34 (1996); Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012).

224. On the difficulties that retroactive remedies present, *see* Fallon & Meltzer, *supra* note 46, at 1791–97.

APPENDIX

Table 1: Watershed Inflations (27 cases)

1. *Acra v. State*, 105 So. 3d 460, 467 (Ala. Crim. App. 2012) (State v. Adams, 91 So. 3d 724 (Ala. Crim. App. 2010)).
2. *In re Gomez*, 199 P.3d 574, 580 (Cal. 2009) (*Blakely*).
3. *In re Willover*, 186 Cal. Rptr. 3d 146, 156 (Ct. App.) (*Miller*), *superseded by* 351 P.3d 328 (Cal. 2015).
4. *In re Rainey*, 168 Cal. Rptr. 3d 719, 724–25 (Ct. App.) (*Miller*), *superseded by* 326 P.3d 251 (Cal. 2014).
5. *Casiano v. Comm’r of Corr.*, 115 A.3d 1031, 1037, 1042–1043 (Conn. 2015) (*Miller*), *cert. denied sub nom.* *Semple v. Casiano*, 136 S. Ct. 1364 (2016).
6. *People v. Johnson*, 2013 IL App (5th) 110112, ¶¶ 18–24, 998 N.E.2d 185, 194–95 (*Miller*).
7. *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (*Miller*).
8. *State v. Simmons*, 2011-1810, p. 1–2 (La. 10/12/12); 99 So. 3d 28, 28 (per curiam) (*Miller*).
9. *Commonwealth v. Clarke*, 949 N.E.2d 892, 904 (Mass. 2011) (*Padilla*).
10. *Commonwealth v. Halbert*, No. 1988-14286, 2013 WL 5529328, at *2–3 (Mass. Super. Ct. July 16, 2013) (*Miller*).
11. *Jones v. State*, 2009-CT-02033-SCT (¶ 18) (Miss. 2013), 122 So. 3d 698, 703 (*Miller*).
12. *State v. Whitfield*, 107 S.W.3d 253, 268–69 (Mo. 2003) (en banc) (*Ring*).
13. *Branch v. Cassady*, No. WD 77788, 2015 WL 160718, at *8–9 (Mo. Ct. App. Jan. 13, 2015) (*Miller*), *cause ordered transferred to Mo. Sup. Ct.* (Mar. 31, 2015).
14. *State v. Mantich*, 842 N.W.2d 716, 731 (Neb.) (*Miller*), *cert. denied* *Nebraska v. Mantich*, 135 S. Ct. 67 (2014).
15. *In re State*, 103 A.3d 227, 233–34 (N.H. 2014) (*Miller*), *cert. denied sub nom.* *New Hampshire v. Soto*, No. 14-639, 2016 WL 854309 (U.S. Mar. 7, 2016).
16. *Ramirez v. State*, 2014-NMSC-023, ¶ 2, 333 P.3d 240 (*Padilla* and *State v. Paredes*, 101 P.3d 799 (N.M. 2004)).
17. *State v. Forbes*, 119 P.3d 144, 147–48 (N.M. 2005) (*Crawford*).
18. *People v. De Jesus*, No. 10335/98, 2010 WL 5300535, at *9 (N.Y. Sup. Ct. Dec. 24, 2010) (*Padilla*).
19. *People v. Dobbin*, 791 N.Y.S.2d 897, 905 (Sup. Ct. 2004) (*Crawford*).

20. *State v. Zuniga*, 444 S.E.2d 443, 446–47 (N.C. 1994) (*McKoy*).
21. *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014) (*Miller*), *cert. denied*, 135 S. Ct. 2379 (2015).
22. *Talley v. State*, 640 S.E.2d 878, 882 (S.C. 2007) (*Shelton*).
23. *Darden v. State*, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *9–10 (Tenn. Crim. App. Mar. 13, 2014) (*Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001)).
24. *Adkins v. State*, 911 S.W.2d 334, 345 (Tenn. Crim. App. 1994) (*Sandstrom*).
25. *Ex parte Maxwell*, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014) (*Miller*).
26. *Aguilar v. State*, 375 S.W.3d 518, 524 (Tex. Ct. App. 2012) (*Padilla*), *vacated*, 393 S.W.3d 787 (Tex. Crim. App. 2013).
27. *State v. Mares*, 2014 WY 126, ¶ 2, 335 P.3d 487, 491 (*Miller*).

*Table 2: Watershed Inflations Excluded Due to Overlap with Similar State Decisions (16 cases).*²²⁵

1. *In re Wilson*, 182 Cal. Rptr. 3d 774, 790–91 (Ct. App.) (*Miller* overlaps *In re Rainey*), *rev. granted and opinion superseded by* 367 P.3d 26 (Cal. 2015).
2. *In re Watson*, 104 Cal. Rptr. 3d 403, 408–10 (Ct. App. 2010) (*Cunningham* overlaps *Gomez*).
3. *People v. Davis*, 2014 IL 115595, ¶ 39, 6 N.E.3d 709, 722 (*Miller* upholds *Davis* (2012) and overlaps *Johnson* and *Williams*), *cert. denied*, 135 S. Ct. 710 (2014).
4. *People v. Arrieta*, 2014 IL App (2d) 130035-U, ¶ 15 (*Miller* overlaps *Johnson*, *Davis*, and *Williams*).
5. *People v. Williams*, 2012 IL App (1st) 111145, 982 N.E.2d 181 (*Miller* overlaps *Johnson*), *abrogated by* *People v. Davis*, 2014 IL 115595, 6 N.E.3d 709.
6. *People v. Cooks*, 2012 IL App (1st) 112991-U, ¶¶ 16–18 (*Miller* overlaps *Johnson*, *Davis*, and *Williams*).
7. *People v. Morfin*, 2012 IL App (1st) 103568, ¶¶ 47–56, 981 N.E.2d 1010, 1020–22 (*Miller* overlaps *Johnson*, *Davis*, *Williams*, and *Cooks*).
8. *People v. Davis*, 2012 IL App. (1st) 112577-U, ¶ 16 (*Miller* overlaps *Johnson* and *Williams*).
9. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 278 (Mass. 2013) (*Miller* overlaps *Halbert*).
10. *State v. Ramirez*, 2012-NMCA-057, ¶¶ 4–5, 278 P.3d 569, 570–71 (*Padilla* upheld by *Ramirez* (2014)).
11. *People v. Bevans*, No. 20704V-2008, 2011 WL 923077, at *7 (N.Y. Sup. Ct. Jan. 31, 2011) (*Padilla* overlaps *De Jesus*).
12. *People v. Garcia*, 907 N.Y.S.2d 398, 404–05 (Sup. Ct. 2010) (*Padilla* overlaps *De Jesus* and *Bevans*).
13. *People v. Watson*, 827 N.Y.S.2d 822, 830–33 (Sup. Ct. 2007) (*Crawford* overlaps *Dobbin*).
14. *People v. Encarnacion*, No. 5804/95, 2005 WL 433252, at *8, *17 n.6 (N.Y. Sup. Ct. Feb. 23, 2005) (*Crawford* overlaps *Dobbin* and *Watson*).

225. For each citation in this table, the first case noted parenthetically indicates the Supreme Court precedent on which the state court was relying. Any cases following the word “overlaps” indicate preceding decisions issued within the same state concerning the same subject matter.

15. *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *9 (N.Y. Sup. Ct. 2004) (*Crawford* overlaps *Dobbin*, *Encarnacion*, and *Watson* (2007)).
16. *Brewer v. State*, No. 1179, 1991 WL 21605, at *4 (Tenn. Crim. App. Feb. 22, 1991) (*Sandstrom* overlaps *Adkins*).

Table 3: Watershed Decisions that Align with Teague Doctrine (201 cases)

1. *Ex parte Williams*, 183 So. 3d 220, 233 (Ala. 2015), *vacated sub nom.*, *Williams v. Alabama*, ___ U.S. ___, 136 S. Ct. 1365 (2016).
2. *Williams v. State*, 183 So. 3d 198, 218 (Ala. Crim. App. 2014), *vacated*, ___ U.S. ___, 136 S. Ct. 1365 (2016).
3. *Bush v. State*, 92 So. 3d 121, 132 (Ala. Crim. App. 2009).
4. *Poole v. State*, 846 So. 2d 370, 388 (Ala. Crim. App. 2001), *overruled by Lightfoot v. State*, 152 So. 3d 445 (Ala. 2013).
5. *State v. Smart*, 202 P.3d 1130, 1146–47 (Alaska 2009).
6. *State v. Towery*, 64 P.3d 828, 835–36 (Ariz. 2003) (en banc).
7. *State v. Mata*, 916 P.2d 1035, 1043 (Ariz. 1996).
8. *State v. Poblete*, 260 P.3d 1102, 1107 (Ariz. Ct. App. 2011).
9. *State v. Molina*, No. 2 CA-CR 2010-0003-PR, 2010 WL 1511427, at *1 (Ariz. Ct. App. Apr. 15, 2010).
10. *State v. Febles*, 115 P.3d 629, 635 (Ariz. Ct. App. 2005).
11. *State v. Sepulveda*, 32 P.3d 1085, 1087–88 (Ariz. Ct. App. 2001).
12. *People v. Trujeque*, 349 P.3d 103, 119–22 (Cal. 2015).
13. *In re Saade*, 77 Cal. Rptr. 3d 39, 51–52 (Ct. App. 2008), *superseded by Saade on H.C.*, 190 P.3d 535 (Cal. 2009).
14. *In re Gomez*, 64 Cal. Rptr. 3d 281, 286 (Ct. App. 2007), *rev'd*, 199 P.3d 574 (Cal. 2009).
15. *In re Moore*, 34 Cal. Rptr. 3d 605, 611–12 (Ct. App. 2005).
16. *People v. Amons*, 22 Cal. Rptr. 3d 908, 916–17 (Ct. App. 2005).
17. *People v. Tate*, 2015 CO 42, ¶ 10, 352 P.3d 959, 963, *overruling recognized by People v. Wilder*, 2016 COA 23.
18. *People v. Johnson*, 142 P.3d 722, 728 (Colo. 2006) (en banc).
19. *People v. McDowell*, 219 P.3d 332, 338 (Colo. App. 2009).
20. *People v. Wenzinger*, 155 P.3d 415, 442 (Colo. App. 2006).
21. *Edwards v. People*, 129 P.3d 977, 979 (Colo. 2006) (en banc).
22. *People v. Edwards*, 101 P.3d 1118, 1124 (Colo. App. 2004), *aff'd*, 129 P.3d 977 (Colo. 2006).
23. *People v. Bradbury*, 68 P.3d 494, 499 (Colo. App. 2002).
24. *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 839 (Conn. 2015).
25. *Duperry v. Solnit*, 803 A.2d 287, 300 (Conn. 2002).
26. *Garcia v. Comm'r of Corr.*, 84 A.3d 1, 7–8 (Conn. App. Ct.), *appeal denied*, 93 A.3d 156 (Conn. 2014).
27. *Garcia v. Warden*, No. TSRCV084002573, 2011 WL 3335413, at *3 (Conn. Super. Ct. July 8, 2011), *aff'd sub nom. Garcia v. Comm'r of Corr.*, 84 A.3d 1 (Conn. App. Ct. 2014).

28. *Watson v. Warden*, No. CV970400369S, 2007 WL 706591, at *3–4 (Conn. Super. Ct. Feb. 13, 2007), *aff'd sub nom. Watson v. Comm'r of Corr.*, 958 A.2d 782 (Conn. App. Ct. 2008).
29. *Gathers v. United States*, 977 A.2d 969, 972–73 (D.C. 2009).
30. *Richardson v. State*, 3 A.3d 233, 239 (Del. 2010).
31. *State v. Desmond*, No. 91009844DI, 2013 WL 1090965, at *2 (Del. Super. Ct. Feb. 26, 2013).
32. *State v. McGriff*, No. 93002189DI, 2006 WL 1515831, at *8 (Del. Super. Ct. Jan. 9, 2006), *aff'd*, No. 49, 2006, 2007 WL 1454883 (Del. May 18, 2007).
33. *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005).
34. *Hughes v. State*, 901 So. 2d 837, 846 (Fla. 2005).
35. *Figarola v. State*, 841 So. 2d 576, 577 (Fla. Dist. Ct. App. 2003).
36. *State v. Sosa*, 733 S.E.2d 262, 265 (Ga. 2012).
37. *Carter v. Johnson*, 599 S.E.2d 170, 172 (Ga. 2004).
38. *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003).
39. *State v. Auld*, 361 P.3d 471, 483 (Haw. 2015).
40. *State v. Gomes*, 113 P.3d 184, 189–90 (Haw. 2005).
41. *State v. Owens*, 343 P.3d 30, 35–36 (Idaho 2015).
42. *Gutierrez-Medina v. State*, 333 P.3d 849, 858 (Idaho Ct. App. 2014), *rev. denied* (Sept. 15, 2014).
43. *Rhoades v. State*, 233 P.3d 61, 70–71 (Idaho 2010).
44. *Hoffman v. State*, 121 P.3d 958, 960 (Idaho 2005).
45. *Jacobs v. State*, 799 N.E.2d 1161, 1167 (Ind. Ct. App. 2003), *aff'd in part, vacated in part*, 835 N.E.2d 485 (Ind. 2005).
46. *Drach v. Bruce*, 136 P.3d 390, 403–04 (Kan. 2006).
47. *Easterwood v. State*, 44 P.3d 1209, 1223 (Kan. 2002).
48. *Whisler v. State*, 36 P.3d 290, 300 (Kan. 2001).
49. *Verge v. State*, 335 P.3d 679, 684 (Kan. Ct. App. 2014), *rev. denied* (June 29, 2015).
50. *Hollingsworth v. State*, No. 106,357, 2012 WL 718971, at *7 (Kan. Ct. App. Mar. 2, 2012).
51. *People v. Smith*, 2015 IL 116572, ¶ 34, 26 N.E.3d 335, 343.
52. *People v. Sanders*, 939 N.E.2d 352, 364 (Ill. 2010).
53. *People v. Morris*, 925 N.E.2d 1069, 1080 (Ill. 2010).
54. *People v. De La Paz*, 791 N.E.2d 489, 496–97 (Ill. 2003).
55. *People v. Hickey*, 792 N.E.2d 232, 259–60 (Ill. 2001).
56. *People v. Caballero*, 688 N.E.2d 658, 665 (Ill. 1997).
57. *People v. Smith*, 2015 IL App (1st) 12281-U, ¶¶ 15–17.
58. *People v. Miller*, 2015 IL App (1st) 130918-U, ¶ 14.
59. *People v. Johnson*, 2015 IL App (2d) 140388, ¶¶ 9–11, 29 N.E.3d 1181, 1186.

60. *People v. Reed*, 2014 IL App (1st) 122610, ¶ 94, 25 N.E.3d 10, 34.
61. *People v. Talavera*, 2013 IL App (2d) 120232-U, ¶ 58 n.5.
62. *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 22, 998 N.E.2d 185, 194–95, *appeal denied*, 3 N.E.3d 799 (Ill. 2014), *appeal denied*, 23 N.E.3d 1204 (Ill. 2015).
63. *People v. Avery*, 2012 IL App (1st) 110298, ¶ 46, 974 N.E.2d 266.
64. *People v. Jones*, 2011 IL App (5th) 070370-U, ¶ 15.
65. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 42, 954 N.E.2d 365, 378.
66. *People v. Lucas*, No. 2-09-0895, 2011 WL 10099132, at *2–3 (Ill. App. Ct. May 9, 2011).
67. *People v. Ramirez*, No. 2-09-0765, 2011 WL 10099636, at *2 (Ill. App. Ct. Mar. 22, 2011).
68. *People v. Tripp*, 944 N.E.2d 405, 413 (Ill. App. Ct. 2011).
69. *People v. Sanders*, 911 N.E.2d 1096, 1107–08 (Ill. App. Ct. 2009), *aff'd*, 939 N.E.2d 352 (Ill. 2010).
70. *Weidner v. Cowan*, 838 N.E.2d 179, 180–81 (Ill. App. Ct. 2005).
71. *People v. Schrader*, 820 N.E.2d 489, 498 (Ill. App. Ct. 2004).
72. *People v. Turner*, 785 N.E.2d 879, 886–88 (Ill. App. Ct. 2003).
73. *People v. Gholston*, 772 N.E.2d 880, 888 (Ill. App. Ct. 2002).
74. *People v. Kizer*, 741 N.E.2d 1103, 1115 (Ill. App. Ct. 2000).
75. *State v. Mohler*, 694 N.E.2d 1129, 1137 (Ind. 1998).
76. *Daniels v. State*, 561 N.E.2d 487, 491–92 (Ind. 1990).
77. *Lyons v. State*, No. 48A02-0911-PC-1126, 2010 WL 1987741, at *7 (Ind. Ct. App. May 19, 2010).
78. *Leatherwood v. State*, 880 N.E.2d 315, 320–21 (Ind. Ct. App. 2008).
79. *Baxter v. State*, 689 N.E.2d 1254, 1259 (Ind. Ct. App. 1997).
80. *Cossel v. State*, 675 N.E.2d 355, 360 (Ind. Ct. App. 1996).
81. *State v. Silva*, 668 N.E.2d 718, 720 (Ind. Ct. App. 1996).
82. *Long v. State*, 645 N.E.2d 1111, 1114 (Ind. Ct. App. 1995).
83. *Perez v. State*, 816 N.W.2d 354, 361 (Iowa 2012).
84. *Morgan v. State*, 469 N.W.2d 419, 425 (Iowa 1991).
85. *Brewer v. State*, 444 N.W.2d 77, 81–82 (Iowa 1989).
86. *Stewart v. State*, 676 So. 2d 87, 89 (La. 1996).
87. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1299–1300 (La. 1992).
88. *State v. Tate*, 2012-2763, p. 16–17 (La. 11/5/13); 130 So. 3d 829, 841, *cert. denied*, 134 S. Ct. 2663 (2014), *abrogated by* *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016).
89. *State v. Huntley*, 2013-127, p. 12–13 (La. App. 3 Cir. 7/10/13); 118 So. 3d 95, 103.
90. *State v. Sam*, 623 So. 2d 1, 1 (La. Ct. App. 1993).

91. Carmichael v. State, 2007 ME 86, ¶¶ 27, 42, 927 A.2d 1172, 1179, 1181.
92. Grandison v. State, 38 A.3d 352, 370 (Md. 2012).
93. Miller v. State, 77 A.3d 1030, 1043–44 (Md. Ct. App. 2013).
94. Commonwealth v. Augustine, 4 N.E.3d 846, 866–67 (Mass. 2014).
95. Commonwealth v. Phillips, No. 10-P-337, 2011 WL 1761537, at *1 n.2 (Mass. App. Ct. May 10, 2011).
96. Commonwealth v. Arnaut, 940 N.E.2d 1232, 1233–34 (Mass. App. Ct. 2011).
97. Commonwealth v. Peppicelli, 872 N.E.2d 1142, 1152 (Mass. App. Ct. 2007).
98. Commonwealth v. Hampton, 831 N.E.2d 341, 347 (Mass. App. Ct. 2005).
99. Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at *11–13 (Mass. Super. Ct. Oct. 25, 2005).
100. People v. Maxson, 759 N.W.2d 817, 825 (Mich. 2008).
101. People v. Houlihan, 706 N.W.2d 731, 732 (Mich. 2005).
102. People v. Carp, 828 N.W.2d 685, 713–15 (Mich. Ct. App. 2012), *aff'd*, 852 N.W.2d 801 (Mich. 2014), *vacated sub nom.*, Davis v. Michigan, __ U.S. __, 136 S. Ct. 1356 (2016).
103. Chambers v. State, 831 N.W.2d 311, 330 (Minn. 2013), *abrogated by* Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016).
104. Campos v. State, 816 N.W.2d 480, 498–99 (Minn. 2012).
105. State v. Houston, 702 N.W.2d 268, 274 (Minn. 2005).
106. O’Connell v. State, 858 N.W.2d 161, 166 (Minn. Ct. App. 2015), *rev. granted* (Mar. 25, 2015).
107. Shaw v. State, No. A14-0745, 2014 WL 7344306, at *4 (Minn. Ct. App. Dec. 29, 2014).
108. Pantoja-Coronado v. State, No. A12-0952, 2013 WL 2301812, at *1 (Minn. Ct. App. May 28, 2013).
109. El Eid v. State, No. A11-0898, 2013 WL 141628, at *2 (Minn. Ct. App. Jan. 14, 2013).
110. Sasic v. State, No. A11-1221, 2012 WL 4856143, at *3 (Minn. Ct. App. Oct. 15, 2012).
111. Odegard v. State, 767 N.W.2d 472, 477 (Minn. Ct. App. 2009).
112. State v. Petschl, 688 N.W.2d 866, 875 (Minn. Ct. App.), *opinion withdrawn and superseded by* 692 N.W.2d 463 (Minn. Ct. App. 2004).
113. Meemken v. State, 662 N.W.2d 146, 150 (Minn. Ct. App. 2003).
114. Manning v. State, 2001-DR-00230-SCT (¶¶ 32–42), 929 So. 2d 885, 900 (Miss. 2006).
115. Nixon v. State, 641 So. 2d 751, 755 (Miss. 1994).

116. *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 651–52 (Mo. 2011) (en banc).
117. *Gratzer v. Mahoney*, 2006 MT 282, ¶ 14, 334 Mont. 297, 150 P.3d 343.
118. *State v. Nichols*, 1999 MT 212, ¶ 16, 295 Mont. 489, 493, 986 P.2d 1093, 1096–97, *overruled by State v. Whitehorn*, 2002 MT 54, 309 Mont. 63, 50 P.3d 121.
119. *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1995), *rev'd*, 518 U.S. 37 (1996).
120. *Branch v. Cassady*, No. WD 77788, 2015 WL 160718, at *8–9 (Mo. Ct. App. Jan. 13, 2015), *cause ordered transferred to Mo. S. Ct.* (Mar. 31, 2015).
121. *State v. Lotter*, 664 N.W.2d 892, 908 (Neb. 2003).
122. *State v. Alsharif*, 724 S.E.2d 597, 602 (N.C. Ct. App. 2012).
123. *State v. Tallard*, 816 A.2d 977, 981 (N.H. 2003).
124. *State v. Gonsalves*, No. 95-S-038, 2001 WL 34012421, at *2 (N.H. Super. Ct. Dec. 27, 2001).
125. *Croft v. Coplan*, No. 01-E-066, 2001 WL 34013571, at *4–5 (N.H. Super. Ct. May 22, 2001).
126. *Ennis v. State*, 137 P.3d 1095, 1101–02 (Nev. 2006).
127. *Colwell v. State*, 59 P.3d 463, 472–73 (Nev. 2002).
128. *State v. Gaitan*, 37 A.3d 1089, 1108 (N.J. 2012).
129. *State v. Purnell*, 735 A.2d 513, 520, 523–24 (N.J. 1999).
130. *State v. J.A.*, 942 A.2d 149, 159 (N.J. Super. Ct. App. Div. 2008).
131. *State v. Cupe*, 672 A.2d 1233, 1239 (N.J. Super. Ct. App. Div. 1996).
132. *Dominguez v. State*, 2015-NMSC-014, ¶¶ 24–25, 348 P.3d 183, 191.
133. *Kersey v. Hatch*, 237 P.3d 683, 693 (N.M. 2010).
134. *State v. Frawley*, 2007-NMSC-057, ¶¶ 42–44, 143 N.M. 7, 172 P.3d 144.
135. *People v. Baret*, 16 N.E.3d 1218, 1228–31 (N.Y. 2014), *cert. denied*, 135 S. Ct. 961 (2015).
136. *People v. Vatic*, No. 2008BX5805, 2013 WL 2450502, at *2–3 (N.Y. Sup. Ct. May 31, 2013).
137. *People v. Ramirez*, No. 4676/1996, 2012 WL 1193762, at *3 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd*, 993 N.Y.S.2d 893 (App. Div. 2014).
138. *People v. Valerio*, No. 1893/96, 2012 WL 3854863, at *4–5 (N.Y. Sup. Ct. Sept. 6, 2012).
139. *People v. Santana*, No. 0542/1997, 2012 WL 2377788, at *7–8 (N.Y. Sup. Ct. June 19, 2012).

140. *People v. Lorente*, No. QN13956/90, 2012 WL 470456, at *2–3 (N.Y. Sup. Ct. Feb. 10, 2012).
141. *People v. Hernandez*, No. 02556/2008, 2011 WL 846231, at *3–4 (N.Y. Cty. Ct. Feb. 24, 2011).
142. *People v. Kabre*, 905 N.Y.S.2d 887, 891 (Crim. Ct. 2010).
143. *People v. Tam*, No. 1667/94, 2006 WL 1868023, at *3–4 (N.Y. Sup. Ct. July 7, 2006).
144. *People v. Jackson*, No. 1673/95, 2006 WL 1867328, at *3–4 (N.Y. Sup. Ct. June 30, 2006).
145. *People v. Perfetto*, No. 1772/80, 2005 WL 1330536, at *2 (N.Y. Sup. Ct. May 3, 2005).
146. *People v. Vasquez*, 795 N.Y.S.2d 820, 840 (Sup. Ct. 2005).
147. *People v. Soto*, 795 N.Y.S.2d 429, 432–33 (Sup. Ct. 2005).
148. *People v. Khan*, No. 499-90, 2004 WL 1463027, at *3–4 (N.Y. Sup. Ct. June 23, 2004).
149. *People v. Breazil*, 744 N.Y.S.2d 818, 820–21 (Sup. Ct. 2002), *rev'd*, 819 N.Y.S.2d 274 (App. Div. 2006).
150. *People v. Jones*, No. 7587/90, 1994 WL 96985, at *2–3 (N.Y. Sup. Ct. Mar. 8, 1994).
151. *State v. Gottschall*, 2007-Ohio-3980, at ¶¶ 14–19.
152. *State v. Chaney*, 2007-Ohio-2231, at ¶¶ 9–10.
153. *State v. Bishop*, 2014-Ohio-173, 7 N.E.3d 605, at ¶¶ 8–11.
154. *Ferrell v. State*, 902 P.2d 1113, 1114–15 (Okla. Crim. App. 1995).
155. *Miller v. Lampert*, 125 P.3d 1260, 1267 (Or. 2006) (en banc).
156. *Page v. Palmateer*, 84 P.3d 133, 139–40 (Or. 2004) (en banc).
157. *Teague v. Palmateer*, 57 P.3d 176, 184–85 (Or. 2002).
158. *Peed v. Hill*, 153 P.3d 125, 132 (Or. Ct. App. 2007).
159. *Commonwealth v. Cunningham*, 81 A.3d 1, 10–11 (Pa. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).
160. *Commonwealth v. Hughes*, 865 A.2d 761, 781–82 (Pa. 2004).
161. *Commonwealth v. Riggle*, 2015 PA Super 147, 119 A.3d 1058, 1067.
162. *Commonwealth v. Cristina*, 2015 PA Super 74, 114 A.3d 419, 422–23, *vacated*, 131 A.3d 482 (Pa. 2016).
163. *Pierce v. Wall*, 941 A.2d 189, 197–98 (R.I. 2008).
164. *Taylor v. Wall*, 821 A.2d 685, 691 (R.I. 2003).
165. *Pailin v. Vose*, 603 A.2d 738, 742 (R.I. 1992).
166. *Siers v. Weber*, 2014 SD 51, ¶¶ 4–5, 851 N.W.2d 731, 734.
167. *Cowell v. Leapley*, 458 N.W.2d 514, 519 (S.D. 1990).
168. *Bush v. State*, 428 S.W.3d 1, 20–21 (Tenn. 2014).
169. *Bell v. State*, No. W2013-00176-CCA-R3-PC, 2013 WL 9570548, at *3–4 (Tenn. Crim. App. Sept. 4, 2013).

170. *Jelks v. State*, No. M2012-00984-CCA-R3-PC, 2013 WL 3958442, at *2–3 (Tenn. Crim. App. July 30, 2013).
171. *Rhodes v. State*, No. M2011-01124-CCA-R3-PC, 2012 WL 5544423, at *2 (Tenn. Crim. App. Nov. 13, 2012).
172. *Lopez v. State*, No. M2011-02349-CCA-R3PC, 2012 WL 2394148, at *2–3 (Tenn. Crim. App. June 26, 2012).
173. *Cantu v. State*, No. M2011-02506-CCA-R3-PC, 2012 WL 2323243, at *2 (Tenn. Crim. App. June 18, 2012).
174. *Bush v. State*, No. M2011-02133-CCA-R3-PC, 2012 WL 2308280, at *7–9 (Tenn. Crim. App. June 15, 2012), *aff'd*, 428 S.W.3d 1 (Tenn. 2014).
175. *Guevara v. State*, No. W2011-00207-CCA-R3-PC, 2012 WL 938984, at *3 (Tenn. Crim. App. Mar. 13, 2012).
176. *Diotis v. State*, No. W2011-00816-CCA-R3PC, 2011 WL 5829580, at *2 (Tenn. Crim. App. Nov. 17, 2011).
177. *Gomez v. State*, No. E2010-01319-CCA-R3-PC, 2011 WL 1797305, at *5–6 (Tenn. Crim. App. May 12, 2011).
178. *Zonge v. State*, No. W2008-01930-CCA-R3-PC, 2009 WL 160926, at *2–3 (Tenn. Crim. App. Jan. 23, 2009).
179. *Quintero v. State*, No. M2005-02959-CCA-R3-PD, 2008 WL 2649637, at *62 (Tenn. Crim. App. July 7, 2008).
180. *Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *10 (Tenn. Crim. App. Dec. 21, 2004).
181. *Greenup v. State*, No. W2001-01764-CCA-R3-PC, 2002 WL 31246136, at *3–4 (Tenn. Crim. App. Oct. 2, 2002).
182. *Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013).
183. *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008).
184. *Ex parte Keith*, 202 S.W.3d 767, 771 (Tex. Crim. App. 2006).
185. *Mueller v. Murray*, 478 S.E.2d 542, 549 (Va. 1996).
186. *State v. Sears*, 2007 VT 112, ¶¶ 6–7, 183 Vt. 537, 945 A.2d 832.
187. *State v. White*, 2007 VT 113, ¶ 15, 182 Vt. 510, 944 A.2d 203.
188. *In re Gentry*, 179 Wash. 2d 614, 630, 316 P.3d 1020, 1028 (2014) (en banc).
189. *In re Haghghi*, 178 Wash. 2d 435, 443–45, 309 P.3d 459, 463–64 (2013).
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191. *State v. Abrams*, 163 Wash. 2d 277, 291–92, 178 P.3d 1021, 1028 (2008) (en banc).
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193. *In re* Markel, 154 Wash. 2d 262, 273, 111 P.3d 249, 254 (2005) (en banc).
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196. *In re* Hachenev, 169 Wash. App. 1, 10–11, 288 P.3d 619, 623–24 (2012).
197. *State v. Kennedy*, 735 S.E.2d 905, 924–25 (W. Va. 2012).
198. *State v. Lagundoye*, 2004 WI 4, ¶ 41, 268 Wis. 2d 77, 107, 674 N.W.2d 526, 540–41.
199. *State v. Lo*, 2003 WI 107, ¶¶ 70–74, 264 Wis. 2d 1, 33–34, 665 N.W.2d 756, 772 (Wis. 2003).
200. *State v. Walker*, 2008 WI App 135, ¶6, 313 Wis. 2 831, 831, 756 N.W.2d 809, 809.
201. *State v. Horton*, 536 N.W.2d 155, 159–60 (Wis. Ct. App. 1995).