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"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review

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The United States Supreme Court issued only eighty opinions during its 2003 Term. Yet two of those decisions, *Illinois v. Lidster*[1] and *Illinois v. Fisher*,[2] involved the same basic procedural scenario. In each case, the Court granted a petition for a writ of certiorari filed by the Attorney General of Illinois that challenged a pro-defense criminal law decision of an Illinois appellate court.[3] And in each case, the Attorney General succeeded in convincing the Supreme Court to reverse the state decision.[4] *Lidster* and *Fisher* were the twelfth and thirteenth pro-defense Illinois criminal decisions reviewed by the United States Supreme Court on direct appeal in the last twenty-five years.[5] They are also the eleventh and twelfth of these cases in which the Supreme Court reversed and held for the prosecution.[6] The refusal of Illinois appellate

* Professor, The John Marshall Law School. I wish to acknowledge the invaluable research assistance of Belinda Belk and Erin Graham.

1. Illinois v. Lidster, 124 S. Ct. 885 (2004).

2. Illinois v. Fisher, 124 S. Ct. 1200 (2004) (per curiam).

3. A "pro-defense" decision is one that either reverses a criminal conviction or affirms a pre-trial suppression of evidence. This includes both outright reversals based on insufficiency of the evidence and reversals for trial error that result in remands for new trials. It would also include reversals based on erroneous denials of suppression motions, because those issues are decided only if and when the defendant is convicted. *See generally* ILL. S. CT. R. 604 (a)(1) (allowing for interlocutory appeal by the prosecution only under certain circumstances, including where a suppression motion was decided against the prosecution). A "pro-prosecution" decision is one that either affirms a conviction or reverses a trial judge's decision to grant a suppression motion.

4. *See Lidster*, 124 S. Ct. at 885 (reversing the Supreme Court of Illinois decision and ruling that brief stops of motorists at police checkpoints are not presumptively invalid under the Fourteenth Amendment), *rev'g* 779 N.E.2d 855 (Ill. 2002); *Fisher*, 124 S. Ct. at 1200 (reversing the Illinois appellate court decision and holding that the Due Process Clause does not mandate dismissal of charges when police, without evidence of bad faith, destroy potentially useful evidence), *rev'g* 792 N.E.2d 310 (Ill. 2003).

5. *See infra* notes 121–23 and accompanying text (recounting the Illinois record of pro-defense cases reviewed by the United States Supreme Court).

6. Since these two cases, the U.S. Supreme Court has also decided Illinois v. Caballes, 125 S. Ct. 834 (2005), making it the thirteenth reversal out of fourteen cases. The Court in *Caballes*

courts to protect their pro-defense criminal decisions from United States Supreme Court review raises issues grounded in the very roots of our federal system. They are issues that Illinois courts can no longer ignore.

It is easy to forget how extraordinary the Court's action actually is. The first United States Supreme Court direct appeal reversal of a pro-defense Illinois criminal judgment did not occur until *1980*—only twenty-five years ago.[7] Thus, almost *two centuries* passed before the United States Supreme Court first interfered with a pro-defense Illinois state court criminal judgment. The reason for this long history without Supreme Court interference lies in deeply-embedded concepts of federalism.[8]

Traditionally, enforcement of criminal law has been largely a state concern. The criminal procedure guarantees found in the Federal Bill of Rights originally had no application to the states.[9] The first federal constitutional provision with significant relevance to state criminal prosecutions was the Due Process Clause of the Fourteenth Amendment.[10] Although the Clause became effective against state action in 1868, the Supreme Court applied it only sparingly against state court criminal decisions for the next ninety years.[11] It was not until the Warren Court revolution of the 1960's that the United States Supreme Court became actively engaged in influencing state criminal law systems.[12] The Court did this by selectively incorporating most,[13] if not

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reversed the Supreme Court of Illinois' decision that the use of a drug-sniffing dog at a routine traffic stop violated the Fourth Amendment. *Id.*

7. *See* Illinois v. Vitale, 447 U.S. 410 (1980) (vacating a state court judgment that the defendant's manslaughter prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment).

8. Federalism is the system of government established by our constitution that divides power into a national and local (or state) level. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES 3–4 (2d ed. 2002). An inherent tension exists between the two levels of government and their concerns for asserting and maintaining power within their respective realms. *Id.* at 4.

9. *See* Barron v. Mayor and City Council of Baltimore, 32 U.S. 243 (1833) (holding that the Federal Bill of Rights only applies against the federal government).

10. U.S. CONST. amend. XIV § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

11. *See infra* notes 89–90 and accompanying text (surveying the history of the application of the Fourteenth Amendment to the states).

12. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 440–41 (14th ed. 2001) (describing the Warren Court's role in incorporating the guarantees of the Bill of Rights).

13. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (holding the protection against double jeopardy, guaranteed by the Fifth Amendment, is applicable to the states through the Due Process

all,[14] of the guarantees of the federal Bill of Rights.[15]

Some contemporary commentators feared that the Warren Court was forcing a single standard of constitutional protection for criminal justice upon all states.[16] Yet this is inaccurate. The Supreme Court instead established, in the words of Professor James A. Gardner, a constitutional "floor," a minimum level of protection for all criminal defendants below which neither state nor federal courts may venture.[17] Individual states, however, may always freely exceed this minimum "floor" by offering greater protection to their defendants than the United States Constitution, as interpreted by the Supreme Court. Thus, states "may accord as much or more protection to individual rights as does the United States Constitution, but they may not accord less."[18] Although the United States Supreme Court provides the floor, state courts may freely dictate the height of the ceiling.

In other words, our federal system authorizes the United States

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Clause of the Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding the right to a jury trial, guaranteed by the Sixth Amendment, is applicable to the states); Washington v. Texas, 388 U.S. 14 (1967) (holding the right to compulsory process, guaranteed by the Sixth Amendment, is similarly applicable to the states); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (holding the right to a speedy trial, guaranteed by the Sixth Amendment, is "as fundamental as any of the rights secured by the Sixth Amendment" and therefore is applicable to the states through the Fourteenth Amendment); Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding the right to confront adverse witnesses, guaranteed by the Sixth Amendment, is a "fundamental right and is made obligatory on the States by the Fourteenth Amendment"); Malloy v. Hogan, 378 U.S. 1 (1964) (holding the privilege against self-incrimination, guaranteed by the Fifth Amendment, applies to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the right to counsel, guaranteed by the Sixth Amendment, similarly applicable to provide appointed counsel for all indigent state defendants in felony cases); Robinson v. California, 370 U.S. 660 (1962) (holding the right against cruel and unusual punishments, guaranteed by the Eighth Amendment, similarly applicable against the states); Mapp v. Ohio, 367 U.S. 643 (1961) (holding the "exclusionary rule," found in the Fourth Amendment, is applicable against the states).

14. *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (holding that the Due Process Clause of the Fourteenth Amendment did not make the Indictment Clause of the Fifth Amendment applicable against the states).

15. Selective incorporation is the process by which a particular guarantee listed in the Bill of Rights is made applicable to the states through the Fourteenth Amendment. BLACK'S LAW DICTIONARY 770 (7th ed. 1999). The Court's decision to selectively incorporate a provision turned on "whether the particular Bill of Rights guarantee [was] itself essential to 'fundamental fairness.'" SULLIVAN & GUNTHER, *supra* note 12, at 441. *See supra* note 13 (providing examples of cases in which such rights were selectively incorporated and made applicable to the states).

16. *See, e.g.*, Henry J. Friendly, *The Bill of Rights As a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 931–56 (1965) (discussing the manner in which the Warren Court encouraged the scholarly efforts of the 1960s to create a universal penal code as a means of incorporating the Bill of Rights to the states and warning that "there is danger in moving too far too fast").

17. James A. Gardner, *State Constitutional Rights As Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1030 (2003).

18. *Id.* at 1031 (citations omitted).

Supreme Court to interfere with a state criminal conviction only when that state has violated the federal constitutional rights of a defendant by offering less than the constitutionally-mandated minimum protections. That is, a criminal defendant who has lost in state court may always ask the United States Supreme Court to review any adverse state court decision predicated on any provision of the Federal Bill of Rights that has been selectively incorporated through the Due Process Clause of the Fourteenth Amendment.

However—and this is crucial—it is legally *impermissible* for the United States Supreme Court to interfere with a pro-defense decision of a state court if that state court bases its pro-defense decision on its own state law.[19] This is because if the defense has been granted relief under adequate and independent state law, there is simply no federal interest that the United States Supreme Court can vindicate.[20]

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19. *See, e.g.*, 4 AM. JUR. 2D *Appellate Review* § 42 (2004). According to that source:

> The United States Supreme Court has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if the state court's judgment rests on a state-law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.
>
> The principle that the Supreme Court will not review judgments of state courts that are supported by adequate and independent state grounds is based, in part, on the limitations of the Supreme Court's jurisdiction. The Supreme Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights; the power is to correct wrong judgments, not to revise opinions taking erroneous views of federal law. Where a state court decision rests upon an adequate and independent state ground, the state ground controls the result in the case, no matter what the Supreme Court may say about the merits of the federal issue. In such a case, anything which the Supreme Court could say on the federal issue would merely be an advisory opinion, and the Supreme Court has stated that it does not have jurisdiction to render an advisory opinion under such circumstances, or to correct statements in state court opinions which do not affect the final outcome of a case, even though a state court's opinion may reflect an erroneous view of federal law. Accordingly, a writ of certiorari to review a state court decision will generally be dismissed as improvidently granted where the state court judgment rests on an adequate and independent state ground.

Id. See generally Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality, and Individual Liberty*, 16 FLA. ST. U. L. REV. 365 (1988) (explaining the adequate and independent state ground doctrine in the context of the federal system); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (arguing that, regardless of the presence of adequate and independent state grounds, the Supreme Court should always reach federal issues decided in state cases); Richard W. Westling, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379, 383–87 (1988) (outlining the rationale of the adequate and independent state grounds doctrine).

20. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding that the United States Supreme Court will not review a state court decision that "clearly and expressly" indicates "that it is . . . based on bona fide separate, adequate, and independent grounds"); *see also* Florida v.

But if this is true, how did the United States Supreme Court have the power to reverse the pro-defense state court decisions in *Lidster* and *Fisher*? The United States Supreme Court could review these cases only because in both cases the Illinois appellate courts literally gave the high Court the power to review and reverse their decisions. The Illinois courts accomplished this by predicating their decisions—completely unnecessarily and with no discussion—on provisions of the Federal Constitution.[21] Whenever a state court relies on the Federal Constitution, it implicitly invites the United States Supreme Court to determine the proper interpretation of federal law.[22]

Admittedly, there may be occasions when a state court believes that operation of the United States Constitution, as applied to the states through selective incorporation, forces it to render a pro-defense decision that it would not otherwise make. In those situations, a state court would welcome the United States Supreme Court's review and subsequent reversal of the decision.[23] But, as we shall see, both the

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Meyers, 466 U.S. 380, 381 n.1 (1984) (noting that the "adequate and independent state grounds" doctrine is predicated on the fact that the Supreme Court refuses to render "advisory" opinions); *infra* notes 102–05, 107 and accompanying text (noting that states may not use a federal constitutional provision to justify a restriction when the United States Supreme Court has determined the restriction does not fall within the ambit of the Federal Constitution).

21. *See* People v. Fisher, No.1-00-1997, at 15–17 (Ill. App. Ct. 2003) (unpublished written order) (relying only on the Fourteenth Amendment Due Process Clause analysis used in *People v. Newberry*, even though the *Newberry* decision also offered adequate independent state grounds for the decision); People v. Lidster, 747 N.E.2d 419 (Ill. App. 2d Dist. 2001) (predicating the decision on Fourth Amendment search and seizure analysis rather than state law), *aff'd*, 779 N.E.2d 855 (Ill. 2002), *rev'd sub nom* Illinois v. Lidster, 124 S. Ct. 885 (2004); *see also* Illinois v. Fisher, 124 S. Ct. 1200, 1201 n.1 (2004) (acknowledging that the Illinois appellate court *could have* relied solely on adequate and independent state grounds, but instead based the decision solely on the Fourteenth Amendment Due Process Clause); People v. Newberry, 652 N.E.2d 288 (Ill. 1995) (offering an adequate and independent state ground for its decision in addition to relying on the Fourteenth Amendment Due Process Clause).

22. *See* Pennsylvania v. Labron, 518 U.S. 938, 941 (1996) (per curiam) (noting that without a "plain statement" that the decision was predicated on adequate and independent state grounds, the Supreme Court will assume that federal law is "interwoven" with state constitutional law in the judgment and, consequently, that the Court has jurisdiction to decide the case); New York v. Class, 475 U.S. 106, 109 (1986) (holding that the mention of the state constitutional provision only occurred "in direct conjunction with the United States Constitution" and that use of both state and federal cases for the same proposition did not equate to a "plain statement" resting on independent grounds). *See generally*, Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371 (1991) (describing the effect of the state court's language on the adequate and independent state grounds doctrine).

23. For an analogous situation in which the Fourth District Illinois Appellate Court felt constrained by binding decisions of the Supreme Court of Illinois with which it disagreed, see *People v. Heather*, 815 N.E.2d 1, 7 (Ill. App. Ct. 4th Dist. 2004). The court in *Heather* recognized that despite the court's feelings that the police recognition both of a passenger as someone "involved in illegal drug activity" and of a strong, unidentifiable odor were enough to

Supreme Court of Illinois in *Lidster* and the Illinois Appellate Court in *Fisher* appeared satisfied with their pro-defense decisions.[24] The simple addition of one line at the end of each opinion—clearly indicating that the decision was predicated on Illinois law—would have immunized each decision from United States Supreme Court review.[25] But the Illinois court in each case refused to do this.

This situation leads us to the question: Why? Illinois judges are elected by Illinois voters to provide justice to Illinois citizens. Why would these Illinois judges unnecessarily invite the United States Supreme Court to reverse decisions in favor of the rights of Illinois citizens that they appeared to support?

This Article contends that Illinois courts too often abdicate their authority to provide Illinois defendants final relief under Illinois law. Part I will look at the decisions rendered by both the state courts and the United States Supreme Court in *Lidster* and *Fisher*.[26] Part II will review the constitutional history that has resulted in a federal system that allows states great leeway in regulating their criminal justice systems, while at the same time guaranteeing a minimum baseline of rights to criminal defendants.[27] Part III will argue that, as a general rule, state courts should insulate their pro-defense decisions from federal review and reversal.[28] However, Illinois courts may have fatally compromised their power to assert adequate and independent state grounds through the state supreme court's decisions announcing that Illinois will follow the United States Supreme Court in lockstep both in the areas of search and seizure and double jeopardy. Finally, Part IV will contend that there should be consequences to a state court's repeated decisions to allow their pro-defense judgments to be reviewed by the United States Supreme Court.[29] If Illinois courts have no interest in insulating their

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support "reasonable articulable suspicion of criminal activity to support a warrant check[,]" the court was "constrained" to follow Supreme Court of Illinois precedent and rule both that the facts did not support reasonable articulable suspicion and that the warrant check "chang[ed] the fundamental nature of the stop." *Id.*

24. *See infra* notes 41–45, 61–66 and accompanying text (outlining the pro-defense rationales of *Lidster* and *Fisher*).

25. *But see* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 106 (2003) (noting that the adequate and independent state ground concept is inapplicable to situations where a state has held that the federal and state constitutional provisions are identical).

26. *See infra* Part I.A–B (examining the various rationales applied in *Lidster* and *Fisher*).

27. *See infra* Part II (providing framework of federal system and explaining rules that restrict appellate court review).

28. *See infra* Part III (arguing that Illinois should respect its role as final arbiter of state law).

29. *See infra* Part IV (suggesting that considerations of finality compel the Supreme Court of Illinois to insulate its pro-defense decisions from United States Supreme Court review, or risk undermining the deference and respect afforded its pro-prosecution decisions in the context of

pro-defense decisions from federal review, then why should federal courts provide greater deference to their *pro-prosecution* decisions? If Illinois courts eagerly offer up their pro-defense decisions for federal review and reversal, why should federal courts on habeas review refrain from performing the same searching review that Illinois courts implicitly invited in *Lidster* and *Fisher*? It is time that Illinois courts confronted these issues.

I. *ILLINOIS V. LIDSTER* AND *ILLINOIS V. FISHER*: TWO STATE COURT VICTORIES FOR ILLINOIS CRIMINAL DEFENDANTS PROVE SHORT-LIVED

It is important to first look at the procedural history of *Illinois v. Lidster* and *Illinois v. Fisher* to understand precisely how these cases proceeded through the Illinois court system and then into the United States Supreme Court.[30] Only then can we ask *why* the state courts would decide these cases in such a way as to permit United States Supreme Court review.[31]

A. Illinois v. Lidster *and the Constitutionality of Information-Seeking Roadblocks*

On August 30, 1997, a hit-and-run motorist struck and killed a bicyclist in Lombard, a suburb west of Chicago. About a week later, the police set up a highway checkpoint at that location, stopped each vehicle traveling eastbound for ten to fifteen seconds, and asked the occupants whether they had seen anything at this location around the time of the fatal accident.[32] The police then handed each driver a flyer describing the accident and asking the public for assistance.[33]

Robert Lidster, one of the drivers stopped at the checkpoint, attracted police attention when his van swerved and almost hit an officer.[34] The police smelled alcohol on his breath. After flunking a sobriety test, Lidster was arrested and later charged with driving under the influence of alcohol. Before trial, Lidster filed a motion to quash his arrest and suppress the test results. He argued that the roadblock violated the constitution because the public interest in conducting the roadblock did

habeas review).

30. *See infra* Parts I.A–B (discussing the history of the *Lidster* and *Fisher* cases).

31. *See infra* Part III.A (considering the motivations behind the Illinois court's actions in *Lidster* and *Fisher*).

32. People v. Lidster, 747 N.E.2d 419, 421 (Ill. App. Ct. 2d Dist. 2001), *rev'd sub nom* Illinois v. Lidster, 124 S. Ct. 885 (2004).

33. *Id.*

34. *Id.*

not outweigh the intrusion on his rights.[35] The trial judge denied his motion and a jury subsequently found him guilty.[36]

While Lidster awaited appeal in the Illinois Appellate Court, the United States Supreme Court decided *City of Indianapolis v. Edmond*.[37] The Court in *Edmond* held that a roadblock designed to search for evidence of drug trafficking violated the Fourth Amendment. The Court recognized that it had previously approved of roadblocks designed to target drunk drivers[38] and to stop illegal aliens at the national border.[39] In those cases, the Court found that the overriding special governmental interests in highway safety and the security of the national borders sufficiently merited an exception to the individualized suspicion usually required for a reasonable seizure. But the Court found that the Indianapolis roadblock was intended merely to uncover evidence of "ordinary criminal wrongdoing," a goal that did not compel the suspension of the usual rule requiring individualized suspicion.[40]

The Illinois Appellate Court for the Second District found the new *Edmond* case controlling and reversed Lidster's conviction because it believed the roadblock in Lombard merely sought general information about a crime.[41] The Illinois court noted that this roadblock was not designed with an overriding governmental interest in line with promoting highway safety or securing national borders. The court therefore found it "impossible to escape the conclusion" that this roadblock, like the roadblock in *Edmond*, simply sought evidence of "ordinary criminal wrongdoing."[42]

The Supreme Court of Illinois affirmed in a 4–3 decision.[43] The majority agreed that the purpose of the Lombard roadblock, like the roadblock condemned by the Court in *Edmond*, was a general interest in crime control.[44] The majority ended with this eloquent defense of its

35. *Id.*

36. *Id.*

37. City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (affirming the constitutionality of police roadblocks but only if the goal is beyond simply detecting "ordinary criminal wrongdoing").

38. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449 (1990).

39. United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976).

40. *Edmond*, 531 U.S. at 41 (stating that "[w]e have never approved a checkpoint program whose primary purpose was to detect ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions").

41. *Lidster*, 747 N.E.2d at 422–23.

42. *Id.* at 422.

43. People v. Lidster, 779 N.E.2d 855 (Ill. 2002), *aff'g* 747 N.E.2d 419 (Ill. App. Ct. 2d Dist. 2001).

44. *Id.* at 859.

ruling:

> The right of an individual to be free from unreasonable searches and seizures is an indispensable freedom, not a mere luxury. It cannot give way in the face of a temporary need for the police to obtain information regarding the identity of the motorist at issue. *As the protector of the constitutional rights of all citizens of this state, this court is commanded to draw [a line]....* Without such a line the fourth amendment will do little to prevent intrusive searches and seizures from becoming a routine part of American life.[45]

The United States Supreme Court reversed in a 6–3 decision.[46] The Court disagreed with the Supreme Court of Illinois' holding that *Edmond* controlled the *Lidster* case.[47] The Court noted that while the roadblock in *Edmond* dealt with an attempt to allow the police to detect a crime in progress, namely drug trafficking, the *Lidster* roadblock was designed merely to ask vehicle occupants for assistance in solving a crime probably committed by others.[48] Unlike the roadblock in *Edmond,* this merely constituted an "information-seeking" kind of stop.[49] Since the Court found that "an *Edmond*-type rule of automatic unconstitutionality"[50] was inapplicable, it thus applied the traditional Fourth Amendment balancing test and concluded that the minimal intrusion on drivers coupled with the grave public concern over the traffic fatality justified the police roadblock.[51]

B. Illinois v. Fisher *and the Destruction of Evidence*

During a traffic stop of Gregory Fisher in 1988, Chicago police observed him attempting to conceal a bag containing a white powdery substance.[52] Tests confirmed that the bag contained cocaine.[53] After Fisher was charged with possession, he filed a discovery motion that requested all physical evidence that the State intended to use at trial.[54] The State agreed to provide this evidence at a future time.[55]

Fisher missed a court date in 1989 and remained a fugitive for the

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45. *Id.* at 861(emphasis added).

46. Illinois v. Lidster, 124 S. Ct. 885 (2004).

47. *Id.* at 886–87 (stating that "the importance of soliciting the public's assistance . . . is not important enough to justify an *Edmond*-type rule here").

48. *Id.* at 886.

49. *Id.*

50. *Id.*

51. *Id.* at 887.

52. Illinois v. Fisher, 124 S. Ct. 1200 (2004) (per curiam).

53. *Id.* at 1200.

54. *Id.* at 1201.

55. *Id.*

next ten years.[56] In November 1999, the police finally located Fisher and the 1988 cocaine charge was reinstated.[57] The prosecution informed Fisher that, pursuant to established police procedures, the cocaine had been destroyed two months earlier.[58] The court denied Fisher's motion to dismiss based on the evidence destruction.[59] Despite his contention that he had been "framed," a jury found Fisher guilty of possession.[60]

The Illinois Appellate Court for the First District reversed in an unpublished written order.[61] The court acknowledged that the United States Supreme Court in *Arizona v. Youngblood* had held that without a showing of bad faith the police's failure to preserve potentially useful evidence does not violate the Due Process Clause of the Fourteenth Amendment.[62] The Appellate Court noted, however, that the Supreme Court of Illinois had distinguished *Youngblood* in *People v. Newberry*.[63] The Court in *Newberry* held that a properly filed discovery motion obviated the need for the defense to establish bad faith on the part of the police.[64] Because Fisher had properly requested the destroyed evidence in his 1988 discovery motion, and because that evidence represented his "only hope for exoneration," the First District concluded that Fisher had been "denied due process" and thus reversed his conviction.[65] The Supreme Court of Illinois subsequently denied leave to appeal.[66]

However, the United States Supreme Court granted the Illinois

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Fisher*, No.1–00–1997 (Ill. App. Ct. 1st Dist. 2003) (unpublished written order). *See* ILL. S. CT. R. 23 (stating that only opinions of the court may be published). The court may only use an opinion if a majority of the court either (1) "establishes a new rule of law or modifies, explains or criticizes an existing rule of law"; or (2) "resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." ILL. S. CT. R. 23(a). An unpublished written order contains the facts, issues, reasons for decision, and judgment of the court. ILL. S. CT. R. 23(b). If the case does not satisfy the requirements for a written order, the court may dispose of the matter in a summary order, providing the court is unanimous, and when one or more of the following criteria is applicable: (1) lack of appellate jurisdiction; (2) clear control of the disposition of the case by precedent, statute or court rules; (3) appeal is moot; (4) case involves application of "well-settled rules to recurring fact situations"; (5) adequate explanation of decision by trial court or agency; (6) "no error of law appears on the record"; (7) no abuse of discretion; or (8) decision is not against the manifest weight of the evidence, according to the trial record. ILL. S. CT. R. 23(c). A summary order contains a discussion of the facts and issues, precedent, and a citation to the provision under Rule 23 applicable to the order in question. ILL. S. CT. R. 23(c).

62. Arizona v. Youngblood, 488 U.S. 51, 59 (1988).

63. People v. Newberry, 652 N.E.2d 288, 291 (Ill. 1995).

64. *Id.* at 292.

65. *Id.*

66. People v. Fisher, 792 N.E.2d 310 (Ill. 2003) (denying leave to appeal).

Attorney General's petition for a writ of certiorari and, without further briefing or oral argument, reversed the decision of the Illinois Appellate Court in a *per curiam* opinion.[67] First, the Court noted that although *Newberry* was based on both the Due Process Clause and an Supreme Court of Illinois Rule regulating discovery,[68] the Court nevertheless had jurisdiction.[69] This is because the Illinois Appellate Court predicated its decision in *Fisher* solely on the Fourteenth Amendment Due Process Clause.[70] The United States Supreme Court held that it was not deprived of jurisdiction merely because there was a possible adequate and independent state ground; rather, a state court must clearly and expressly rely on the state ground to deprive the Court of jurisdiction.[71]

Next, turning to the merits, the Supreme Court disagreed that the existence of a pending discovery request should eliminate the *Youngblood* requirement of police bad faith.[72] Further, the Supreme Court held that the outcome should not change because the evidence provided Fisher's "only hope for exoneration."[73] Rather, *Youngblood* applies even if the evidence was only "potentially useful."[74] In these circumstances, *Youngblood* holds that a Due Process Clause violation only exists if the defense can establish bad faith on the part of the police.[75] The Court thus reversed the appellate court and remanded the case for further proceedings.[76]

Concurring in the judgment, Justice Stevens expressed his continued disagreement with that part of *Youngblood* that categorically insisted on a showing of police bad faith regardless of the nature of the lost evidence.[77] However, he agreed that the evidence in *Fisher* was not of such quality to warrant a different conclusion.[78] Stevens also argued

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67. Illinois v. Fisher, 124 S. Ct. 1200 (2004) (per curiam).

68. ILL. S. CT. R. 415(g)(i) (outlining sanctions for failure to comply with applicable discovery rule(s) or court order(s), including allowing the court to order a "party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances").

69. *Fisher*, 124 S. Ct. at 1201 n.1.

70. *Id.*

71. *Id.* (citing *Michigan v. Long*, 463 U.S. 1032 (1983) and *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam)).

72. *Id.* at 1202.

73. *Id.*

74. *Id.* at 1203.

75. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

76. *Fisher*, 124 S. Ct. at 1203.

77. *Id.* (Stevens, J., concurring) (stating that "there may be cases in which the defendant is unable to prove that the state acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make the criminal trial fundamentally unfair").

78. *Id.* (Stevens, J., concurring).

that this case did not merit a grant of certiorari because, on remand, the Illinois courts may simply reinstate their judgment by relying on the adequate and independent state law ground of the *Newberry* decision.[79]

II. THE USE OF FEDERAL CONSTITUTIONAL LAW IN STATE COURT CRIMINAL DECISIONS: A CONTINUING SOURCE OF CONFUSION

As we have seen, the United States Supreme Court had jurisdiction to review *Lidster* only because the Supreme Court of Illinois predicated its decision solely on the Fourth Amendment.[80] Likewise, jurisdiction in *Fisher* existed because the appellate court decided to base its holding solely on the Fourteenth Amendment Due Process Clause.[81]

The use of federal constitutional provisions in state criminal cases represents a relatively recent development in American legal history.[82] This makes it even more interesting to note that the appellate court decision in *Lidster* referred to a "Fourth Amendment seizure."[83] In Illinois, the *federal* constitutional provision has become synonymous with the issue itself. Consider this fact: a LEXIS search shows that during the first six months of 2004 the term "Fourth Amendment" was cited in thirty-three Illinois cases.[84] That is exactly the number of Illinois cases that cited the term "Fourth Amendment" during *a forty-year period from 1920 to 1960.*[85] What took *four decades* now only takes six months.

This trend highlights how completely irrelevant the Federal Constitution was in the area of state criminal law for most of our nation's history.[86] As noted above, the Federal Bill of Rights, adopted in 1791, had absolutely no relevance to the states.[87] The first federal

79. *Id.* (Stevens, J., concurring).

80. *See supra* notes 41–42 and accompanying text (discussing the Illinois Appellate Court's holding that *Edmund* applied to information-seeking roadblocks).

81. *See supra* notes 67–71 and accompanying text (discussing the Court's finding of jurisdiction in *Fisher* because the state court had relied in part on the Federal Constitution's Due Process Clause).

82. *See supra* notes 5–7 and accompanying text (discussing the recent trend of Supreme Court reversals of Illinois state court decisions).

83. People v. Lidster, 747 N.E.2d 419, 421 (Ill. App. Ct. 2d Dist. 2001).

84. Search in "IL State Cases, Combined database" on LEXIS, from January 1, 2004 through June 30, 2004, listed thirty-three cases citing the "Fourth Amendment" in their decisions.

85. A search in "IL State Cases Combined database" on LEXIS, from January 1, 1920 through December 31, 1959, also listed thirty-three cases citing the "Fourth Amendment" in their decisions.

86. *See supra* notes 8–9 and accompanying text (discussing the concept and historical underpinnings of federalism).

87. *See supra* note 9 and accompanying text (explaining that the Federal Bill of Rights originally did not apply to the states).

inroads did not occur until the adoption of the Fourteenth Amendment in 1868.[88] During the latter part of the nineteenth and the first half of the twentieth century, the Supreme Court only rarely found certain state criminal decisions were in violation of the Due Process Clause,[89] and these findings were usually in the area of confessions.[90]

Everything changed, of course, with the Warren Court revolution that selectively incorporated most of the provisions of the Bill of Rights and made them applicable in state criminal proceedings through the Fourteenth Amendment Due Process Clause.[91] The wrenching changes in areas such as search and seizure and confession law perhaps project the illusion that the Federal Bill of Rights and the United States Supreme Court now control every aspect of state criminal law.

One way to understand the effect of selective incorporation is to imagine a set of rules for state appellate judges created in response to the newly applicable federal provisions. The following rules became applicable in the late 1960's and remain in effect today. They apply whenever a state appellate panel considers a criminal appeal. As earlier stated, a "pro-defense" decision is one that either reverses a criminal

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88. *See supra* notes 10–15 and accompanying text (describing the effects of the Fourteenth Amendment).

89. *See* Rochin v. California, 342 U.S. 165 (1952) (determining that warrantless use of stomach pump on arrestee merely to recover two morphine capsules resulted in violation of Fourteenth Amendment Due Process); Powell v. Alabama, 287 U.S. 45 (1932) (noting that the state's failure to allow "adequate time" for African-American defendants in a capital case to secure counsel resulted in a violation of Fourteenth Amendment Due Process); Moore v. Dempsey, 261 U.S. 86 (1923) (holding that a trial held in a lynch-mob atmosphere violated Fourteenth Amendment Due Process).

90. *See* Spano v. New York, 360 U.S. 315 (1959) (excluding confession under Fourteenth Amendment Due Process where the police used the accused's "childhood friend," who was now a police officer, to obtain confession); Payne v. Arkansas, 356 U.S. 560 (1958) (excluding confession under Fourteenth Amendment Due Process where accused was held incommunicado and threatened with mob violence); Fikes v. Alabama, 352 U.S. 191 (1957) (holding that confession violated Due Process where officials moved mentally handicapped accused to a prison far from home, kept him in isolation except for questioning, and denied access to friends and family); Leyra v. Denno, 347 U.S. 556 (1954) (finding improper interrogation tactics violated Fourteenth Amendment Due Process); Haley v. Ohio, 332 U.S. 596 (1948) (excluding confession from juvenile under the Due Process Clause because of coercive interrogation techniques); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (excluding confession because of Fourteenth Amendment Due Process violation where accused was deprived of sleep and continuously questioned for over thirty-six hours by a succession of experienced police officers); Ward v. Texas, 316 U.S. 547 (1942) (excluding confession under Due Process Clause where it was obtained through a threat of mob violence); Chambers v. Florida, 309 U.S. 227 (1940) (excluding confession under Due Process Clause due to five days of physical threats and mistreatment); Brown v. Mississippi, 297 U.S. 278 (1932) (excluding confession under Due Process Clause because it was obtained through use of police violence against the accused).

91. *See supra* notes 12–15 and accompanying text (discussing selective incorporation and the Warren Court).

conviction or affirms a pre-trial suppression of evidence, while a "pro-prosecution" decision is one that either affirms a conviction or reverses a trial judge's decision to grant a suppression motion.[92]

A. Rule One: Before A State Appellate Court May Issue A Pro-Prosecution Decision, It Must First Clear It with the United States Supreme Court.

There is no question that the Warren Court caused a major change in the way that state appellate courts decided criminal appeals. Before the 1960's, about the only restraint on a state appellate court came from that state's law. The sole federal limit was the relatively light touch of the Fourteenth Amendment's Due Process Clause.[93] But since the Warren Court revolution, a state appellate court may not render a pro-prosecution decision until it has reviewed an exhaustive checklist[94] to make sure that the decision does not run afoul of United States Supreme Court precedent in the areas of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. We speak of the first ten amendments to the United States Constitution as the "Bill of Rights." Yet from the government's viewpoint, it is more like a "Bill of *Restrictions*." Judge Richard Posner has written that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone. . . ."[95] Depending on the issues raised, a state appellate court must consult the United States Supreme Court's interpretations of the Federal Bill of Rights to determine, *inter alia*, if the state has refrained from illegal searches and seizures, tactics that produce unlawful confessions, and imposing cruel and unusual punishment.[96]

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92. *See supra* note 3 and accompanying text (reviewing the definitions of both of these terms).

93. *See supra* notes 10–12 and accompanying text (discussing the passage, impact, and applicability of Fourteenth Amendment principles). *See also*Wolf v. Colorado, 338 U.S. 25 (1949) (dealing with a state court case where defendant was convicted on the basis of evidence that would not have been admissible in a federal court proceeding because of the exclusionary rule, the Court stated that while the general principles of the Fourth Amendment may be applied to the states via the Fourteenth Amendment Due Process Clause, there is no constitutional basis for the exclusionary rule to be passed along to the states).

94. This review is limited, of course, by the issues raised by the appellant. *See* ILL. S. CT. R. 341(e)(7) (stating that points not argued in the brief are deemed waived); ILL.S.CT. R. 615(a) (stating that points not raised in brief may be considered by appellate court only if they are "plain errors or defects affecting substantial rights").

95. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

96. However, the duty to provide counsel to indigent defendants facing criminal prosecutions is an example of a positive duty the Bill of Rights imposes on state criminal systems. *See* Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (holding that the Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense, made applicable to the states through the Fourteenth Amendment, commanding that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for

The Illinois state Constitution along with the constitutions of most other states, contain parallel provision concerning issues such as search and seizure,[97] the right against self-incrimination,[98] and cruel and unusual punishment.[99] Before selective incorporation, the only issue facing a state appellate court in a criminal appeal was whether the prosecution had run afoul of any of these state laws; the Federal Bill of Rights was irrelevant.[100]

But selective incorporation made most of the criminal guarantees of the Bill of Rights[101] applicable against the states through the Fourteenth

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him); Scott v. Illinois, 440 U.S. 367, 374 (1979) (holding that the Sixth and Fourteenth Amendments require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense).

97. *See, e.g.*, ILL. CONST. art. I, § 6 (1970) (tracking the language of the Fourth Amendment). That provision of the Illinois Constitution of 1970 reads:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Id. Prior to 1970, a similar guarantee was embodied in article II, § 6 of the 1870 Constitution, article 13, § 7 of the 1848 Constitution, and article 8, § 7 of the 1818 Constitution. The corresponding federal provision of the Fourth Amendment provides:

> The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

98. For example, compare ILL. CONST. art. I, § 10 ("No person shall . . . be twice put in jeopardy for the same offense") with U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb").

99. *See, e.g.*, ILL. CONST. art. I, § 11.

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Id. The corresponding United States Constitutional guarantee can be found in the Eighth Amendment. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

100. The only federal limit was the relatively light touch provided by the Fourteenth Amendment Due Process Clause. *See supra* notes 12–15 and accompanying text (discussing selective incorporation).

101. There appears to be only one criminal guarantee of the Bill of Rights that the Supreme Court has explicitly refused to apply to the states through selective incorporation. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Due Process Clause of the Fourteenth Amendment did not make the Indictment Clause of the Fifth Amendment applicable against the states). There are three other rights that the Supreme Court has not explicitly addressed: the Eighth Amendment prohibition against excessive bail, the Eighth Amendment prohibition against excessive fines, and the vicinage requirement of the Sixth Amendment. However, it has been

Amendment's Due Process Clause. Moreover, a state court in our federal system has the duty to follow all federal guarantees binding on the state, the Supremacy Clause of the United States Constitution severely limits the state courts' interpretive power over these provisions.[102] The Supreme Court always has final authority on the meaning of the federal constitution.[103] Thus, selective incorporation unquestionably added another layer of work to any state appellate court inclined to issue a pro-prosecution decision.

B. Rule Two: Before A State Appellate Court May Issue a Pro-Defense Decision, However, It Has No Need to Ever Consider Any Decision From the United States Supreme Court.

Assume a state appellate court is inclined to issue a pro-defense decision. In this situation, a state appellate court need not ever consult any United States Supreme Court opinion. While no pro-prosecution decision in a criminal case can ever issue without first reconciling it with United States Supreme Court authority, a state appellate court may freely ignore the federal constitution if it chooses to issue a pro-defense decision. Quite simply, no federal interest is implicated if a state government has chosen *not* to restrict the liberty of one of its citizens. This asymmetry, caused by selective incorporation, still seems to elude many state courts. Justice Stevens succinctly expressed this idea in his dissent in *Long:*

> In this case the State of Michigan has arrested one of its citizens and

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suggested that "the reasoning of the Court's major selective incorporation opinions . . . provides a strong indication that at least the two Eighth Amendment guarantees will be selectively incorporated when the issue is appropriately presented." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 2.6(b), 64–65 (4th ed. 2004).

102. U.S. CONST., art. VI, § 4, cl. 2. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; *see also* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (stating that a state court has no right to interpret governmental restrictions established by the Fourth Amendment more strictly than does the United States Supreme Court; if the state court wishes to add more restrictions on its own state government in the area of search and seizure, it must do so by clearly and expressly relying on its own state law).

103. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (holding that a state may impose greater police restrictions than required by federal constitutional standards under "*its own law*," but may not impose those greater restrictions under "*federal constitutional law*" when the United States Supreme Court "specifically refrains from imposing them"); *see also* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (per curiam) (reiterating this prohibition on states, when acting under federal law rather than state law, and imposing restrictions on police greater than those mandated by the federal constitution).

> the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.[104]

This asymmetry is also found in the adequate and independent state grounds doctrine.[105] This doctrine holds that the Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."[106] Thus a state is always free to provide more protection for its citizens than is mandated by the United States Constitution.[107] Of course, the adequate and independent state grounds doctrine does not work in reverse; if the state law provided less protection, then there would be a Supremacy Clause problem.[108]

To summarize, a state court inclined to issue a pro-defense decision in a criminal case stands in a very different relationship to the United States Supreme Court than does a state court inclined to issue a pro-prosecution decision. A pro-prosecution decision must always be checked against the applicable binding provisions of the federal Bill of

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104. Michigan v. Long, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting). The Court found it had jurisdiction in *Long* only because the Michigan Supreme Court failed to clearly and expressly predicate its holding solely on state law. Justice Stevens argued that, regardless, the United States Supreme Court nevertheless had no real federal interest to vindicate by taking the case. *Id.*

105. *See supra* notes 97–99 and accompanying text (discussing the nearly verbatim language in the Bill of Rights and the Illinois Constitution); *supra* notes 19–22 and accompanying text (exploring the adequate and independent state grounds doctrine).

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

107. *See* Massachusetts v. Upton, 466 U.S. 727, 735–36 (1984) (Stevens, J., concurring) (noting the basis for the United States Supreme Court's jurisdiction was the failure of the Massachusetts Supreme Judicial Court to determine whether there was a violation of the Massachusetts State Constitution first before predicating the decision on the federal constitution). On remand, the Supreme Judicial Court of Massachusetts found a violation of the state constitution and held that it afforded the accused more protection than the accused would be given under a Fourth Amendment analysis. Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985) (rejecting state court use of the United States Supreme Court's "totality of the circumstances" test for determining probable cause). *See also* South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (finding the inventory search of an impounded vehicle reasonable under the Fourth Amendment). On remand, the Supreme Court of South Dakota found that its state constitution did not permit the inventory search of an interior compartment of a vehicle that had been impounded for only a minor parking violation. State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976).

108. U.S. CONST., art. VI, §4, cl. 2.

Rights to make sure that the decision does not go below the floor established by the United States Supreme Court's interpretations of these rights. On the other hand, a state court inclined to issue a pro-defense decision based on its own state law need never look at any federal law. A state's decision to place more restrictions on its own government implicates no federal interest whatsoever.

C. Rule Three: Although the Federal Bill of Rights May Compel a State Appellate Court to Issue a Pro-Defense Decision, It Can Never Compel a State Court to Issue a Pro-Prosecution Decision.

Once again there is an asymmetry. A violation of the federal Bill of Rights—an unreasonable search and seizure, an involuntary confession, a finding of double jeopardy—can force a state appellate court to issue a pro-defense decision in situations where it prefers not to. The Supremacy Clause forces the state court to bow to the restrictions imposed by the federal Bill of Rights.[109] On the other hand, nothing in the federal Bill of Rights ever forces a state court to issue a pro-prosecution decision. Even in those situations where the United States Supreme Court finds that the Bill of Rights does not prevent the state government from taking some action to facilitate law enforcement, a state court is always free to find that its own state law provides more rights to its citizens and thus forbids the state from so acting.[110]

These first three rules also have a significant effect on the advocates involved in state criminal cases. The defense will necessarily spend a considerable amount of time emphasizing those federal cases that show that the federal Bill of Rights restricts the prosecution in various ways. The prosecution, obviously, will attempt to distinguish the federal authority. Nevertheless, even when state law offers a stronger route for relief, the defense is compelled to federalize as many issues as possible because the defense must exhaust any federal issues in state court before it may raise them on federal habeas corpus review.[111] This adds a burden requiring the defense to fairly present each federal claim or risk losing the chance to obtain federal habeas review.[112]

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109. *See supra* note 23 (discussing an analogous situation in which an Illinois Appellate Court panel expressed its misgivings about a pro-defense decision that it felt compelled to render because of existing Supreme Court of Illinois precedent).

110. *See* Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (remanding to the state supreme court because the state was prohibited from granting more protection to an accused under a federal constitutional analysis than is allowed by the United States Supreme Court); State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002) (holding that the Arkansas constitution provides more protection for an accused than is provided under the Fourth Amendment).

111. 28 U.S.C. § 2254(b)(1) (2000).

112. *See, e.g.*, Baldwin v. Reese, 541 U.S. 27 (2004) (holding that a petitioner does not "fairly

D. Rule Four: If a State Appellate Court Decides to Rule In Favor of the Defense, It Is Always Permitted to Rely Solely on State Law In Its Decision.

Consider an issue in which an appellate court decides that the defendant deserves relief under either state or federal law. The court has the choice of relying on state law, federal law, or both. This choice will determine just how final the decision is.

If the court wishes to completely insulate its decision from federal review, it should rely solely on the state law ground because use of an adequate and independent state ground will deprive the United States Supreme Court of jurisdiction to hear the case.[113] On the other hand, relying solely on federal law or a mix of federal and state law will provide the United States Supreme Court with the power to reverse the state court's decision.[114]

A state court may consciously choose to "federalize" its decision in some circumstances. Assume a situation under Rule Three[115] in which United States Supreme Court authority forces a state court to reach a pro-defense decision it would not reach on its own; the state court, however, is bound by the Supremacy Clause to hold for the defense. In that situation, a state court could candidly explain why it was compelled to reach a result with which it disagreed. It could then rely on the federal constitutional provision, rather than the state counterpart,[116] in order to provide jurisdiction for the United States Supreme Court possibly to take the case, reconsider its position, and hold for the prosecution.

To synthesize the rules, the selective incorporation revolution has set a floor of federal rights for state criminal defendants—and concomitant restrictions on state governments—that did not exist prior to the 1960s.

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present" his claim if he does not clearly identify federal claims and that a state judge is not required to read lower court opinions to try and identify if there are federal claims). Note that one area of federal constitutional error that cannot be raised on federal habeas corpus is the failure of a state to exclude evidence under the Fourth Amendment. *See* Stone v. Powell, 428 U.S. 465, 495 (1976) (holding that failure of a state to exclude evidence under the Fourth Amendment is not a constitutional error that can be raised in a habeas petition).

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

114. Michigan v. Long, 463 U.S. 1032, 1037–38 (1983).

115. *See supra* Part II.C (explaining that Rule Three allows federal authority to compel state courts to reach pro-defense conclusions under federal constitutional principles).

116. The Supremacy Clause would compel the state to interpret the state counterpart to provide a similar floor of rights to defendants. *See supra* note 108 and accompanying text (explaining the role of the Supremacy Clause in formulating rules for appellate review); *supra* notes 19–22 (discussing the role of adequate and independent state grounds precluding United States Supreme Court jurisdiction over a state supreme court decision).

Selective incorporation has had *no* effect, however, on state courts already pre-disposed to rule for the defense.[117] The doctrine only mandates that a state court can render *no pro-prosecution* decision without first considering the United States Supreme Court's interpretations of those rights in the Fourth, Fifth, Sixth, and Eighth Amendments that are applicable against the states through the Due Process Clause.[118] A state court may freely grant *more* rights to state defendants, but it can never grant *fewer*.[119] A state appellate court may always render a pro-defense decision without citing federal law because finding for the citizen/defendant implicates no federal interest that the federal courts can vindicate.[120] The only way the United States Supreme Court has jurisdiction to review a state court's pro-defense decision is if the state court relies in some way on an interpretation of federal law; only this provides the jurisdictional hook to allow federal review. A state court may choose this strategy if it believes that it is compelled by the United States Supreme Court to render a pro-defense decision that it would not otherwise make. Otherwise, reliance on federal law in a pro-defense decision is entirely superfluous and unnecessarily invites review.

III. THE ILLINOIS RECORD: AN ABDICATION OF THE STATE COURT'S DUTY TO ADMINISTER ITS JUSTICE SYSTEM

Over the last quarter-century, the United States Supreme Court has reviewed fourteen Illinois pro-defense decisions, all in the areas of the Fourth Amendment,[121] Fifth Amendment,[122] and the Due Process Clause

117. *See supra* Part II.D (explaining that state courts may always impose greater procedural safeguards on criminal proceedings than imposed by the federal constitution).

118. *See supra* Part II.A (showing that state courts must always comply with the Federal Bill of Rights when issuing pro-prosecution decisions).

119. *See supra* Part II.B (discussing the ability of state courts to provide procedural protections that rise above the floor established in the federal constitution).

120. *See* Michigan v. Long, 463 U.S. 1032, 1068 (Stevens, J., dissenting) (analogizing the Court's basis of jurisdiction to that of an American court reviewing the decision of Finnish court); *supra* note 104 and accompanying text (discussing the lack of a federal interest to vindicate by taking such a case).

121. *See generally* Illinois v. Caballes, 125 S. Ct. 834 (2005) (reversing the Supreme Court of Illinois pro-defense finding that during a routine traffic stop there was a lack of articulable facts suggesting drug activity and the use of a drug-sniffing dog violated the Fourth Amendment, and accordingly held in favor of the government and the use of drug-sniffing dogs); Illinois v. Lidster, 124 S. Ct. 885 (2004) (reversing the Supreme Court of Illinois' pro-defense decision on the use of roadblocks); Illinois v. McArthur, 531 U.S. 326, 337 (2001) (reversing the lower court's decision and finding in favor of the prosecution on warrant exceptions); Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (reversing the Supreme Court of Illinois' decision on "stop and frisk" procedures and finding in favor of the prosecution); Illinois v. Rodriguez, 497 U.S. 177, 189 (1990) (reversing the lower court's decision on consent to search and finding in favor of the prosecution); Illinois v.

of the Fourteenth Amendment.[123] In each one of these pro-defense decisions, the United States Supreme Court had jurisdiction only because the Illinois appellate courts chose not to predicate the decisions on adequate and independent state grounds.[124] Significantly, the United States Supreme Court reversed and found for the government in *thirteen of the fourteen cases.*[125] In the ten cases involving search and seizure issues, the United States Supreme Court held for the government *in every single case.*

Concededly, Illinois has the power to yield its state sovereignty and simply function as a cog in the federal system; it can choose to allow review of its judicial work as if it were merely the United States Court of Appeals for the Illinois Circuit. Yet, by deliberately writing opinions that gratuitously allow the United States Supreme Court to have final review of the matter, Illinois courts have turned federalism on its ear. And at the very least, the Illinois courts owe Illinois citizens an explanation for its decision.

This decision by Illinois appellate courts to relegate themselves to providing "rough drafts" for the United States Supreme Court, rather than final decisions for Illinois citizens, can no longer be ignored.

A. The Lockstep Doctrine: The Relationship Between The Fourth

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Krull, 480 U.S. 340, 360 (1987) (reversing the holding by the Supreme Court of Illinois on the use of the "good faith exception" and finding in favor of the prosecution); Illinois v. Batchelder, 463 U.S. 1112, 1119 (1983) (per curiam) (reversing an Illinois Appellate Court's decision with Fourth Amendment implications and finding in favor of the prosecution by using a straight Due Process analysis); Illinois v. Andreas, 463 U.S. 765, 773 (1983) (reversing a First District decision on warrantless searches and finding in favor of the prosecution); Illinois v. Lafayette, 462 U.S. 640, 649 (1983) (reversing a Third District decision on inventory searches and holding for the prosecution); Illinois v. Gates, 462 U.S. 213, 246 (1983) (reversing an Supreme Court of Illinois decision on standards for probable cause and finding in favor of the prosecution).

122. Illinois v. Vitale, 447 U.S. 410, 421 (1980) (reversing an Supreme Court of Illinois decision on double jeopardy and finding for the prosecution); Illinois v. Perkins, 496 U.S. 292, 300 (1990) (reversing an Illinois Appellate Court decision concerning *Miranda* and holding for the prosecution).

123. *See* Illinois v. Fisher, 124 S. Ct. 1200, 1201–03 (2004) (reviewing a First District written order concerning government destruction of evidence and holding for the prosecution); City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (upholding, in the one isolated case, an Supreme Court of Illinois case on the constitutionality of a loitering statute and finding in favor of the defense, despite the prosecution's appeal); Illinois v. Batchelder, 463 U.S. 1112, 1119 (1983) (reversing an Illinois Appellate Court decision and holding for the prosecution).

124. As previously noted, the highest state appellate court can always choose to make any pro-defense decision final and unreviewable simply by relying on adequate and independent state grounds. *See supra* notes 19–22 and accompanying text (introducing the adequate and independent state grounds doctrine).

125. *See supra* notes 121–23 (detailing the outcome of fourteen cases where the prosecution appealed and won the reversal of thirteen Illinois decisions).

Amendment and Article I, Section 6 of the Illinois Constitution[126]

Twenty-one years ago in *People v. Tisler*,[127] the Supreme Court of Illinois confronted an argument that the state guarantee for reasonable searches and seizures[128] should provide more protection than the Fourth Amendment.[129] The Court held:

> After having accepted the pronouncements of the [United States] Supreme Court in deciding fourth amendment cases as the appropriate construction of the search and seizure provisions of the Illinois Constitution for so many years, we should not suddenly change course and go our separate way simply to accommodate the desire of the defendant to circumvent what he perceives as a narrowing of his fourth amendment rights under the Supreme Court's decision. . . . Any variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution must be based on more substantial grounds. *We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.*[130]

And two years ago the Supreme Court of Illinois reiterated its support for this position:

> [T]he fourth amendment provides the same level of protection as the search and seizure provision in article I, section 6 of our Illinois Constitution. The narrow exception we have carved to the lockstep

126. *See supra* note 97 (comparing the language of Article I, §6 of the Illinois Constitution with the federal Fourth Amendment).

127. People v. Tisler, 469 N.E.2d 147 (Ill. 1984).

128. ILL. CONST. art. I, §6.

129. *Tisler*, 469 N.E.2d at 155. *Tisler* involved a search and seizure incident to a warrantless arrest. *Id.* at 152. The main issue was whether the police officer had probable cause for the warrantless arrest. *Id.* The defendant argued that the older and more restrictive *Aquilar-Spinelli* test should govern the question of probable cause. *Id.* at 155. *See* Aguilar v. Texas, 378 U.S. 108, 114 (1964) (requiring that an affidavit for a search warrant both set forth a sufficient "basis of knowledge" to a magistrate and establish the credibility of the affiant's information); Spinelli v. United States, 393 U.S. 410, 415 (1969) (upholding the two-prong test in *Aguilar* and stating that the totality of circumstances test used by the court of appeals "paints with too broad a brush"). The prosecution argued that the newer totality of the circumstances test adopted by the United States in Illinois v. Gates should govern the question of probable cause. *Tisler*, 469 N.E.2d at 155; Illinois v. Gates, 462 U.S. 213 (1983).

130. *Tisler*, 469 N.E.2d at 157 (emphasis added). The Supreme Court of Illinois has also applied the same idea to the state and federal provisions on double jeopardy. *See In re* P.S., 676 N.E.2d 656, 662 (Ill. 1975) (citing People v. Levin, 623 N.E.2d 317, 328 (Ill. 1993)) ("[T]he double jeopardy clause of our state constitution is to be construed in the same manner as the double jeopardy clause of the federal constitution").

> doctrine in the fourth amendment context is not relevant to this case. Defendant provides no specific argument that the Illinois Constitution should provide broader protection than that of the fourth amendment in this situation. Thus, we follow the United States Supreme Court decisions on fourth amendment issues in this case.[131]

This approach is known as "lockstep."[132] Lockstep refers to a state supreme court's determination that, when its own state constitution contains a provision similar to one found in the federal constitution, it will interpret its state provision in the exact same manner as the United States Supreme Court interprets the federal provision.[133] In other words, the state court announces that it will follow all United States Supreme Court decisions in a particular area of the law in lockstep. Or, to paraphrase *Tisler,* when deciding the run-of-the-mill Illinois search and seizure case, there is no need to even look at Article I, Section 6 of the Illinois Constitution, since it is nothing more than the Fourth Amendment. The lockstep approach substitutes a nuanced view of federalism with a "cut-and-paste" procedure: *Tisler* merely "cuts out" the Fourth Amendment of the federal Bill of Rights and "pastes" that text right over Article I, Section 6.

Not all Supreme Court of Illinois justices have agreed with this approach. Justice William Clark stated in his separate opinion in *Tisler* that "I believe the majority's [position] is dangerous because it limits our power to interpret our own State Constitution in the future."[134] And in a later case, Justice James Heiple similarly disagreed with the idea that the United States Supreme Court's holdings in Fourth Amendment cases should necessarily provide the definitive interpretation of Article I, Section 6:

> There is no reason for deference in this area of constitutional interpretation. . . . Regardless of the language employed in the two documents, they are separate and distinct. The United States Supreme Court has the responsibility to interpret the Federal Constitution; the Supreme Court of Illinois has the responsibility to interpret its State constitution. These are nondelegable duties.[135]

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131. People v. Lampitok, 798 N.E.2d 91, 99 (Ill. 2003) (citations omitted) (holding that the only exceptions to the "lockstep doctrine" are narrow and rare). *See infra* note 146 (discussing the Supreme Court of Illinois' decision in *Krull* with regards to the "narrow exception").

132. *See generally* Thomas B. McAffee, *The Illinois Bill of Rights And Our Independent Legal Tradition: A Critique Of The Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1 (1987) (describing and criticizing the Supreme Court of Illinois' use of the "lockstep doctrine").

133. *Id.*

134. *Tisler*, 469 N.E.2d at 163–64 (Clark, J., concurring specially).

135. People v. Mitchell, 650 N.E.2d 1014, 1025 (Ill. 1995) (Heiple, J., dissenting) (discussing Minnesota v. Dickerson, 508 U.S. 366 (1993)).

Justices Clark and Heiple have proved prescient. Indeed, during the last fifteen years the United States Supreme Court has held that a state supreme court's adoption of lockstep seriously curtails its ability to rely on adequate and independent state grounds to immunize its decisions from United States Supreme Court review.

Two years ago, the United States Supreme Court reviewed a decision of the Iowa Supreme Court in *Fitzgerald v. Racing Association of Central Iowa.*[136] Owners of racing dogs argued that an Iowa statute that taxed them nearly twice as much as owners of dog racetracks was unconstitutional. The Iowa Supreme Court relied on both the Federal Equal Protection Clause[137] and Iowa's own equal protection clause[138] and agreed that the statute must be invalidated.[139]

Before the United States Supreme Court, the respondent contended that review was precluded because the Iowa Supreme Court's opinion relied on both the State and the Federal Equal Protection Clause, and therefore the decision was based on an adequate and independent state ground.[140] The United States Supreme Court disagreed. It held that the Iowa Supreme Court had forfeited its right to invoke its State Equal Protection Clause as an adequate and independent state ground because the opinion stated that "Iowa courts are to apply the same analysis in considering the state equal protection claims as.... [They use] in considering the federal equal protection claim."[141]

The United States Supreme Court then noted that "[w]e have previously held that, in such circumstances, we shall consider a state-court decision as resting upon federal grounds sufficient to support this Court's jurisdiction."[142] The Court went on to note that the underlying policy behind this result was expressed in 1983 in *Michigan v. Long,*[143] in which the Court held that federal review is allowed when a state court does not merely use federal cases for guidance, but rather concedes that

136. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003).

137. U.S. CONST. amend. XIV, § 1.

138. IOWA CONST. art. I, § 1.

139. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555 (Iowa 2002).

140. *Fitzgerald*, 539 U.S. at 106.

141. *Fitzgerald*, 648 N.W.2d at 558 (internal punctuation omitted).

142. *Fitzgerald,* 539 U.S. at 106. The prior decision the Court relied on was Pennsylvania v. Muniz, 496 U.S. 582, 588, n.4 (1990). The U.S. Supreme Court in *Muniz* found jurisdiction to hear the case because the Superior Court of Pennsylvania had previously stated that the protections under its state constitution regarding the privilege against self-incrimination were the same as those expressed in the Fifth Amendment. *Id.* Therefore, the state could put forth no "adequate and independent" state grounds on which to insulate their pro-defense decision. *Id.*

143. Michigan v. Long, 463 U.S. 1032 (1983).

those cases *compel* a certain result.[144]

B. The Impact of the Lockstep Doctrine on Illinois Independence

Lockstep seriously affects the ability of Illinois courts to protect its decisions from United States Supreme Court review. If Illinois simply recognized Article I, Section 6 as an independent guarantee of reasonable searches and seizures for Illinois citizens, it could immunize any pro-defense search and seizure from federal review by simply adding one sentence to the end of the opinion: "We find that this result is compelled by Article I, Section 6 of the Illinois Constitution."

Yet Illinois' adoption of lockstep makes matters much more difficult. Since the Supreme Court of Illinois has already announced that normally Article I, Section 6 is exactly the same as the Fourth Amendment, an opinion that simply concludes with a citation to Article I, Section 6 will not prevent the United States Supreme Court from asserting jurisdiction under *Fitzgerald, Muniz,* and *Long.*[145] When *Tisler* announced that lockstep applied to Illinois search and seizure issues, it essentially abolished Article I, Section 6 and replaced it with the Fourth Amendment.[146] In order for Illinois to rule independently on the state constitutional provision, the Supreme Court of Illinois has the self-imposed burden of establishing from either the language of the state constitution, or from the debates and the committee reports of the constitutional convention, that there are specific historical reasons for concluding that the state and federal provisions should be interpreted

144. *Id.* at 1041–42.

145. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003); Pennsylvania v. Muniz, 496 U.S. 582 (1990); Michigan v. Long, 463 U.S. 1032 (1983).

146. The exceptions to lockstep are narrow and rare. *See* People v. Lampitok, 798 N.E.2d 91, 99 (Ill. 2003) (referring to the exceptions to the lockstep doctrine as "narrow" and irrelevant to the case). As *Tisler* notes, an exception will be found only if the court finds "in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned." People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984). The one major example is found in *People v. Krueger.* People v. Krueger, 675 N.E.2d 604 (Ill. 1996). The Supreme Court of Illinois in *People v. Krull,* 481 N.E.2d 703 (Ill. 1985), held that the "good faith exception" would not be applied to a warrantless search executed pursuant to a statute later held to be unconstitutional. *Id.* at 708–09. The United States Supreme Court granted certiorari and reversed, holding in a 5–4 decision that indeed the "good faith exception" did apply to such a search. People v. Krull, 480 U.S. 340, 360 (1987). Nine years later, the Supreme Court of Illinois re-examined the issue and this time found that the state's history of an exclusionary rule for search and seizure violations—in a case predating *Mapp* by 38 years—allowed the Court to find that the Illinois Constitution provided more protection than the United States Supreme Court provided in *Krull. Krueger,* 675 N.E.2d at 611–12 (citing People v. Brocamp, 138 N.E. 728, 731 (Ill. 1923)). *Krueger* is the "narrow exception" to the lockstep doctrine referred to in *Lampitok. Lampitok,* 798 N.E.2d at 99.

differently in a particular context.[147]

Lockstep reduces the Supreme Court of Illinois' role from "top state court" to "junior federal court." It is tempting to call the Supreme Court of Illinois' adoption of lockstep the worst deal since the one Esau made with Jacob. But at least Esau got some lentil stew;[148] the Supreme Court of Illinois traded away its sovereignty for nothing.[149]

So in the area of search and seizure, Illinois' refusal to invoke the adequate and independent state grounds doctrine may be less a refusal than a self-imposed disability. In the era since the Fourth Amendment exclusionary rule was made applicable against the states,[150] on ten different occasions Illinois appellate courts have issued opinions holding for the defense on a search and seizure issue that have later been reversed by the United States Supreme Court.[151] And none of these state court decisions attempted to invoke adequate and independent state grounds. None of the ten decisions indicated that the Illinois appellate courts believed that they were going beyond what they thought the United States Supreme Court would have done under the Fourth Amendment.[152] Rather, in each of the ten cases, the Illinois court

147. *See supra* notes 130–31 and accompanying text (providing Illinois courts' language maintaining lockstep in the area of search and seizure law).

148. *Genesis* 25:19–34 (recounting that Esau, the first born son of Isaac who was entitled to God's blessing as promised to Abraham, that he would rule over nations and indeed, over his siblings, traded his birthright to his brother Jacob for some lentil stew after returning hungry from the fields).

149. *See* People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984). The Supreme Court of Illinois has also applied the same idea to the state and federal provisions on double jeopardy. *See In re* P.S., 676 N.E.2d 656, 662 (Ill. 1975) (citing People v. Levin, 623 N.E.2d 317, 328 (Ill. 1993)) (". . . the double jeopardy clause of our state constitution is to be construed in the same manner as the double jeopardy clause of the federal constitution").

150. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (declaring that since the Fourth Amendment's privacy protections are enforceable against the states through the Fourteenth Amendment, "the same sanction of exclusion" that is used against the federal government is also applicable against the states); Wolf v. Colorado, 338 U.S. 25 (1949) (setting forth a general principle that the Fourth Amendment may be applicable to the states through the Fourteenth Amendment Due Process Clause).

151. *See supra* notes 121–23 (detailing the pro-defense Illinois Appellate decisions that have been reversed by the United States Supreme Court).

152. *See* People v. Caballes, 802 N.E.2d 202 (Ill. 2003) (holding that during a routine traffic stop there was a lack of articulable facts suggesting drug activity and the use of a drug sniffing dog violated the Fourth Amendment); People v. Lidster, 779 N.E.2d 855, 861 (Ill. 2002) (distinguishing City of Indianapolis v. Edmond, 531 U.S. 32 (2000)); People v. McArthur, 713 N.E.2d 93 (Ill. App. Ct. 4th Dist. 1999) (grounding its holding of securing a home while waiting for a search warrant in the United States Supreme Court's analysis of the Fourth Amendment in Segura v. United States, 468 U.S. 796 (1984)); People v. Wardlow, 701 N.E.2d 489, 496 (Ill. 1998) (using the United States Supreme Court's Terry v. Ohio, 392 U.S. 1 (1968) analysis to determine that presence in a high-crime area and flight from a police officer were not enough to support reasonable articulable suspicion of involvement with criminal activity); People v. Krull,

applied what it considered existing search and seizure law and found for the defense.

The pernicious effect of lockstep may even be seen empirically. Consider this fact: the first Illinois case ever to cite Article I, Section 6 of the 1970 Illinois Constitution was decided on March 14, 1973.[153] Since then, Article I, section 6 has been cited in 114 cases.[154] During this same period, Illinois appellate courts have cited the Fourth Amendment in 1,494 cases.[155] That is, for every case that has cited the Illinois Constitution's search and seizure provision, over 13 cases can be found that cite the Fourth Amendment. Lockstep has led Illinois courts to believe there is no Article I, Section 6; this, in turn, has led to these courts to leaving pro-defense decisions vulnerable to federal review.

C. Distinguishing Truth from Interpretation

No one can offer a definitive account of why Illinois courts are so unwilling to protect their pro-defense criminal law decisions from federal interference, but it is hard to resist concluding that Illinois courts somehow believe that United States Supreme Court opinions actually provide "the truth" or "the right answer" to constitutional issues. If so, this is very distorted view of our constitutional system.

Professor Paul Kahn has argued that state courts should understand that "constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political

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481 N.E.2d 703, 708–09 (Ill. 1985) (finding only that "good faith exception" as established by United States Supreme Court had no application to actions of police in relying on unconstitutional legislation); People v. Gates, 423 N.E.2d 887, 893 (Ill. 1981) (finding the use of an anonymous tip as the basis for a search warrant violated both the Illinois constitution and the Fourth Amendment); People v. Batchelder, 437 N.E.2d 364, 368 (Ill. App. Ct. 3d Dist. 1982) (using the United States Supreme Court's Fourth Amendment search and seizure analysis to question the reasonableness of the officer's belief that the accused was driving under the influence); People v. Andreas, 426 N.E.2d 1078, 1084 (Ill. App. Ct. 1st Dist. 1981) (criticizing the controlled delivery of a table containing marijuana under established Fourth Amendment search and seizure principles); People v. Lafayette, 425 N.E.2d 1383, 1386 (Ill. App. Ct. 3d Dist. 1981) (finding that a postponed warrantless search of a handbag was unlawful under the United States Supreme Court's Fourth Amendment search and seizure analysis).

153. People *ex rel.* Better Broad. Council, Inc. v. Keane, 309 N.E.2d 362, 366 (Ill. App. Ct. 1st Dist.1973).

154. A search in the "IL State Cases, Combined" database on LEXIS, using the search terms: "Article I, section 6" w/p "Illinois Constitution" and limiting the date from March 14, 1973 through March 13, 2005, resulted in 114 citing decisions in Illinois.

155. A search in the "IL State Cases, Combined" database on LEXIS, using the search phrase "fourth amendment" and limiting the date from March 14, 1973 through March 13, 2005, resulted in 1,494 Illinois cases citing the "fourth amendment" of the United States Constitution in their decisions.

order."[156] American constitutionalism should be a "ceaseless discourse,"[157] a process by which we discover our constitutional values. All jurisdictions should see themselves as engaged in a common interpretive project. The United States Supreme Court may ultimately exercise its authority to decide an issue. But, somewhat echoing Justice Jackson's famous aphorism on the role of the Supreme Court,[158] Kahn asserts that, "[a]uthority terminates, but does not resolve, interpretive conflict."[159]

When Illinois courts refused to protect their fourteen pro-defense decisions from immediate United States Supreme Court reversal, they impoverished American constitutional dialogue. As Kahn expressed it, "Each state court has the authority to put into place, within its community, its unique interpretation of [American constitutionalism]."[160] The actions of the Illinois courts thus deprived the state of Illinois of its opportunity to be, in Justice Brandeis's conception, a "laboratory" for social experiment.[161]

It would be possible to end our story here, ruefully noting that Illinois courts do a poor job of protecting the finality of their pro-defense constitutional decisions. However, there should be consequences for this behavior. If Illinois has such little interest in protecting its pro-defense final judgments, why should federal courts extend deference to Illinois' *pro-prosecution* final judgments?

IV. A POSTSCRIPT: FINALITY, COMITY, AND AEDPA

One final asymmetry exists in the area of appellate review of state criminal decisions. If a state conviction is reversed by the last court of review on direct appeal—whether that is a state appellate court or the United States Supreme Court—that absolutely ends the ability of the prosecution to further question that pro-defense decision. But the same is not always true for a criminal defendant. Under certain circumstances, the criminal defendant may pursue a collateral remedy; in Illinois, he can do this through the filing of a Post-Conviction Petition.[162] And, in some circumstances, he may even ask a federal

156. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147–48 (1993).

157. *Id.* at 1164.

158. "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

159. Kahn, *supra* note 156, at 1148.

160. *Id.*

161. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

162. 720 ILL. COMP. STAT. 7.1/122 (2002).

court for a writ of habeas corpus.[163]

How much deference should a federal court on habeas review extend to a final judgment from a state criminal trial? Nine years ago, Congress provided a new answer to this question. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") curtailed the ability of federal courts to grant habeas corpus petitions to state prisoners.[164] It accomplished this by, *inter alia*, instituting a much narrower standard of review.[165]

The enormous deference given to state court criminal judgments by the AEDPA is largely predicated on the concepts of comity and finality—the idea that federalism demands that federal courts must extend proper respect to the criminal judgments of state courts because those courts are equal partners in the American justice system.[166] Thus, a very deferential standard of review has resulted and makes habeas relief enormously difficult to obtain.[167]

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163. 28 U.S.C. § 2254 (2000).

164. Pub. L. No. 104-132, tit. I (1996) (codified at 28 U.S.C. § 2254 (2000)).

165. *See* 28 U.S.C. § 2254(d) (2000) (noting that a writ of habeas corpus pursuant to a state court judgment, adjudicated on the merits, will only be granted if the judgment was clearly against or an unreasonable application of established federal law, or, in light of the facts presented at the state court, based on an unreasonable determination of those facts).

166. *See* Dretke v. Haley, 124 S. Ct. 1847, 1849 (2004) (holding that "[o]ut of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default"); Woodford v. Garceau, 538 U.S. 202, 206 (2003) (noting the Congressional intent behind AEDPA was to "reduce delays in the execution of state and federal criminal sentences" and further the principles of finality and comity); Carey v. Saffold, 536 U.S. 214, 220 (2002) (holding that the requirement for a federal habeas corpus petitioner to exhaust all state remedies ensures achievement of comity and "respect[s] the interests in the finality of state court judgments"); Duncan v. Walker, 533 U.S. 167, 179 (2001) (holding that the exhaustion rule of AEDPA promotes finality and comity by providing an "opportunity to the state to correct a constitutional violation").

167. *See, e.g.*, Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam) (holding that a state supreme court's application of *Strickland* was not "contrary to clearly established federal law" thereby preventing issuance of habeas writ); Early v. Packer, 537 U.S. 3 (2002) (per curiam) (holding that state court's determination that trial court's comments to deadlocked jury and individual juror were not coercive did not offend clearly established federal law and was not unreasonable); Stewart v. Smith, 536 U.S. 856 (2002) (per curiam) (holding that petitioner's ineffective assistance of counsel claim was not reviewable in federal habeas proceeding after state court had determined, without reaching the merits, that issue had been waived in state post-conviction relief proceeding); Horn v. Banks, 536 U.S. 266 (2002) (per curiam) (holding that threshold *Teague* retroactivity analysis was required in federal habeas proceeding because the state advanced a *Teague* argument, even though state high court had applied *Mills* rule without considering retroactivity); Carey v. Saffold, 536 U.S. 214 (2002) (remanding for further findings after holding that application for state collateral review was "pending" in the California state court so as to toll time period for seeking federal habeas corpus remedy during the interval between a lower court's determination and filing of a further original state habeas petition in a higher court); Fiore v. White, 531 U.S. 225 (2001) (per curiam) (holding that conviction and

Indeed, finality has often been invoked as a reason for courts to carefully limit the use of habeas corpus relief.[168] The United States Supreme Court has even contended that "[f]inality also enhances the quality of judging."[169] Quoting Paul Bator, the Court has noted that there is perhaps "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[170]

But what of a state such as Illinois that exhibits no interest in the finality of its pro-defense decisions, and even appears to welcome federal review and possible reversal? A state's interest in finality should be treated the same way the United States Supreme Court treats the state's invocation of a procedural bar to contend that a defendant's forfeiture of a claim in state court should also result in forfeiture of the claim for federal habeas review. The Supreme Court has held that it will not allow a state to invoke such a procedural bar unless it can establish that the rule is "consistently or regularly applied."[171]

If it can be shown that Illinois courts regularly fail to protect their pro-defense judgments from federal review, Illinois should not be allowed to rely on Congress's assumption in AEDPA that states are interested in the finality of their pro-prosecution decisions. Illinois certainly shows no interest in finality when it allows its pro-defense decisions to be so regularly reviewed and reversed by the United States Supreme Court on direct appeal. Thus, AEDPA should be amended to

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continued incarceration of defendant based on conduct that the state statute, as properly interpreted, did not prohibit, violated due process); Tyler v. Cain, 533 U.S. 656 (2001) (per curiam) (holding that the provision of AEDPA allowing successive habeas petition if claim relies "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;" a new rule is "made retroactive to cases on collateral review" only if the Supreme Court holds it to be retroactively applicable to cases on collateral review); Duncan v. Walker, 533 U.S. 167 (2001) (holding that an application for federal habeas corpus review is not "application for State post-conviction or other collateral review," within the meaning of the tolling provision of AEDPA); Edwards v. Carpenter, 529 U.S. 446 (2000) (holding that ineffective assistance of counsel claim asserted as cause for procedural default of another federal claim could itself be procedurally defaulted).

168. Calderon v. Thompson, 523 U.S. 538, 555 (1998); Wood v. Bartholomew, 516 U.S. 1, 8 (1995) (per curiam); Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992); Engle v. Isaac, 456 U.S. 107, 127 (1982).

169. *Calderon*, 523 U.S. at 555

170. *See id.* (quoting Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) (noting that a lack of finality, besides impugning a state's sovereignty, deprives the law of its retributive and deterrent effect)).

171. Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

allow for a less deferential standard of review when a state persists in failing to protect its pro-defense criminal decisions from federal review. A state court system should have to *earn* deference by showing that it desires finality in *all* its decisions—not just the pro-prosecution ones.

A state's continual refusal to invoke adequate and independent state grounds provides a reason for assuming that these courts wish to have their work "checked" by federal courts. A federal habeas court should not have to be as deferential to courts such as Illinois' that regularly leave their pro-defense decisions open to federal review and reversal.

V. CONCLUSION

Illinois courts need to re-examine their reluctance to invoke state constitutional provisions in criminal cases. As Justice Clark presciently noted in his concurrence in *Tisler,* it was foolish for Illinois courts to announce in advance that they were willing to follow anything the United States Supreme Court would do in areas such as search and seizure.[172] Even worse, the lockstep doctrine has actually restricted Illinois' ability to even attempt to invoke the adequate and independent state grounds rule to preclude review of its pro-defense decisions.[173]

But regardless of the wisdom of lockstep, it is just as foolish for Illinois courts to issue pro-defense decisions on behalf of Illinois citizens and then to allow the United States Supreme Court to immediately reverse them. Illinois appellate courts should not be in the business of writing advisory opinions. These courts should stand by their pro-defense opinions to the extent of supporting them with adequate and independent state grounds. The United States Supreme Court should treat Illinois criminal *convictions* deferentially on federal habeas review only to the extent that Illinois courts protect their *pro-defense decisions* from direct review.

The Supreme Court of Illinois needs to seriously rethink its use of the lockstep doctrine in the areas of search and seizure and double jeopardy. The Illinois courts should no longer settle for issuing rough drafts for United States Supreme Court review. If Illinois courts lack the confidence to definitely decide constitutional issues in their criminal cases, then all of their decisions—not just their pro-defense ones—should be open to vigorous federal review.

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172. People v. Tisler, 469 N.E.2d 147, 164–65 (Ill. 1984) (Clark, J., concurring). Indeed, years later the Court had to retreat from this position in *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996). *See supra* note 146 (discussing the Supreme Court of Illinois' decision in *Krueger*).

173. *See supra* notes 136–44 and accompanying text (discussing *Fitzgerald, Muniz, and Long*).

TABLE OF CASE CROSS-REFERENCES

Case Name	Regional Reporter Citation	Illinois Reporter Citation
People v. Lidster	747 N.E.2d 419 (Ill. App. Ct. 2001)	319 Ill. App. 3d 825 (2d Dist. 2001)
People v. Lidster	779 N.E.2d 855 (Ill. 2002)	202 Ill. 2d 1 (2002)
People v. Fisher	792 N.E.2d 310 (Ill. 2003)	204 Ill. 2d 655 (2003)
People v. Newberry	652 N.E.2d 288 (Ill. 1995)	166 Ill. 2d 310 (1995)
People v Heather	815 N.E.2d 1 (Ill. App. Ct. 2004)	351 Ill. App. 3d 1052 (4th Dist. 2004)
People v Tisler	469 N.E. 2d 147 (Ill. 1984)	103 Ill. 2d 226 (1984)
In re P.S.	676 N.E.2d 656 (Ill. 1997)	175 Ill. 2d 79 (1997)
People v. Levin	623 N.E.2d 317 (Ill. 1993)	157 Ill. 2d 138 (2003)
People v. Lampitok	798 N.E.2d 91 (Ill. 2003)	207 Ill. 2d 231 (2003)
People v. Mitchell	650 N.E.2d 1014 (Ill. 1995)	165 Ill. 2d 211 (1995)
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People v. Brocamp	138 N.E. 728 (Ill. 1923)	307 Ill. 448 (1923)
People v. McArthur	713 N.E.2d 93 (Ill. App. Ct. 1999)	304 Ill. App. 3d 395 (4th Dist. 1999)
People v. Wardlow	701 N.E.2d 484 (Ill. 1998)	183 Ill. 2d 306 (1998)
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People v. Andreas	426 N.E.2d 1078 (Ill. App. Ct. 1981)	100 Ill. App. 3d 396 (1st Dist. 1981)
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People v. Gates	423 N.E.2d 887 (Ill. 1981)	85 Ill. 2d 376 (1981)
People ex rel. Better Broad. Council, Inc. v. Keane	309 N.E.2d 362 (Ill. App. Ct. 1973)	17 Ill. App. 3d 1090 (1st Dist. 1973)