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The Attorneys Are Bound and The Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases

Kathryn E. Miller*

This Article is the first to take a comprehensive look at the ways in which State actors restrict post-conviction investigations in criminal cases, especially capital cases. By examining these restrictions in the context of interviews with jurors, victims, and State witnesses, this Article reveals that they harm criminal defendants and fail to achieve stated policy goals. The Article then examines why traditional legal arguments against these restrictions have failed, and ultimately makes the case for a constitutional right to investigate state post-conviction proceedings, grounded in the fundamental fairness prong of the Due Process Clause.

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INTRODUCTION

In 1997, an Alabama jury convicted Larry Dunaway of two counts of murder and sentenced him to death.¹ Subsequent investigation by Mr. Dunaway's post-conviction counsel revealed that two of his jurors withheld critical information during voir dire about their likely biases.² One of the jurors had concealed that a close family member had recently been a victim of an attempted murder under circumstances that resembled those of the crime with which Mr. Dunaway was charged.³ Just like one of the victims in the case against Mr. Dunaway, the juror's cousin had been shot inside her home.⁴ There is reason to believe the juror had her cousin in mind during Mr. Dunaway's trial: jury selection in the case of her cousin's assailant had occurred in another room of

1. *Ex parte* Dunaway (*In re* Dunaway v. State), 198 So. 3d 567, 568 (Ala. 2014).

2. *Id.* at 581, 584.

3. *Id.* at 572–76.

4. *Id.* at 573, 582.

the same courthouse on the same day in which she was chosen to serve on Mr. Dunaway's case.⁵ In fact, the juror was a member of the jury pool in both cases, but was excused from the other case because the victim was her cousin.⁶ Despite the contemporaneous proceedings, the juror never divulged her cousin's recent victimization—not even when she was asked twice—both on a written juror questionnaire and again during attorney voir dire in Mr. Dunaway's case—whether she or a family member had ever been a victim of crime.⁷ The juror served on Mr. Dunaway's jury, where she voted to convict him of capital murder.⁸

A second juror on Mr. Dunaway's case also concealed her potential for bias. This juror never revealed her relationship with District Attorney Boyd Whigham, who had previously served as her personal lawyer in a child custody dispute.⁹ The juror had a high opinion of Whigham, later divulging that she knew him to be “a good attorney” and that “he did very well” in the custody dispute.¹⁰ When Whigham directly asked whether any of Mr. Dunaway's prospective jurors had formerly been his client, this juror remained silent and never disclosed the connection.¹¹ She then served on the jury that voted to convict Mr. Dunaway of capital murder and sentence him to death.¹²

Mr. Dunaway's conviction and death sentence by at least two biased jurors went undiscovered for nearly a decade and would have remained so, but for the investigation of his post-conviction counsel.¹³ Post-conviction counsel submitted their findings of the jurors' undisclosed biases in the form of a state habeas corpus petition, and the court granted a hearing on the strength of their allegations.¹⁴ At the hearing, the testimony of the two jurors confirmed Mr. Dunaway's allegations.¹⁵

Seventeen years after Mr. Dunaway's conviction and sentence of death, the Alabama Supreme Court granted him a new trial, holding that the jurors' “obvious potential for bias” violated Mr. Dunaway's right to a fair trial.¹⁶ Due to

5. *Id.* at 581.

6. *Id.* at 572–73, 581; Brief for Petitioner at 10, *Dunaway v. State*, 198 So. 3d 567 (Ala. 2014) (No. 1090697), 2012 WL 1739673.

7. *Dunaway*, 198 So. 3d at 583.

8. Brief for Petitioner, *supra* note 6, at 1 (describing the juror at issue as one of “several jurors who served on the jury that convicted Mr. Dunaway and sentenced him to death”).

9. *Dunaway*, 198 So. 3d at 584.

10. *Id.* at 585–86.

11. *Id.* at 584.

12. Brief for Petitioner, *supra* note 6, at 1.

13. *Id.* at 4–5 (indicating that Dunaway was convicted in 1997 and that the court held an evidentiary hearing on his juror misconduct claim in 2004); *Dunaway*, 198 So. 3d at 587–88 (reversing conviction based on juror misconduct in 2012).

14. Brief for Petitioner, *supra* note 6, at 5 (indicating counsel filed a post-conviction petition and the habeas court ultimately granted an evidentiary hearing on juror misconduct claims).

15. *Dunaway*, 198 So. 3d at 573, 584–85.

16. *Id.* at 582, 588. The Alabama Supreme Court specifically observed that Whigham's representation of the juror in a successful custody dispute “obviously implicates personal emotions.”

his post-conviction defense team's juror investigation, the constitutional error in his capital trial was caught and corrected (albeit almost two decades later).¹⁷

Had Mr. Dunaway's case been litigated in the neighboring states of Florida or Mississippi instead of Alabama, the misconduct of the jurors at this capital trial would likely never have been exposed, and Mr. Dunaway would have been executed.¹⁸ Indeed, if his trial had taken place in the same state, just four hours away, in Mobile County instead of in Barbour County, post-conviction counsel likely would never have learned about the jurors' concealment.¹⁹ This is because a growing number of state judges and legislatures are creating obstacles to post-conviction investigation by restricting defense counsel's ability to interview certain witnesses.²⁰ While these restrictions are occasionally found in uniformly applied state statutes, they more often are the product of local decision makers, appearing as inconsistently applied local court rules and the court orders of individual judges—often at the urging of prosecutors.²¹

Although scholars have previously critiqued similar rules in the federal context,²² they have largely ignored the interview restrictions imposed by state

and “[i]t takes no leap of imagination to assume that [the juror] carried a favorable opinion of Whigham based on his representation of her when he was in private practice and that this opinion could have biased her view of Dunaway's case.” *Id.* at 586.

17. *Id.* at 588.

18. Alabama imposes no state-wide restriction on juror investigations. Florida Rule of Criminal Procedure 3.575 requires counsel to proffer facts demonstrating “reason to believe that the verdict may be subject to legal challenge” to conduct juror interviews. Florida permits the court to determine the time and place for the interviews, which are conducted in the presence of both parties. FLA. R. CRIM. P. § 3575. Mississippi trial courts may require counsel to both obtain written permission to interview jurors and, under certain circumstances, to supervise the interviews under certain circumstances. *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407, 419 (Miss. 1993); *see also James v. State*, 777 So. 2d 682, 684 (Miss. Ct. App. 2000) (applying *Gladney* to criminal cases). For additional information on state interview restrictions, I have included an Appendix. This Appendix is not exhaustive because most investigation restrictions are imposed by individual trial judges. Thus, if the restriction is the subject of appeal, it is captured in case law; however, if the attorney does not seek review, the restriction is not memorialized in any easily searchable way. As a result, the Appendix includes case citations that reiterate trial orders by individual judges, alongside state statutes and local rules.

19. One individual trial judge in Mobile County has issued an order requiring post-conviction counsel to seek permission and to proffer evidence in support of good cause to believe juror misconduct has occurred in order to interview jurors. Order, CC 11-1569, *State v. Kennedy* (Ala. Cir. Ct. May 16, 2013) (on file with author).

20. *See infra* Part II for a discussion of these restrictions.

21. *See infra* Part II for a discussion of these restrictions. *See* Appendix for information on whether the restriction is due to the individual order of a trial judge, a local rule, or a state statute.

22. *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 526–28 (1988) (calling for a modest revision of Federal Rule of Evidence 606(b) to better serve its policy goals); Benjamin M. Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1970 (1994) (arguing that federal court local rules and case law hinder post-verdict interviews with jurors and violate a criminal defendant's Sixth Amendment rights by hampering discovery of jury misconduct). For a list of federal district court rules restricting post-verdict contact with jurors, *see* Brief for the United States as Amicus Curiae Supporting Respondent, at Appendix A, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

judges, rule commissions, and legislators, which have the potential to impact many more people.²³ This Article brings state-imposed investigation limitations into the scholarly debate and argues that these inconsistently applied limitations undermine our ability to uncover constitutional errors and right wrongful convictions. Such obstacles to post-conviction investigation threaten justice for all criminal defendants; however, their potential for harm is most salient in capital cases, where diligent investigation often makes the difference between life and death.

This Article builds a case for the abandonment of state investigation restrictions. More fundamentally, it argues that courts should recognize a constitutional “right of investigation” in state post-conviction proceedings²⁴ to retain the value of these proceedings. Part I explains the essential role of investigation in post-conviction litigation, which is restricted to legal claims based on facts not evident on the face of a defendant’s trial record.²⁵ It argues that unencumbered interviews are more likely to uncover truthful information.

Part II introduces state restrictions on three types of investigation: that of jurors, of victims, and of State witnesses. These restrictions commonly require defense counsel to request formal permission and proffer facts to a judge before contacting a witness.²⁶ Some also impose judicial oversight on the interviewing process, such as requiring notice be given to the prosecutor, mandating

23. This is because the best opportunity a criminal defendant has to develop facts to challenge his state conviction is in state court, not federal court. See Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 958, 968–71 (2012) (noting that the 1991 passage of the Anti-Terrorism and Effective Death Penalty Act and the 2011 ruling in *Cullen v. Pinholster*, 563 U.S. 170 (2011), have significantly reduced the opportunities for fact development in federal habeas proceedings). Professor Wiseman emphasizes the increased importance of state investigation: “[F]act development in the state court . . . is now even more vital to a petitioner’s claim.” *Id.* at 958 (describing *Pinholster* as “a significant barrier for federal habeas petitioners who did not or were unable to fully develop the factual record in state court”). Even before *Pinholster*, the likelihood of obtaining an evidentiary hearing in which to present new evidence was already exceedingly rare. In a study of 368 capital and 2,384 non-capital federal habeas cases, researchers concluded that only 9.5 percent of capital petitioners and .41 percent of non-capital petitioners were granted evidentiary hearings. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NAT’L INST. OF JUSTICE, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 2, 5 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [<https://perma.cc/NB5Z-Q2B5>].

24. A note on terminology: “State post-conviction” proceedings are also known as “State habeas corpus” proceedings or “State collateral attack.” I use these terms interchangeably. The attorney who represents a criminal defendant in proceedings that follow his direct appeal may be referred to as “post-conviction counsel,” “defense counsel,” or “habeas counsel.” I use these terms interchangeably. In contrast, I refer to a client’s defense attorneys at trial as “trial counsel.” Depending upon the state, post-conviction defense counsel’s adversary may be a representative from the state attorney general’s office or the local prosecutor’s office. I use the terms “prosecutor” and “the State” interchangeably to refer to counsel representing the state in post-conviction proceedings.

25. See 53 OHIO JUR. 3D HABEAS CORPUS § 91 (“Postconviction relief is appropriate only when it concerns errors based upon facts and evidence outside the record.”); see also Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 843 (2013) (“Most ineffectiveness claims depend on discovery and investigation of facts that are outside the trial record.”).

26. See Appendix.

prosecutor participation in the defense interview, or appointing outside counsel for the witness.²⁷

Part III presents the following problem: how restrictions that limit post-conviction interviews prevent the discovery of grave constitutional errors and give criminal defendants no recourse for the violation of their rights. This Part also explains how the arguments of supporters of these restrictions come up short, as the restrictions fail to achieve policy goals and are redundant to existing laws. It argues that, left unchecked, judicial interference with post-conviction investigation threatens to render state habeas corpus a hollow process with little opportunity for relief.

Part IV evaluates the merits and limitations of several traditional constitutional challenges to these restrictions before making the case that courts should recognize a constitutional “right to investigate” in state habeas corpus proceedings. The Supreme Court has repeatedly held that state post-conviction proceedings must comply with the fundamental fairness guarantee of the Due Process Clause. Because state post-conviction proceedings are often the first opportunity that a criminal defendant has to raise claims of ineffective assistance of counsel, presentation of false evidence, and juror misconduct during his trial, fundamental fairness requires that their attorneys be permitted to attempt to investigate the factual basis in support of such claims by interviewing witnesses.

I.

THE IMPORTANCE OF INVESTIGATION IN POST-CONVICTION CASES

State post-conviction counsel represent a client in habeas corpus proceedings after the client has failed to gain relief during his trial and direct appeal. Unlike appellate claims, state habeas claims are not confined to the record on appeal and instead include information that serves as the basis for legal errors that go well beyond what the court reporter transcribed.²⁸ Unlike direct appeals, which primarily seek relief based on the legal errors of the trial court, habeas petitions typically include allegations of ineffective assistance of trial counsel, prosecutorial concealment of exculpatory evidence, and juror misconduct.²⁹ Success for each of these claims requires demonstrating both that a legal error occurred outside of the courtroom and that the error prejudiced the criminal defendant by having a likely impact on the outcome of their case—hence, the need to investigate.³⁰ Below, I will discuss how both the broad scope

27. *See id.*

28. *See Alper, supra* note 25, at 843.

29. EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL POSTCONVICTION MANUAL 18–19 (5th ed. 2009).

30. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

of post-conviction investigation and the best practices of effective interviewing require that defense teams have unencumbered access to jurors, victims, and other potential witnesses.

A. *The Broad Scope of Post-Conviction Investigation Requires Unencumbered Access to Potential Witnesses*

Practice guides and professional guidelines emphasize that post-conviction counsel must conduct a “thorough, independent investigation.”³¹ For example, the Alabama Capital Postconviction Manual makes plain the need for investigation:

In every case, new facts will emerge after the trial. Most of the Alabama death row prisoners who obtained relief in postconviction did so because critical facts were uncovered and presented by postconviction counsel. However, these facts cannot be developed without investigation.³²

The 2003 American Bar Association guidelines advise post-conviction counsel both to “continue an aggressive investigation of all aspects of the case”³³ and to “keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments.”³⁴ The commentary to the ABA Guidelines explains that success in collateral litigation

reliable.”); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); 24 AM. JUR. PROOF OF FACTS 2D 633 (1980) (“To justify a grant of a new trial on the basis of juror misconduct, there generally must be some showing of prejudice to the losing party as the result of such misconduct.”); Ty Alper, ‘So What?’: *Using Reverse Investigation to Articulate Prejudice and Win Post-Conviction Claims*, 35 CHAMPION 44, 44 (Dec. 2011) (“The post-conviction case will inevitably turn on *what made a difference at trial*.”).

31. EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 36; *see also* AM. BAR ASS’N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 1015 (2003) [hereinafter ABA GUIDELINES] (outlining counsel’s obligation to conduct a thorough investigation “at every stage”). The U.S. Supreme Court has repeatedly cited the ABA Standards and Guidelines as reflecting the prevailing professional norms for defense counsel at the trial level. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (referring to ABA GUIDELINES as “well-defined norms”); *Strickland*, 466 U.S. at 688 (“Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable.”). However, the Court has not yet considered whether the ABA GUIDELINES do so at the post-conviction level. Allen L. Bohnert notes that while few courts have considered the question of what constitutes effective counsel at the post-conviction level, those who have done so have applied standards applicable to trial counsel. *See Allen L. Bohnert, Wrestling with Equity: Identifiable Trends as the Federal Courts Grapple with the Practical Significance of Martinez v. Ryan & Trevino v. Thaler*, 43 HOFSTRA L. REV. 945, 981–84 (2015). Bohnert argues that in addition to the *ABA Guidelines*, courts should consider case law, state statutes, professional standards set by state agencies, publications of private defender organizations, training manuals, and legal scholarship. *Id.* at 982.

32. EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL POSTCONVICTION MANUAL 40 (4th ed. 2004).

33. ABA GUIDELINES, *supra* note 31, r. 10.15.1(E)(4), at 1080.

34. *Id.* r. 10.15.1(E)(3), at 1080.

requires “changing the picture that has previously been presented.”³⁵ To that end, post-conviction counsel must not rely on the work of trial counsel, but must instead conduct their own independent investigation of a scope that both encompasses and exceeds that of trial counsel’s investigation.³⁶

The unencumbered ability to conduct interviews is essential to post-conviction counsel’s ability to uncover the basis for potentially meritorious legal claims. To determine the effectiveness of trial counsel during the culpability phase of the trial, post-conviction counsel must speak with fact witnesses who can shed light on the client’s guilt or innocence and the veracity of the State’s evidence at trial.³⁷ To evaluate trial counsel’s mitigation presentation at the penalty phase of a capital case, post-conviction counsel must contact the client’s family members, neighbors, coworkers, friends, doctors, and any other individuals who can shed light on the client’s personal history and life experiences.³⁸

Post-conviction counsel’s investigatory duties go beyond those of trial counsel to include efforts to uncover any exculpatory evidence that may have been concealed by the State, to discover and evaluate witnesses who either failed to testify at trial or who may have testified falsely, to examine the latest scientific and forensic methods, and to uncover any evidence of juror misconduct.³⁹ Interviews with testifying co-defendants or other State witnesses are a frequent

35. *Id.* r. 10.15.1 cmt., at 1085; *see also* Alper, *supra* note 30, at 45 (“The goal in post-conviction is not only to paint a portrait of the trial that would have occurred but for the deficient performance of trial counsel and/or the prosecutor’s improper withholding of evidence. The goal is for the trial that would have occurred to look substantially different than the trial that actually occurred. . . . [A]ttorneys have long understood that their task in post-conviction is to ‘change the picture’ that was presented at trial.”) (emphasis removed)).

36. ABA GUIDELINES, *supra* note 31, r. 10.15.1 cmt., at 1085–86; EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 36 (“Postconviction counsel cannot rely on the trial record or trial-level investigation, no matter how thorough it may appear, because information may have been concealed by the State, witnesses may not have testified truthfully, the trial attorney may not have conducted an adequate investigation, new developments may demonstrate that forensic evidence used at trial was unreliable, and other factors undermine the completeness and accuracy of the record.”).

37. Just like trial counsel, post-conviction counsel must conduct an investigation of their client’s culpability, which includes interviewing actual and potential witnesses to the crime and re-examining discovery, physical evidence, and the crime scene. ABA GUIDELINES, *supra* note 31, r. 10.15.1 cmt., at 1085–86; *id.* r. 10.7 cmt., at 1015–20; EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 51–62.

38. In capital cases, post-conviction counsel also have the same duty as trial counsel to conduct an extensive mitigation investigation—an investigation of any evidence that might serve as a basis for supporting a sentence less than death—by conducting interviews and obtaining records to determine the client’s family and social history, medical history, educational history, military service, employment history, and correctional or institutional history. ABA GUIDELINES, *supra* note 31, r. 10.15.1 cmt., at 1085–86; *id.* r. 10.7 cmt., at 1021–23; EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 45–50. Because no body of literature yet exists discussing a unique standard of practice for post-conviction attorneys in non-capital cases, this Article relies on those established for post-conviction litigation of capital cases. The investigative and interviewing methods established in the capital case context are equally applicable to non-capital cases.

39. ABA GUIDELINES, *supra* note 31, r. 10.15.1 cmt., at 1086; EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 36.

source of information concerning undisclosed plea agreements or other exculpatory information withheld by the State.⁴⁰ Scientific, medical, and mental health interviews allow post-conviction counsel to determine both the reliability of forensic evidence and the mental state and abilities of the client.⁴¹ And, of course, conversations with jurors provide the most accessible and reliable evidence of prejudicial juror misconduct.

B. Best Practices for Effective Interviews Require Unencumbered Access to Potential Witnesses

Rote adherence to the ABA Guidelines is not sufficient for post-conviction counsel to uncover evidence that can serve as the basis to support constitutional claims. Put another way, not all investigative interviews are equal. A post-conviction attorney who speaks with witnesses over the telephone or recites a script of enumerated questions is unlikely to uncover useful information.⁴² The techniques of an appropriate investigation have been most fully developed in the context of mitigation investigation in capital cases, but the lessons learned from such investigations are fully applicable to all post-conviction investigations.⁴³ Capital mitigation specialists⁴⁴ have developed a set of best practices for

40. See, e.g., *Pyle v. Kansas*, 317 U.S. 213, 214–16 (1942) (reversing based on affidavit from State’s witness that State knowingly relied on perjured testimony and that State promised witness nothing in exchange for testimony).

41. See, e.g., *Hinton v. Alabama*, 134 S. Ct. 1081, 1086 (2014) (discussing testimony of post-conviction counsel’s tool mark experts introduced to establish the inadequacy of defense tool mark expert at trial); *Smith v. Zant*, 855 F.2d 712, 717–19, 722 (11th Cir. 1988) (granting relief due to post-conviction expert’s testimony that defendant was intellectually disabled and under severe stress at the time he waived his Miranda rights); *Armstrong v. Dugger*, 833 F.2d 1430, 1432–34 (11th Cir. 1987) (finding trial counsel ineffective where expert testified to defendant’s intellectual disability and organic brain damage in post-conviction proceeding).

42. See Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 746–47 (2008) (explaining that phone interviews are disfavored because they prevent interviewers from observing critical body language and impede the development of rapport).

43. See *id.* at 748 (discussing facets of mitigation investigation that are “common elements to any successful interview”); see also Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1813–14 (2016) (discussing the applicability of mitigation investigation to juvenile defendants sentenced to life without parole); Hugh M. Mundy, *It’s Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31, 50–53, 62–73 (2013) (discussing use of capital mitigation investigation techniques in juvenile life-without-parole cases and applicability to criminal defense clinics).

44. A mitigation specialist is a member of the capital post-conviction defense team who typically has a psychology, social work, or journalism background and who conducts the investigation into the client’s life history to determine what aspects of the client’s background, environment, or character support a sentence less than death. See Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL’Y 337, 339–40 (2009).

interviewing witnesses.⁴⁵ Their methods reveal what conditions make a good interview, that is, one that is likely to reveal complete and honest information.⁴⁶

Mitigation specialists have developed interviewing techniques for members of a defense team who seek to uncover the truth of the client's life story.⁴⁷ The U.S. Supreme Court has recognized that the struggles a client encounters, such as abuse, neglect, drug addiction, cognitive limitations, and trauma, may serve as persuasive mitigating evidence.⁴⁸ Thus interviews of this type involve sensitive and sometimes shame-inducing subject matter that families may have devoted considerable energy to covering up.⁴⁹ Mitigation witnesses are frequently reluctant to discuss such hard truths, preferring to hide behind platitudes that paint a picture of the client's childhood as typical or idyllic.⁵⁰

45. AM. BAR ASS'N, SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *reprinted in* 36 HOFSTRA L. REV. 677, 682, 689 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]; *see also* Hon. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 825–28 (2008) (discussing special training and skills that mitigation specialists possess in interviewing and gathering information).

46. O'Brien, *supra* note 42, at 746–47.

47. Russell Stetler, one of the preeminent scholars and experts in the field of capital mitigation, writes that an effective post-conviction investigator must have “expertise at interviewing, and an ability to knock on a stranger’s door and engage the stranger in conversation, without any authority to coerce cooperation.” Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 252 (2008).

48. *See, e.g.*, Porter v. McCollum, 558 U.S. 30, 40 (2009) (finding ineffective assistance of counsel where trial counsel failed to discover mitigation, including capital defendant’s mental health or mental impairment, family background, or military service); Rompilla v. Beard, 545 U.S. 374, 390–93 (2005) (finding ineffective assistance of trial counsel for failure to obtain file on capital defendant’s prior conviction, which contained evidence of mitigation, including parental alcoholism, physical and verbal abuse, cognitive impairments, and mental health disorders); Wiggins v. Smith, 539 U.S. 510, 516, 523–25 (2003) (finding ineffective assistance of trial counsel for failing to investigate and present mitigating evidence of capital defendant’s “dysfunctional background,” including severe physical and sexual abuse); Williams v. Taylor, 529 U.S. 362, 395–96 (2000) (finding ineffective assistance of trial counsel where counsel failed to discover and present mitigating evidence of capital defendant’s “nightmarish childhood,” including parental abuse and neglect, and of defendant’s status as borderline intellectually disabled).

49. *See* Berrigan, *supra* note 45, at 826 (“The defendant and family members have the firsthand information needed for an effective defense, but are often not forthcoming because the information is highly personal. Childhood trauma and abuse are common in the background of capital defendants, yet family members, parents in particular, are understandably reluctant to disclose maltreatment or failure.”).

50. *See* Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 931, 957 (2008) (discussing psychological and familial barriers to disclosure of traumatic experiences, including fear of being judged, distrust of strangers, and fear of backlash or disapproval); *see also* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation As the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 969 (2008) (“It is common for family members to emphasize positive information about the defendant. Often, they do not understand why it is necessary to delve into painful aspects of their lives or look at their family’s history three generations back.”).

Often, family witnesses feel responsible for the client's difficulties and are understandably reluctant to confront their own culpability.⁵¹

Investigative interviews are best conducted in a comfortable setting after the interviewer has built a rapport with the witness.⁵² To that end, mitigation specialists recommend that members of the defense team interview these witnesses in person, at the home of the witness.⁵³ Recognizing that markers of formality are chilling to witnesses, mitigation specialists recommend that the interviewer wear casual clothing and adopt a conversational, rather than interrogation-like, tone.⁵⁴ Knowing that even the most well-intentioned witness has a tendency toward avoidance, mitigation specialists recommend arriving unannounced at the witness's home for an initial meeting.⁵⁵ Once the interviewer

51. See Russell Stetler, *Capital Cases*, CHAMPION, Jan./Feb. 1999, at 35–36 (“Mitigation investigation invades the darkest, most shameful secrets of the client’s family, exposes raw nerves, re-traumatizes, scratches at the scars nearest the client’s heart. It is also cyclical, rather than linear, because the most intimate witnesses—family members and loved ones—will often oscillate between denial and disclosure as painful truths slowly unfold.”).

52. SUPPLEMENTARY GUIDELINES, *supra* note 45, at 689. Supplementary Guideline 10.11 mandates: team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information, and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding. *Id.*; see also O’Brien, *supra* note 42, at 746–47. O’Brien writes, “Because the mitigation specialist’s interviews will invade traumatic and sensitive areas of the client’s and witnesses’ lives, one-on-one interviews are essential. . . . A telephone interviewer could not detect nonverbal cues that may be incongruent with the words being spoken.” *Id.*

53. O’Brien, *supra* note 42, at 746–47.

54. See SUPPLEMENTARY GUIDELINES, *supra* note 45, at 682, 689 (explaining need for interviewer to establish rapport with witness); ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES 194 (6th ed. 2016) (explaining importance of putting defense witnesses at ease, establishing rapport, and engaging in casual conversation); see also WASH. DEF. ASS’N, INVESTIGATION TRAINING MANUAL 7 (publication date unknown), http://www.defensenet.org/resources/publications-1/INVESTIGATION_TRAINING_MANUAL.docx [<https://perma.cc/A5TE-RQDD>] (advising defense investigators to dress casually when interviewing witnesses); RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES, 175 (5th ed. 2015) (“Dressing in a suit will make the attorney or investigator look like a plain-clothes police detective or probation officer, thereby ensuring that no one on the street will talk to him or her.”). A witness’s ability to share sensitive information in a casual conversation in his home does not mean he would have been capable of testifying to that information in a formal courtroom setting. As legendary mitigation specialist Scharlette Holdman told legal journalist Jeffrey Toobin, “[t]he fact that someone tells you that story in their living room is a long, long way from getting them to tell you that story in a public courtroom.” Jeffrey Toobin, *The Mitigator*, NEW YORKER (May 9, 2011), <http://www.newyorker.com/magazine/2011/05/09/the-mitigator> [<https://perma.cc/EF32-Y9DT>].

55. See Stetler, *supra* note 51, at 35 (“[R]eluctant witnesses find it much easier to hang up the telephone than to refuse to speak with an investigator on their doorstep.”). Stetler writes, “Witnesses should always be interviewed in person. The information needed in mitigation is simply not disclosed to strangers over the telephone. Full disclosure comes only in person with great patience, no matter how skilled the interviewer.” *Id.*

has established a rapport with the witness, the interviewer may choose to schedule days and times for any necessary follow-up questions.⁵⁶

Effective interviewers are culturally competent.⁵⁷ Witnesses often have racial, ethnic, gender, and socioeconomic backgrounds that differ from their interviewers, and it is important for rapport building for the interviewer to recognize and respect these differences.⁵⁸ A witness who feels judged by the interviewer is less likely to respond fully or candidly to his questions.⁵⁹ Mitigation specialists advise that interviewers should appear comfortable in the witness's home and should accept normal social offerings, such as a glass of water or coffee, to make the witness feel at ease.⁶⁰

These practices are applicable to interviewing witnesses in non-mitigation contexts, whether they be fact witnesses, jurors, or victims' family members. To different extents, all of these witnesses have reasons to want to avoid the inconvenience of a lengthy question and answer session.⁶¹ Those who have engaged in wrongdoing, such as perjury or other misconduct, have the additional motive of wanting to conceal their own culpability. Threatening these witnesses overtly, or more subtly with the trappings of authority and formality, is not an effective method to uncover truth.⁶² Instead, just as in the mitigation context,

56. See *infra* note 158.

57. See SUPPLEMENTARY GUIDELINES *supra* note 45, Guideline 5.1(C), at 682 (“Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information.”); see generally Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008) (examining the *Supplementary Guidelines* to explain the skills that make up cultural competency, how those skills relate to the mitigation specialist's role, and how they relate to the defense team in a capital case).

58. See Holdman, *supra* note 57, at 903–04 (“The Supplementary Guidelines demand that mitigation specialists understand and empathize with a client's cultural influences as a means to open-minded interviewing and investigating, and thorough, unedited, nonjudgmental, and organic fact-gathering. This involves sensitivity to areas of dissonance and the ability to know when further questions are necessary, as well as the ability to identify issues, interview openly, and establish rapport.”).

59. See O'Brien, *supra* note 42, at 750 (an effective interviewer must “listen non-judgmentally”).

60. DANALYNN RECER, ARIZ. CAPITAL REPRESENTATION PROJECT, INTERVIEW SKILLS 6 (2011), <http://azcapitalproject.org/wordpress/wp-content/uploads/2011/04/Investigation-Protocols-2-Interview-skills.ppt> [<https://perma.cc/JMW8-H54B>] (“Always accept offers of something to drink or eat.”).

61. See, e.g., AMSTERDAM & HERTZ, *supra* note 54, at 176 (discussing fact witness's “unwilling[ness] to ‘get involved’ because of the uncertainty of what s/he will have to do as a witness and fears of the degree of inconvenience it will entail”); Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 SO. CAL. L. REV. 545, 580 (2014) (“Not surprisingly, many witnesses do not want to get involved in a case. In their minds, they have done their duty and the case is over.”).

62. Threatening a witness is also typically a violation of the state penal code. See discussion *infra* Part III.B.1.

building rapport in a casual, comfortable setting is the key to unearthing an accurate account.⁶³

An additional aim of conducting interviews, and of post-conviction investigation generally, is to discover a factual basis upon which to enter new plea negotiations.⁶⁴ Commentary to the ABA Guidelines makes clear that successful plea negotiations often require defense counsel to make contact with the victim's family members: "A very difficult but important part of capital plea negotiation is often contact with the family of the victim. . . . [T]he victim's family can be critical to achieving a settlement."⁶⁵ While this commentary applies to the trial context, the same considerations apply in post-conviction proceedings, where the State retains the authority to negotiate.⁶⁶ Some jurisdictions require victim notice and participation before the State may make a plea offer in either context.⁶⁷ Defense counsel are uniquely positioned to convey a client's willingness to terminate appeals, express remorse, or provide details about the crime in exchange for a lesser sentence.⁶⁸ The Guidelines recommend that, in addition to interviewing the victims directly, defense counsel consider enlisting the help of clergy, defense-initiated victim outreach specialists, or organizations of murder victims' families.⁶⁹

The ability of post-conviction counsel to conduct unencumbered investigation by interviewing witnesses is crucial to gain the candid information

63. See O'Brien, *supra* note 42, at 742 ("Rapport with clients and witnesses is crucial to the representation of clients facing the death penalty for the same reasons that it is essential to effective doctor-patient relationships.").

64. See, e.g., Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 543-44 (2009) (discussing post-conviction investigation that resulted in "a mitigation case strong enough to convince the prosecutor to accept a life sentence instead of death").

65. ABA GUIDELINES, *supra* note 31, r. 10.9.1 cmt., at 1042; see also, e.g., Kelsey Stein, 'Mercy' of Victims' Families Allows Pelham Man Convicted in 3 Murders to Avoid Death Penalty, AL.COM, (Oct. 21, 2014), http://www.al.com/news/birmingham/index.ssf/2014/10/mercy_of_victims_families_allo.html [https://perma.cc/K588-KCLF] (discussing an agreement with the victims' families that resulted in a sentence of life in prison without parole for an individual convicted of five counts of capital murder).

66. Laurie L. Levenson, *Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 LOYOLA L.A. L. REV. S225, S227 (2011) ("For many petitioners, informal negotiations offer the best hope for a remedy. If the defense can get the prosecutor to admit flaws in the original proceedings, which they only do when their own investigators verify the defense's allegations, then there is hope for a retrial or even exoneration."); see also Smith, *supra* note 64, at 543-44; Timothy Williams, *Execution Case Dropped Against Abu-Jamal*, N.Y. TIMES, (Dec. 7, 2011), <http://www.nytimes.com/2011/12/08/us/execution-case-dropped-against-convicted-cop-killer.html> [https://perma.cc/5GD3-A3EW] (discussing Philadelphia prosecutor's decision to agree to sentence of life without parole after the NAACP won a new sentencing hearing for death row prisoner Mumia Abu-Jamal).

67. ABA GUIDELINES, *supra* note 31, r. 10.9.1 cmt., at 1042.

68. *Id.*; see also Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1022 (2008) ("When pleas are discussed, survivors who have been treated with kindness by the defense are less likely to be angry at the possibility of a plea, may be able to accept it, and may even be supportive of it.").

69. ABA GUIDELINES, *supra* note 31, r. 10.9.1 cmt., at 1042.

necessary for any hope of state habeas relief. Facts in support of meritorious claims of ineffective assistance of counsel, concealment of evidence, and juror misconduct are rarely ascertainable from documents and institutional records alone.⁷⁰ Without the candid perspective of witnesses, many of these constitutional errors are effectively unknowable.⁷¹

II.

STATE RESTRICTIONS ON POST-CONVICTION INVESTIGATION

Despite the importance of investigation in habeas corpus petitions, state actors, including those in death penalty states, have increasingly placed restrictions on post-conviction investigation.⁷² A few of these restrictions are codified in state statutes⁷³ and thus are arguably the result of the democratic process; however, many of them arise from local decision makers, appearing as idiosyncratic local court rules and the court orders of individual judges.⁷⁴ The restrictions include requiring a court order to conduct interviews; placing constraints on the time, place, and content of such interviews; creating State notice and participation requirements; and providing for the appointment of outside counsel.⁷⁵ Post-conviction restrictions affect investigations relating to three different types of witnesses: (1) jurors; (2) victims' family members; and (3) trial witnesses who cooperated with the State at trial.

A. Restrictions on Juror Interviews

The most common limitation that state actors impose on post-conviction defense investigation is the requirement that counsel obtain permission to

70. See, e.g., Clive A. Stafford Smith & Remy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 95 (1999) (explaining that there is "no substitute" for interviewing witnesses to determine facts in support of *Brady* violations). With respect to juror misconduct claims, because juror deliberations are secret and therefore not memorialized, the only way to uncover whether jurors committed misconduct during deliberations is by asking them. See Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295-96 (1993) (discussing secrecy of juror deliberations). While records can provide critical evidence of mitigating circumstances, obtaining them can often be difficult as they are frequently lost or destroyed. Betsy Wilson & Amanda Myers, *Accepting Miller's Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile Life-Without-Parole Cases*, 39 CHAMPION 42, 43 (2015). Accordingly, mitigation specialists must interview "everyone who's ever been important in [the client's] life." *Id.* at 45.

71. See *supra* note 70.

72. See Appendix (cataloguing instances of such restrictions across jurisdictions).

73. See, e.g., ARIZ. REV. STAT. ANN. § 13-4433 (West 2017) (imposing restrictions on defense interviews of victims); CAL. CIV. PROC. CODE § 206 (West 2017) (requiring counsel to inform jurors of their right to refuse to interview); OR. REV. STAT. ANN. § 135.970(2) (West 2017) (imposing restrictions on defense interviews of victims); OR. REV. STAT. ANN. § 138.625(5) (West 2017) (imposing restrictions on post-conviction interviews of victims).

74. See Appendix for information on whether the restriction is due to the individual order of a trial judge, a local rule, or a state statute.

75. See *id.*

conduct interviews with jurors.⁷⁶ Rarely found in state statutes, juror restrictions most frequently appear when local court rules or individual trial judges impose them—often at the behest of the prosecutor.⁷⁷ Reviewing courts frequently uphold these restrictions, typically finding that they are part of a trial judge’s inherent powers and a proper exercise of the judge’s discretion.⁷⁸ Many courts condition their grant of permission on the defendant’s ability to show “good cause,” which they interpret more or less strictly depending on the jurisdiction.⁷⁹ While some jurisdictions interpret good cause to mean a “good faith belief”⁸⁰ that misconduct occurred, others go a step further, requiring that the defense proffer evidence of *admissible* juror misconduct—a high standard given counsel’s inability to speak with jurors.⁸¹ Other states do not restrict interviews, but require a good cause order to release the jurors’ identifying information to post-conviction counsel.⁸²

76. Restrictions of this type have appeared in at least thirteen states: Alabama, Arizona, California, Florida, Idaho, Illinois, Kentucky, Mississippi, Missouri, New Jersey, Ohio, Oregon, and Texas. *See* Appendix.

77. *See id.*

78. *See, e.g.,* Hall v. State, 253 P.3d 716, 720 (Idaho 2011) (“We find that a district court has the inherent authority to enter an order restricting contact with the jury, including post-verdict contact.”); Strong v. State, 263 S.W.3d 636, 643 (Mo. 2008) (“Mr. Strong has no inherent right to contact and interview jurors. Courts have discretionary power to grant permission for contact with jurors after a trial.”); People v. Williams, 807 N.E.2d 448, 455 (Ill. 2004) (“[T]he circuit court did not abuse its discretion by restricting further efforts by counsel and the investigator to contact the jurors directly.”); State v. Paxton, 701 P.2d 1204, 1205 (Ariz. Ct. App. 1985) (rejecting argument that defendant has a right to conduct post-verdict juror interviews and upholding court order requiring showing of good cause); State v. Danforth, No. C3-01-959, 2002 WL 47792, at *1 (Minn. Ct. App. Jan. 15, 2002) (“The district court must have inherent authority to protect jurors from harassment by parties or attorneys.”).

79. Susan Crump has observed that the meaning of “good cause” in federal courts is ephemeral: “[A]ppellate opinions do not directly address [good cause] and tend to uphold the trial court’s exercise of discretion without reasoned analysis.” Crump, *supra* note 22, at 528. The same can be said about state appellate courts.

80. *See* FLA. STATE BAR R. 4-3.5 (To conduct informal interviews, counsel must have “reason to believe” in grounds for legal challenge.).

81. The Federal Rules of Evidence and their state corollaries observe a general presumption that the court cannot consider evidence that would impeach the jury verdict, unless that evidence rises to the level of a constitutional violation of the defendant’s right to a fair trial and impartial jury. *E.g.,* FED. R. EVID. 606(b). Most states have corollaries of this rule that limit admissible evidence to specified categories of information. States that have considered admissibility when evaluating a good cause showing include Arizona, Idaho, and Massachusetts. *See Paxton*, 701 P.2d at 1205 (no good cause where juror was crying after verdict because evidence of misconduct was “speculative at best” and did not provide evidence of admissible juror misconduct under ARIZ. CRIM. R. PRO. 24.1(c)(3)); *Hall*, 253 P.3d at 722–23 (affirming trial court’s assessment of good cause required some evidence of impropriety under IDAHO R. EVID. 606(b)); *Commonwealth v. Luna*, 641 N.E.2d 1050, 1053 (Mass. 1994) (“We have allowed postverdict interviews only where there is evidence that the jury considered extraneous matters during their deliberations.”).

82. *See, e.g.,* People v. Carrasco, 163 Cal. App. 4th 978, 989–91 (2008) (finding CAL. CIV. PROC. CODE § 237(b) required showing of good cause to obtain juror information in criminal post-conviction case and upholding trial court’s finding that defendant had not made adequate prima facie showing of good cause); *Streeter v. Superior Ct.*, No. E053574, 2011 WL 3366372, at *1 (Cal. Ct. App. Aug. 4, 2011) (directing trial court to set good cause hearing on disclosure of jurors’ names and to provide notice to jurors); TEX. CRIM. PROC. CODE ANN. art. 35.29 (requiring good cause showing to

In addition, some courts have imposed alternative or additional oversight, requiring in certain circumstances that post-conviction attorneys interview jurors inside the courtroom in the presence of the judge and prosecutor.⁸³ Even among courts that allow *ex parte* interviews, some go so far as to sculpt the content of the conversation between defense attorney and juror.⁸⁴ Again, the focus is on admissibility: these courts forbid attorneys from asking general questions about deliberations; instead, they must constrain their inquiries to the subject of admissible jury misconduct.⁸⁵ Other courts require defense counsel to affirmatively inform jurors that they have a right to refuse to participate in the interview.⁸⁶

obtain juror information but recognizing that defense counsel may transfer such information to successor counsel without good cause showing); Amended Opening Brief at 4–5, *Peña-Rodríguez v. People*, 350 P.3d 287 (Colo. 2015) (No. 13SC9), 2013 WL 12140027, at *4–5 (noting defense counsel sought court order to obtain juror contact information).

83. Florida, Tennessee, and Minnesota permit trial courts to impose these restrictions. FLA. R. CIV. P. 1.431 (indicating that if judge grants post-conviction counsel permission to interview jurors, “the court may prescribe the place, manner, conditions, and scope of the interview”); FLA. R. CRIM. P. 3.575 (“[U]pon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties.”); *see also* *State v. Gaddis*, No. E2011-00003-CCA-R3CD, 2012 WL 2370636, at *11 (Tenn. Crim. App. June 25, 2012) (finding local court rules may place “reasonable minor restrictions on the time, place, and manner” of defense interviewers of jurors). Minnesota courts require that attorneys learning of misconduct inform the trial court so that the court might summon the jurors to court for questioning. *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960) (“[R]ather than permit or encourage the promiscuous interrogation of jurors by the defeated litigant, we think that the better practice would be to bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may then summon the juror before him and permit an examination in the presence of counsel for all interested parties and the trial judge under proper safeguards.”); *see also* *Walker v. State*, No. C4-96-2039, 1997 WL 435873, at *1 (Minn. Ct. App. Aug. 5, 1997) (“An attorney or his agent should never question a juror for the purpose of gathering evidence for a request for a *Schwartz* hearing.”). Mississippi permits *ex parte* interviews of jurors with a good cause showing but reserves the right to impose additional judicial oversight. *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407, 419 (Miss. 1993) (“[W]hen the trial court determines that either the likelihood of juror harassment is evident or inquiry into a range of information beyond which testimony is permitted under Rule 606(b) is subject to occur, the inquiry should be interwoven with the trial judge’s supervision.”); *see also* *James v. State*, 777 So. 2d 682, 700 (Miss. Ct. App. 2000) (applying *Gladney* to criminal case). Maine has gone a step further, upholding a trial court’s discretion to conduct its own post-verdict interviews in the courtroom and to permit attorneys to attend but not to question the jurors. *State v. St. Pierre*, 693 A.2d 1137, 1140 (Me. 1997).

84. *See, e.g., State v. Jones*, 979 S.W.2d 171, 183 (Mo. 1998) (en banc) (upholding trial court ruling that permitted post-conviction counsel to speak with jurors about “only a few select issues”); *see also* OKLA. BAR ASS’N, ETHICS OP. NO. 248 (1967) (“[I]t is unethical for a lawyer to inquire of a jury after verdict on matters affecting other than the question of the validity of the verdict involved.”).

85. *See Jones*, 979 S.W.2d at 183; OKLA. BAR ASS’N, *supra* note 84.

86. California requires that attorneys or investigators conducting juror interviews “inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror’s right to review and have a copy of any declaration filed with the court.” CAL. CIV. PROC. CODE § 206 (West 2017). Some trial courts also instruct jurors on their right to refuse an interview. *See, e.g., Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (discussing Colorado jury instruction that informs jurors of their right to refuse to speak with attorneys after the trial).

B. Restrictions on Victim Interviews

While less common than the restrictions on post-conviction juror investigation, two capital punishment states, Arizona and Oregon, have codified similar oversight requirements for defense-initiated interviews of surviving victims. Most strikingly, Arizona mandates that to have any contact with surviving victims and their immediate family members, defense counsel must do so through the prosecutor.⁸⁷ Despite longstanding case law that makes clear that all witnesses, including victims, are property of neither the prosecutor nor the defense⁸⁸ and law that specifically defines victim impact statements as outside of the State's evidence,⁸⁹ Arizona explicitly permits the prosecutor to be present at defense interviews of the victim and to record these interviews, provided the victim does not affirmatively request the prosecutor not to do so.⁹⁰

The Arizona statute arose in the context of the Victims' Rights Movement in the last quarter of the twentieth century when thirty-two states amended their constitutions to grant rights to crime victims.⁹¹ Despite the nationwide effort to protect the interests of victims, only two states, Arizona and Oregon, attempted to do so by statutorily imposing oversight requirements on defense counsel.⁹²

87. ARIZ. REV. STAT. ANN. § 13-4433(B) (2017). Consistent with these provisions, Rule 39 of the Arizona Rules of Criminal Procedure also codified the prosecutor's role as the victim's gatekeeper in the pre-trial process, requiring that "defense initiated requests to interview the victim" and "the victim's response to such requests" be communicated through the prosecutor. ARIZ. R. CRIM. PROC. 39(11).

88. See, e.g., *State ex rel. Romley v. Superior Court*, 891 P.2d 246, 250 (Ariz. Ct. App. 1995) ("[T]he rule is well established that a prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor."); *Mota v. Buchanan*, 547 P.2d 517, 520 (Ariz. Ct. App. 1976) ("A witness, however, is not the exclusive property of either the prosecution or the defendant.").

89. In Arizona, victim impact evidence is presented to the jury directly by the victim, not through the intermediary of the State's direct examination. See *State v. Martinez*, 189 P.3d 348, 359 (Ariz. 2008) (en banc) ("[V]ictim impact evidence is not put on by the State, nor is cross-examination permitted or placing the victim's mother under oath necessary."); ARIZ. REV. STAT. ANN. § 13-4426.01 (2017) ("[T]he victim's right to be heard is exercised not as a witness, the victim's statement is not subject to disclosure to the state or the defendant or submission to the court[,] and the victim is not subject to cross-examination.").

90. ARIZ. REV. STAT. ANN. §§ 13-4433(D)-(E) (2017). Similar limitations on victim access have occurred in other states on a small scale. See *Lewis v. State*, 451 N.E.2d 50, 55 (Ind. 1983) (affirming trial court's order limiting post-conviction defense counsel's access to victim to interview in presence of either prosecutor or representative of Welfare Department).

91. Thirty-two states have enacted constitutional amendments granting special rights to crime victims. *Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/our-programs/public-policy/amendments> [<https://perma.cc/T5NT-QWK4>]; see also Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421 (2015) (reviewing how Arizona courts have interpreted the VBR since enactment); Elisabeth Semel, "Victims' Rights": *New Amendment to the Federal Constitution?*, 1996 CAL. CRIM. DEF. PRAC. REP. 555 (1996) (describing and critiquing 1996 Congressional efforts to add "victim's rights" amendment to the federal Constitution).

92. See Appendix for a summary of ARIZ. REV. STAT. ANN. § 13-4433 (2017) and OR. REV. STAT. ANN. §§ 135.970, 138.625 (West 2017).

In 1990, Arizona voters approved the Victims' Bill of Rights (hereinafter VBR),⁹³ an amendment to the Arizona Constitution that enumerated twelve specific rights designed to "preserve and protect victims' rights to justice and due process."⁹⁴ Among them are the right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process"⁹⁵ and the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."⁹⁶

The following year, in 1991, the Arizona Legislature approved the Victims' Rights Implementation Act (Act)⁹⁷ to give effect to the new constitutional protections for victims.⁹⁸ While the Act affirms the rights of victims to refuse to be interviewed, it also confers on prosecutors the right to act as liaisons to defense counsel and as monitors during any defense-initiated interview.⁹⁹ Though purportedly neutral, the prosecutor has statutory authority to use his discretion to refuse to forward any defense correspondence to the victims.¹⁰⁰

In 1999, Oregon also amended its constitution to incorporate the rights of crime victims.¹⁰¹ As in Arizona, one of these constitutional rights included the right to refuse an interview with defense counsel.¹⁰² Unlike Arizona, Oregon's statute declared that this right did not come at the expense of the constitutional rights of criminal defendants: "[N]othing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state."¹⁰³ Section

93. *State v. Roscoe*, 912 P.2d 1297, 1299 (Ariz. 1996).

94. ARIZ. CONST. art. 2, § 2.1. Scholars have identified four categories of rights in the VBR: "(1) rights that protect victims from harassment and abuse throughout the criminal justice process; (2) rights that allow a victim to participate in, contribute information to, and draw information from a criminal prosecution that will be resolved in a timely manner; (3) rights of victims to receive restitution from the person or persons who committed the crime; and (4) rights which permit the legislature to act on behalf of crime victims so that the rights secured by the VBR may be preserved." Twist & Williams, *supra* note 91, at 424–25.

95. ARIZ. CONST. art. 2, § 2.1(A)(1).

96. *Id.* § 2.1(A)(5).

97. ARIZ. REV. STAT. ANN. §§ 13-4401–13-4438 (2017); *Roscoe*, 912 P.2d at 1299.

98. Arizona's Victims' Rights Implementation Act defines victims to include the surviving "spouse, parent, child, grandparent or sibling, [or] any other person related . . . by consanguinity or affinity to the second degree." ARIZ. REV. STAT. ANN. § 13-4401(19).

99. ARIZ. REV. STAT. ANN. §§ 13-4433(B)–(E).

100. ARIZ. REV. STAT. ANN. § 13-4433(C).

101. *See Johnson v. Dep't of Pub. Safety Standards & Training*, 293 P.3d 228, 232 (Or. 2012) (noting passage of amendment in 1999).

102. OR. CONST. art. I, § 42(1)(c).

103. *Id.* Only a single case has addressed the interplay of victims' and defendants' rights. In *State v. Bray*, 291 P.3d 727, 729 (Or. 2012), an en banc session of the Oregon Supreme Court balanced the right of a victim to refuse to turn over discovery with the right of a defendant to obtain appellate review of the trial court's order denying his discovery request. *Id.* The defendant had requested pre-trial discovery of the contents of the victim's hard drive, and the trial judge denied the request. *Id.* at 729–30. The defendant then moved for and received an order placing a copy of the hard drive that had been preserved in a related civil case under seal in the trial court's record on appeal. *Id.* at 730. The Oregon Supreme Court reasoned that the trial court's order did not violate the victim's discovery right because

135.970 of the Oregon Revised Annotated Statutes codifies this right, by specifying that a victim¹⁰⁴ may not be interviewed without the victim's consent.¹⁰⁵ It also permits a victim to request that the court not share his contact information with the defense in the absence of a demonstration of good cause.¹⁰⁶

The Oregon statute goes a step further than simply codifying victims' rights; it imposes an affirmative duty on defense counsel.¹⁰⁷ Subsection 2 of the law mandates that if any member of the defense team makes contact with the victim, the defense attorney must clearly inform the victim, in person or in writing, of both the team member's identity and the victim's rights.¹⁰⁸ Specifically, the defense attorney must inform the victim both that the victim may refuse the interview and that he may have a prosecutor or advocate present during the interview.¹⁰⁹ Although section 135.970 applied to trial-level defense counsel, in 2007 the Oregon legislature enacted section 138.625, which conferred an identical duty on post-conviction counsel.¹¹⁰

C. Restrictions on State Witness Interviews: A Logical Next Step?

Most recently, a few individual judges and prosecutors have taken steps to restrict post-conviction counsel's ability to speak with State witnesses who testified against the defendant in exchange for a reduced charge or lesser sentence.¹¹¹ Responding to concerns that recanting witnesses run the risk of

it did not require that the hard drive be turned over to the defendant—only that it be preserved. *Id.* at 733. The court left open the possibility that the victim could reassert his rights in the intermediate court should the defendant appeal the trial court's order denying discovery of the hard drive. *Id.*

104. Like Arizona, Oregon defines victims to include a victim's family in homicide cases. OR. REV. STAT. ANN. § 135.970(5) (West 2017) (“As used in this section, ‘victim’ means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime against the person or a third person and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent.”).

105. *Id.* § 135.970(3).

106. *Id.* § 135.970(1).

107. The Oregon Court of Appeals has held that these obligations fall on defense counsel only, regardless of who on the defense team makes contact with the victim. *Johnson v. Dep't of Pub. Safety Standards & Training*, 293 P.3d 228, 229 (Or. 2012).

108. OR. REV. STAT. ANN. § 135.970 (2).

109. *Id.* § 135.970(2) (“If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.”).

110. *Id.* § 138.625(5) (“If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.” (emphasis added)).

111. See, e.g., State's Motion to Appoint Counsel, *State v. Rose*, No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. Apr. 6, 2016) (State's motion to appoint counsel for witnesses who testified at

perjury charge or of violating the terms of their cooperation agreements, these judges have either appointed outside counsel to represent these witnesses or permitted prosecutors to advise them of their right to remain silent.¹¹² When courts have appointed outside counsel, counsel serves as a gatekeeper of the witness, typically advising the witness against speaking with the defendant's post-conviction counsel and, in the event an interview does occur, overseeing any questioning.¹¹³

It remains to be seen whether these actions are a few, isolated incidents or the beginning of a trend. What does seem clear is that courts permitting restrictions on interviews of State witnesses have done so in tandem with restrictions on jurors or victims.¹¹⁴

III.

THE HARMS OF POST-CONVICTION INVESTIGATION RESTRICTIONS AND THEIR POLICY RATIONALES

Restrictions on post-conviction investigation prevent criminal defendants from discovering constitutional error and raising potentially meritorious claims in state habeas proceedings. In addition, they fail to accomplish their stated objectives. In this Part, I explore the harm that investigation restrictions pose to both criminal defendants and the criminal justice system. I then examine why judges and legislatures impose such restrictions before concluding that the restrictions do not achieve intended policy goals and are, at best, redundant to existing laws.

Rose's trial in exchange for reduced sentences and whom defense counsel sought to interview in post-conviction relief proceedings) (on file with author).

112. *See id.*; State v. Feaster, 877 A.2d 229, 232, 247 (N.J. 2005) (remanding for new hearing where trial court permitted prosecutor to inform recanting witness's attorney of risk of perjury charge for changing testimony).

113. Recanting defendants typically refuse to testify after receiving advice from appointed counsel. *See, e.g.*, Hill v. State, 51 N.E.3d 446, 449–52 (Ind. Ct. App. 2016) (State requested that counsel be appointed for recanting victim, and recanting victim chose to invoke Fifth Amendment upon advice of the attorney); State v. Williams, 2004 WL 1363261, at *5 (Ohio Ct. App. June 18, 2004) (witness who wrote letter recanting prior testimony invokes Fifth Amendment after speaking with appointed attorney); State v. Day, No. 94 C.A. 119, 1995 WL 697789, at *4 (Ohio Ct. App. Nov. 21, 1995) (witness retreated from recantation after trial judge informed him of danger of perjury and appointed counsel).

114. *See supra* note 111 and accompanying text; *see also* Ruling, State v. Rose, No. CR-2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. Aug. 17, 2016) (denying State's request to limit post-conviction counsel's contact with trial jury) (on file with author); Ruling, State v. Rose, No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. May 19, 2016) (memorializing State's request to limit post-conviction counsel's contact with trial jury) (on file with author); Ruling, State v. Rose, No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. Feb. 12, 2016) (denying petitioner's post-conviction counsel's request to interview victim) (on file with author). Although the State requested restrictions on interviews of jurors, victims, and State witnesses, the court imposed them only on interviews of victims and State witnesses.

A. *The Cost of these Restrictions to Criminal Defendants*

Limitations on post-conviction interviews of jurors, surviving victims, and State witnesses frustrate a defendant's ability to discover and raise potentially meritorious constitutional claims in state post-conviction proceedings.¹¹⁵ Consequently, they impede the truth-finding function of the criminal justice system.¹¹⁶ Moreover, these restrictions are unfair because they are one-sided; State actors impose them asymmetrically on defense counsel.¹¹⁷

Restricting juror interviews to the rare situation in which the misconduct is already known curbs access to information and impedes the search for truth. All states recognize that some forms of juror misconduct qualify as reversible constitutional error, entitling the defendant to a new trial or sentencing proceeding.¹¹⁸ Without the ability to conduct free and unencumbered jury investigation post-conviction attorneys have little chance of discovering evidence of this misconduct, giving the defendant no remedy for the violation of his constitutional rights.¹¹⁹

Unrestricted, consensual conversation with the surviving family members of a deceased victim serve two purposes in capital cases. First, if the surviving victim gave fact testimony at the defendant's trial, interviews allow the post-conviction attorney to assess the veracity of this testimony. The same is true if the family member provided victim impact testimony at the penalty phase of a capital trial. Second, in capital cases, open lines of communication between post-

115. See Lawsky, *supra* note 22, at 1970.

116. See, e.g., *Feaster*, 877 A.2d at 239 (“The basic premise of our judicial system is that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice.”) (internal quotations omitted).

117. See *infra* notes 136–137 and accompanying text.

118. The U.S. Supreme Court has long held that certain types of juror misconduct, including juror bias and contact with outside influences, violate a defendant's right to a fair trial and impartial jury. As early as 1892, the Court reversed a verdict in a capital case based on the jurors' affidavits that the bailiff spoke to them about the crime and the defendant, holding that “Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict.” *Mattox v. United States*, 146 U.S. 140, 150 (1892). Later, in *Remmer v. United States*, the Court found that contact between a third party and a juror during a trial about a matter before the jury was presumptively prejudicial. 347 U.S. 227, 229 (1954). In *Turner v. Louisiana*, the Court reversed a verdict in another capital case upon repeated juror contact with two deputy sheriffs who served as State witnesses, invoking Lord Coke's caution concerning the harm of a biased jury: “[a] juror must be as ‘indifferent as he stands unsworne.’” 379 U.S. 466, 472 (1965). The Court emphasized that a valid verdict was a verdict based only on the evidence admitted at trial. *Id.* In this vein, the Court held in *Parker v. Gladden* that a bailiff's statement to a capital jury concerning his belief that the defendant was guilty violated the defendant's Sixth Amendment right of Confrontation. 385 U.S. 363, 363–65 (1866). Most recently, in *Peña-Rodriguez*, the Court found that evidence that a juror based his decision on racial bias was admissible to establish a violation of the defendant's right to a fair trial by an impartial jury. 137 S. Ct. 855, 869 (2017).

119. See 27 VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6076 (2d ed. Apr. 2017 Update) (“Since most jury misconduct occurs in private, disclosure of misconduct usually can be made only by one of the jurors.”); Brief for Amici Curiae Professors of Law in Support of Petitioner at 3, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2015 WL 8758156, at *4 (noting that juror testimony is likely to be the “only available evidence” of racial bias during deliberations).

conviction counsel and surviving victims are often instrumental in resolving cases with a sentence of life without parole instead of death.¹²⁰ However, such outcomes are nearly impossible to achieve if the parties cannot speak candidly or cannot speak at all.¹²¹

State witnesses are critical to post-conviction claims because they are often fact witnesses in the case.¹²² Assessing their credibility is essential to determining whether the client actually committed the crime.¹²³ In addition, because many of these witnesses struck bargains with the State, they frequently have knowledge of prosecutorial misconduct, including whether the State failed to disclose any exculpatory information or impeachment evidence to the defense¹²⁴ and whether the State knowingly relied on false information to convict the defendant.¹²⁵ If outside counsel advises silence, post-conviction attorneys have no chance of discovering these issues.¹²⁶ Not only will innocent defendants have no recourse, but prosecutorial misconduct will go undiscovered and uncorrected.

Less obvious is the fact that oversight requirements reduce the quality of any interviews that do take place. Requirements that interviews take place in a formal setting such as a courtroom or prosecutor's office reduce the likelihood that a witness will even appear—let alone speak candidly.¹²⁷ Courts and scholars have long-recognized that civilians serving as prospective jurors are apt to provide responses that they believe will please authority figures.¹²⁸ Because the

120. ABA GUIDELINES, *supra* note 31, r 10.9.1 cmt., at 1042; *see also, e.g.*, Stein, *supra* note 65.

121. *See supra* note 119 and accompanying text.

122. *See* ABA GUIDELINES, *supra* note 31, r 1.1 cmt., at 935 (“Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness’s testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial.”).

123. *See id.*

124. *See generally* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires State to disclose evidence favorable to the defendant).

125. *See, e.g.*, Alcorta v. Texas, 355 U.S. 28, 30 (1957) (discussing State witness’s sworn statement that he testified falsely at trial with prosecutor’s knowledge).

126. Even after a witness has recanted to a post-conviction investigator, the witness may invoke the Fifth Amendment in the courtroom, frustrating the defendant’s ability to rely on the substance of the recantation. *See, e.g.*, Newman v. United States, 238 F.2d 861, 862 (5th Cir. 1956) (describing “a most curious development” when witness, who had signed an affidavit recanting his testimony against the defendant, invoked his Fifth Amendment rights upon the advice of his attorney after being called to testify in an evidentiary hearing).

127. *See* Stetler, *supra* note 51; Toobin, *supra* note 54.

128. *See, e.g.*, Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1485 (2003) (“Numerous studies indicate that jurors consciously or subconsciously attempt to get the ‘right’ answer by responding to questions in a manner that will please the judge and fit the socially acceptable mold.”); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35, 72 (1992) (“[B]ecause of their desire to please the person in the most authoritative position, jurors questioned by judges during voir dire may not respond honestly. Rather, cued by the form of the questions or the judge’s demeanor, the jurors may provide the answer they believe the judge wants to hear.”); Joseph M. Gagliardo & Camille A. Olson, *Jury Selection from the Defense Perspective (With Forms)*, 17 PRAC. LITIGATOR 29, 31 (2006) (“Some jurors want to please

formal trappings of the courtroom or prosecutor's office convey the power of the State and underscore the consequences of a witness's words, they are more likely to have a chilling effect on speech than would a post-conviction interview, which is typically an informal, one-on-one conversation in the witness's home.¹²⁹ To illustrate this, one need look no further than the *Dunaway* case that opens this article. In that case, jurors concealed their biases during a formal courtroom inquiry only to divulge them later during post-conviction investigation.¹³⁰

Oversight by third party counsel is similarly chilling. The job of third party counsel is to give legal advice; they are ethically bound to dissuade their clients from making statements that could result in criminal charges.¹³¹ There is no legal benefit to changing one's false testimony, only the personal moral satisfaction of telling the truth.¹³² The presence of outside counsel during an interview with defense counsel serves as a constant reminder of the personal risk a recanting witness runs.¹³³

Even the mere requirement that post-conviction counsel notify the State—or the court with the prosecutor present—of upcoming interviews generates a shift from information-gathering to strategy.¹³⁴ Knowledge of an impending investigation often prompts prosecutors to conduct a concurrent investigation with the same witnesses in a strategic bid for the interviewee's cooperation and allegiance.¹³⁵

the attorneys and will say what they believe counsel wants to hear and not what they truly think. Others want to hide a particular bias.”). When investigating whether a juror failed to disclose or misrepresented material information in voir dire, it makes little sense to replicate the conditions that resulted in the juror's lack of candor in the first place. *See, e.g., Dunaway v. State*, 198 So. 3d 567, 581 (Ala. 2015) (reversal involving juror who failed to be truthful on juror questionnaire and on voir dire).

129. *See Stetler, supra* note 51; Toobin, *supra* note 54.

130. *Dunaway*, 198 So. 3d at 573–74, 581.

131. *See* AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Preamble and Scope (8th ed. 2015) (“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”); *id.* § 2.1 cmt. (“[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice. . . .”).

132. *See, e.g., Albert Samaha, Why William Varnado Lied*, BUZZFEED NEWS (Mar. 21 2017), <https://www.buzzfeed.com/albertsamaha/he-says-police-pressured-him-to-lie-now-perjury-charges> [<https://perma.cc/KZ24-U2PT>] (noting that New Orleans prosecutor has charged three recanting witnesses with perjury in the last two years); *Witness Who Recanted Testimony Charged with Perjury*, CHICAGO DAILY HERALD (Sept. 2, 2011), <http://www.dailyherald.com/article/20110902/news/709029607> [<https://perma.cc/2THM-HRC5>] (prosecutor charged witness, who recanted trial testimony identifying defendant as murderer, with perjury).

133. For a similar phenomenon, see G. LARRY MAYS & L. THOMAS WINFREE, JR., *JUVENILE JUSTICE* 90 (3d ed. 2013) (noting that police officers believe the presence of an attorney chills interrogations).

134. *See* Levenson, *supra* note 61, at 560 (“For prosecutors, the goal is to shut down post-conviction litigation at the earliest possible stage.”).

135. Some prosecutors go a step further. *See* David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights*, 17

Post-conviction interviewing restrictions are fundamentally unfair because they are asymmetrical: state actors apply them to the defense, but not to the prosecution.¹³⁶ Not all asymmetry is unfair. At trial, asymmetry works in the defendant's favor, as a way to balance the rights of an individual defendant with the power of the State.¹³⁷ Following a conviction, the defendant loses the presumption of innocence and with it many of these protections.¹³⁸ Most fundamentally, in state post-conviction proceedings, the burden of proof shifts from the State to the criminal defendant, who must prove that his constitutional rights were violated by a preponderance of the evidence.¹³⁹ Asymmetrical application of investigation restrictions on post-conviction counsel is unfair, precisely because of this shift; it places the defendant in the position of having to prove information while thwarting his ability to even discover that it exists.¹⁴⁰

Asymmetrical notice requirements, like Oregon's law compelling only defense counsel to notify victims of their right to refuse an interview, harm criminal defendants. The Alaska Supreme Court observed in striking down a similar law:

The fact that only defense representatives must tell a victim or witness "you don't have to talk to me" strengthens the suggestion that noncooperation with the defense side is desirable. The one-sidedness of the requirements also suggests a design to give an unfair advantage to

GEO. J. LEGAL ETHICS 103, 103 (2003) ("Prosecutors and victim advocates are becoming more brazen about discouraging witnesses from speaking to defense counsel and investigators.") (quoting Hon. Louis D. Coffin et al., *Pretrial Conferences, Pretrial Hearings and Discovery Motion Practice*, in 1 MASSACHUSETTS DISTRICT COURT CRIMINAL DEFENSE MANUAL § 8.4.2(a) (Cathleen Bennett et al. eds., rev. ed. 2000)).

136. Either the restriction explicitly applies only to defense counsel, as in the victim context, *see* ARIZ. REV. STAT. ANN. § 13-4433(B) (2017); OR. REV. STAT. ANN. §§ 135.970(2), 138.625(5) (West 2017); or it practically applies only to defense counsel, as in the juror context. There, prosecutors have no need to conduct interviews to preserve the status quo of a guilty verdict and typically do so only in response to defense interviews that purportedly uncover new information that threatens the verdict.

137. For an in-depth discussion of asymmetry in the criminal justice system, *see* Anna Roberts, *Asymmetry As Fairness: Reversing A Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1539-41 (2015) (arguing that asymmetrical allocation of peremptory challenges in the context of jury selection is beneficial in maintaining fairness in the criminal justice system); *see also* *Wardius v. Oregon*, 412 U.S. 470, 472 (1973) (finding discovery statute that placed disclosure obligations only on defendant and not on State violated the fundamental fairness provision of Due Process Clause).

138. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (declining to find a constitutional right to counsel in state habeas proceedings after defendant has been "stripped of his presumption of innocence"); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (declining to find a right to counsel under the Due Process Clause or Eighth Amendment in state capital habeas proceedings).

139. *See, e.g.*, ALA. R. CRIM. P. 32.3 ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."); ARIZ. R. CRIM. P. 32.8(c) ("The defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence.").

140. Even though the criminal defendant has the burdens of pleading and proof in post-conviction proceedings, it is not uncommon for the State in capital cases to preemptively conduct its own interviews. *See, e.g.*, *Motion to Prevent Prosecution from Contacting Jurors and Obtaining Conclusory Affidavits*, *State v. Gonzalez*, No. 2011-CR-5289 (Tex. Dist. Ct. Jan. 15, 2016) (defendant's motion to prevent prosecution from preemptively contacting jurors) (on file with author).

the prosecution and undercuts the argument that they are only meant to convey to prospective interviewees accurate information about their legal rights.¹⁴¹

In the victim context, Arizona's and Oregon's laws that confer on the prosecutors the role of protecting the victim create the false impression that the interests of victims always align with those of prosecutors, when they frequently do not.¹⁴² Prosecutors have a duty to the public as a whole to see that justice is done, which, in the trial context, typically involves the pursuit of a criminal conviction followed by punishment.¹⁴³ Victimology scholars have long observed that crime victims, on the other hand, often place a greater importance on personal dignity concerns than on the outcome of a criminal case.¹⁴⁴

Restrictions on post-conviction interviews of State witnesses are the most likely to have dire consequences. The appointment of attorneys only for those witnesses who testified on behalf of the State pursuant to a cooperation agreement raises fairness concerns. Any witness who testifies is vulnerable to perjury charges if he later changes his story, but only State witnesses receive

141. *State v. Murtagh*, 169 P.3d 602, 615 (Alaska 2007).

142. *State ex rel. Romley v. Superior Court*, 891 P.2d 246, 250 (Ariz. Ct. App. 1995) (“[I]n some cases the wishes of the victim may be adverse to those of the prosecution.”); *see also* *Hawkins v. Auto-Owners (Mut.) Ins. Co.*, 579 N.E.2d 118, 123 (Ind. Ct. App. 1991), *vacated in part on other grounds*, 608 N.E.2d 1358 (1993) (“A deputy prosecutor does not represent the victims or witnesses in a criminal proceeding, but rather, is the State’s representative.”); *Lindsey v. State*, 725 P.2d 649, 660 (Wyo. 1986) (Urbigkit, J., dissenting) (“The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.”) (quotation marks omitted); *State v. Eidson*, 701 S.W.2d 549, 554 (Mo. Ct. App. 1985) (“The prosecutor represents the State not the victim.”); *Murtagh*, 169 P.3d at 615 (“It is reasonable to assume that with respect to some victims, only defense representatives seem threatening and thus only one-sided advice needs to be given. But it is also true that some victims and witnesses feel harassed by the demands made on them by law enforcement personnel.”); Harriet McLeod, *U.S. to Seek Death Penalty Against Accused South Carolina Church Shooter*, REUTERS (May 24, 2016), <http://www.reuters.com/article/us-south-carolina-shooting-idUSKCN0YF2SY> [<https://perma.cc/QA4P-ZPMC>] (noting U.S. Attorney’s decision to seek the death penalty against Dylan Roof despite victim wishes to the contrary). *See generally* MURDER VICTIMS’ FAMILIES FOR RECONCILIATION, <http://www.mvfr.org> [<https://perma.cc/Z3K8-HVD7>] (explaining the mission of an organization made up of the family members of murder victims seeking to end and replace the death penalty).

143. Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005) (“[A] prosecutor cannot align herself exclusively with the victim. A prosecutor also owes an allegiance to constituencies that are independent of the victim—i.e., the general public and the accused.”); *see also* Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2319–20 (2013) (“The decision on whether a trial is to be conducted is forced on both the victim and the offender. The process culminates in the imposition of punishment, which often ravages the defendant’s freedom and dignity.”).

144. *See* Leslie Sebba, *Victim’s Rights—Whose Duties?*, CARING FOR CRIME VICTIMS: SELECTED PROCEEDINGS OF THE NINTH INTERNATIONAL SYMPOSIUM ON VICTIMOLOGY 143 (Jan J.M. van Dijk et al. eds. 1999) (noting research has consistently found that “most victims want some degree of recognition, and that their lack of standing and their demeaning treatment distresses them more than the actual outcomes of these procedures”); Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims’ Families and the Press*, 88 CORNELL L. REV. 486, 486 (2003) (“Perhaps the most common complaint by American crime victims and their families is that they are ignored—by the police, by the prosecutors, by the courts and by the press.”).

counsel.¹⁴⁵ By singling out State witnesses, often at prosecutors' requests, judges insulate the State's evidence from potentially valid challenges and, in some cases, may prevent the discovery of prosecutorial misconduct.

B. Policy Justifications for Restrictions on Juror Interviews

If restrictions on post-conviction investigation prevent criminal defendants from discovering constitutional errors or raising potentially meritorious claims in state habeas proceedings, why do judges and legislatures impose them? Three policy justifications have been put forth: (1) prevention of juror harassment; (2) promotion of unfettered speech during juror deliberations; and (3) preservation of the finality of verdicts.

1. Prevention of Juror Harassment

Because jurors perform a public service they did not choose, courts seek to protect them from any future negative consequences.¹⁴⁶ Courts have repeatedly stated that post-conviction interviews by attorneys may leave a juror feeling harassed or upset.¹⁴⁷ Courts that subscribe to this notion paint a picture of overzealous defense attorneys who use underhanded tactics like guilt or threats to pressure jurors to repudiate their verdict.¹⁴⁸ By preventing or severely limiting contact between jurors and these attorneys, these courts seek to minimize any risk of harassment.

Contrary to their purpose, however, restrictions on defense interviews of jurors often result in procedures that are more disruptive and traumatic than

145. See *supra* note 132 and accompanying text; see also, e.g., State's Motion to Appoint Counsel, State v. Rose, No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. Apr. 6, 2016) (State's motion to appoint counsel for State's witnesses who testified for State at Rose's trial) (on file with author).

146. See, e.g., Muhammad v. Woodford, No. 2:04-CV-1856-RRB-JFM, 2008 WL 1734235, at *2 (E.D. Cal. Apr. 11, 2008) ("The sanctity of jury service performed requires protection of jurors' right to be free of harassment at home and by telephone, and of fear of such contact.").

147. State v. Cabrera, 984 A.2d 149, 162-63 (Del. Super. Ct. 2008) ("Permitting the unbridled interviewing of jurors could easily lead to their harassment.") (citing United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985)); State *ex rel.* Butler v. Howard, No. WD 48096, 1994 WL 4300, at *4 (Mo. Ct. App. Jan. 11, 1994) ("The trial court has a duty, in those cases where good cause has been shown, to provide for juror interviews in any manner which does not amount to harassment."); Gladney v. Clarksdale Beverage Co., 625 So. 2d 407, 416 (Miss. 1993) (citing WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6076 (1990) for the proposition that judicial supervision of defense contact with jurors minimizes juror harassment).

148. In his article, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, Benjamin M. Lawskey accepts without question that jurors require some protection from harassment by defense counsel. 94 COLUM. L. REV. 1950, 1969-70 (1994). Similarly, Susan Crump opines regulation of jury investigation is an effective way to prevent juror harassment, yet cites no instances where any harassment occurred. *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 533 nn. 174-77 (1988). Instead, both Lawskey and Crump rely only on the speculation of federal courts in opinions that cite no instances of harassment as evidence.

standard unencumbered interviews.¹⁴⁹ Moreover, restrictions on interviews are unnecessary where state laws already make harassment illegal and unethical.¹⁵⁰

Although the harassment of jurors by members of the post-conviction defense team may occur in isolated instances¹⁵¹—just as it does with prosecutors and police—there are no data to suggest it occurs with any regularity. Courts and scholars advancing this policy goal cite no specific examples of defense team harassment.¹⁵² Further, there is reason to believe that characteristics of post-conviction investigation in capital cases make harassment of jurors and victims particularly unlikely.

Practical and ethical considerations prevent defense interviewers from resorting to subterfuge to gain a witness's trust—unlike interrogating police officers who are permitted to lie during criminal interrogations.¹⁵³ A defense interviewer must identify himself by name and make clear his position as a member of the post-conviction defense team for a particular client.¹⁵⁴

149. See, e.g., *Cabrera*, 984 A.2d at 150, 165 (affirming trial court's order that interview must take place in court with both parties and the judge present and that parties may direct and cross-examine jurors); *Marshall v. State*, 976 So. 2d 1071, 1080 (Fla. 2007) (holding that, in capital cases, courts may require that attorney conduct formal interviewing in courtroom with adversary present).

150. The crime of harassment typically outlaws intentional conduct where one “(1) makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.” MODEL PENAL CODE § 250.4 (AM. LAW INST. 2016) (Harassment). Ethical obligations go a step further, requiring that lawyers minimize their contact with jurors and treat them respectfully. See MODEL RULES OF PROF'L CONDUCT EC 7-30 (AM. BAR ASS'N 1980) (“Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.”); *id.* at DR 7-108(D) (“After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.”).

151. See *Prosecutors: Jurors Felt Harassed by Widmer Defense*, WLWT NEWS (Jun. 10, 2009), <http://www.wlwt.com/article/prosecutors-jurors-felt-harassed-by-widmer-defense/3499992> [<https://perma.cc/ZEA6-J2EL>] (recounting prosecutors' allegations that three jurors “felt threatened” by post-conviction investigator hired by defense team).

152. See *supra* note 148; see also Brief for Amici Curiae Professors of Law in Support of Petitioner, *supra* note 119, at 13–14 (noting that seven states' and three federal appeals courts' recognition of racial bias as additional form of prejudicial juror misconduct did not result in increased post-verdict juror harassment in those jurisdictions); Brief of Amici Curiae Retired Judges in Support of Petition for a Writ of Certiorari at 3–5, *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 324300, at *3–5 (arguing that Massachusetts's practice of allowing post-verdict interviews of jurors did not prevent the protection of jurors from attorney harassment).

153. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (“The fact that the police misrepresented the statements that [the defendant] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.”); *Miranda v. Arizona*, 384 U.S. 436, 449 n.9, 453 (1966) (observing that law enforcement interrogators frequently employ lies or trickery to exact confessions).

154. See *infra* notes 155–156.

Misrepresentation of an investigator's identity may result in ethical violations¹⁵⁵ or legal charges¹⁵⁶ and make for a devastating cross-examination should the witness ever be called to testify to the content of the interview.¹⁵⁷

Drawing on my own experiences as a post-conviction attorney and my participation in the state habeas investigation process, I know that defense encounters with the majority of witnesses consist of a single consensual interview.¹⁵⁸ Consistent with the best practices of mitigation specialists, as discussed in Part I, one or two members of the defense team¹⁵⁹ arrive at the witness's home, identify themselves and their roles on the defense team, and ask the witness to have a conversation about the case. If the witness agrees, the defense team asks a series of open-ended questions in the comfort of the

155. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.2 (3d ed. 1993), ("Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so."); *see also*, e.g., CAL. CIV. PROC. CODE § 206(c) (West 2017) (mandating defense interviewers of jurors identify self, client, case, and subject of interview); Carr v. State, 873 So. 2d 991, 1006 (Miss. 2004) (affirming denial of juror misconduct claim where jurors stated that defense investigators "implied that they worked for the prosecution" and that they would not have signed defense affidavits had they known purpose was to overturn defendant's conviction).

156. In 2014, the New Orleans District Attorney's Office filed charges against Taryn Blume, an investigator working for the Orleans Public Defenders Office, claiming the investigator misrepresented herself to witnesses as an employee at the District Attorney's Office. The investigator pleaded not guilty but faced up to two years of imprisonment if convicted. Ken Daley, *DA Cannizzaro's Daughter to Prosecute Heated Taryn Blume Case*, TIMES-PICAYUNE, (May 5, 2016), http://www.nola.com/crime/index.ssf/2016/05/da_cannizzaros_daughter_to_pro.html [https://perma.cc/967U-7SSN]; Christopher Louis Romaguera, *Taryn Blume Developments: Curious Case Pits Cannizzaro and Star Prosecutor Against Investigator for Public Defender*, NOLA DEFENDER, <http://www.noladefender.com/content/taryn-blume-developments> [https://perma.cc/GGW4-VBH8]; Ken Daley, *Lawyers' Fantasy Football Chats Sought in Orleans Investigator's Impersonation Case*, TIMES-PICAYUNE, (Nov. 7, 2016), http://www.nola.com/crime/index.ssf/2016/11/lawyers_fantasy_football_chats.html [https://perma.cc/ASU2-USR8]. On January 3, 2017, the District Attorney dropped the charges against Ms. Blume but "reserve[ed] their right to reinstate it at a later date" after the trial court refused to delay her trial a fourth time. Ken Daley, *DA Cannizzaro Drops Impersonation Charge Against Ex-Public Defenders Investigator, For Now*, TIMES-PICAYUNE, (Jan. 3, 2017), http://www.nola.com/crime/index.ssf/2017/01/da_cannizzaro_drops_impersonat.html [https://perma.cc/RU2X-EW75].

157. *See, e.g.*, Hamilton v. Ayers, 583 F.3d 1100, 1106, 1108 (9th Cir. 2009) (affirming denial of relief where juror's testimony at evidentiary hearing supported conclusions that defense investigators did not properly identify themselves, that juror did not understand the purpose of their visits, and that juror did not pay attention to what document she signed).

158. In my current role as a Clinical Teaching Fellow of the Berkeley Law Death Penalty Clinic, I have been involved in fact, mitigation, and jury investigations with different post-conviction defense teams in capital cases in Alabama, Arizona, and Texas. I previously worked as a Staff Attorney at the Equal Justice Initiative, where I participated in both capital and non-capital post-conviction investigations, primarily in Alabama. I also oversaw countless trial-level investigations as a public defender in the Bronx. In each of these roles, I have attended multiple conferences and have led trainings on fact, mitigation, and jury investigation.

159. As I know from my professional experience, *supra* note 158, members of the defense team are not always sophisticated professionals. In capital cases, they frequently include law students or other legal interns.

witness's home to determine if the witness knows any information that could provide the basis of a legal claim.¹⁶⁰ In many cases, the defense team speaks with a witness and determines that the witness has no information relevant to any possible legal claim. In these circumstances, the defense team leaves after the interview and typically does not return. No one ever asks the witnesses to sign an affidavit or testify at an evidentiary hearing. They do not have to come to court or endure cross-examination by the prosecution. Essentially, the defense team has spoken with the witness, deemed him irrelevant, and there is no reason to contact the witness ever again.

Only witnesses with critical information have a further role to play.¹⁶¹ After the state habeas court reviews a defendant's petition, it grants a hearing on any claims that, if true, would merit relief.¹⁶² Post-conviction counsel have the burden of proving those claims via an evidentiary hearing.¹⁶³ Only then would a witness be formally called to the courtroom to testify in support of the claim based on his interview.¹⁶⁴ Thus, the only circumstance where a witness is compelled to enter a courtroom is one where a court has already made a finding that the witness's testimony has the potential to be outcome altering, meaning it could result in relief for the defendant.¹⁶⁵ Following the witness's testimony, the state habeas court makes a determination concerning the witness's credibility and grants or denies relief, accordingly.¹⁶⁶

In contrast, restrictions that impose judicial or prosecutorial oversight on defense interviews may require witnesses to rearrange their schedules to come

160. Importantly, if the witness expresses that he does not wish to speak with the defense team, the members of the team leave. They typically do not return unless there is a change in circumstances that indicates the witness has changed his mind and now wishes to talk. *See supra* note 158.

161. In states that require a criminal defendant to attach supporting proof to his post-conviction pleadings, these jurors would also be asked to sign affidavits attesting to the veracity of the information that they shared with the post-conviction team. *See supra* note 158.

162. *See, e.g.*, ALA. R. CRIM. P. 32.9(a) ("Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf."); ARIZ. R. CRIM. P. 32.8(a) ("The defendant shall be entitled to a hearing to determine issues of material fact."); *see also Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985) (finding post-conviction petitioner is entitled to an evidentiary hearing when his petition is "meritorious on its face").

163. *See supra* notes 139, 162.

164. *See, e.g.*, *Dunaway v. State*, 198 So. 3d 567, 573–74, 584–85 (Ala. 2015) (referencing juror testimony at post-conviction evidentiary hearing).

165. Brief of National Association of Federal Defenders as Amicus Curiae in Support of Petitioner at 17, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 3563929, at *17 ("When a party advances a colorable claim of juror misconduct, the judge conducts an evidentiary hearing to assess the credibility of the evidence, permitting juror testimony to the extent appropriate, provided the evidence is admissible. . . . Juror misconduct only serves to impeach the verdict if it is prejudicial.>").

166. *See, e.g.*, ALA. R. CRIM. P. 32.9(d) (requiring habeas court conducting evidentiary hearing to "make specific findings of fact relating to each material issue of fact presented"); *McWhorter v. State*, 142 So. 3d 1195, 1210 (Ala. Crim. App. 2011) (describing appellate court's obligation to defer to credibility determinations made by state habeas court after evidentiary hearing); *State v. Sepulveda*, No. 2 CA-CR 2014-0024-PR, 2014 WL 2568754, at *2 (Ariz. Ct. App. June 9, 2014) (same).

down to a courthouse or prosecutor's office, typically during work hours.¹⁶⁷ The setting is formal: instead of the comfortable surroundings of the juror's own home, the interview takes place in a courtroom or office. A court reporter or recording device is present. The witnesses may even be sworn in. Instead of open-ended questions asked in a conversational tone, witnesses undergo an adversarial examination, including cross-examination by the prosecutor. If inside the courtroom, the examination will likely occur from the witness chair, after a formal swearing in. The judge may also elect to ask the witness questions. Importantly, unlike with an interview in the witness's home, where a witness can put an end to the interview at will,¹⁶⁸ the witness has no power to terminate a formal courtroom proceeding.¹⁶⁹

Jurors are not unusually vulnerable witnesses in need of special protections. Arguments that suggest individuals would be less likely to perform jury service willingly if they knew they might later be interviewed about the case miss the mark.¹⁷⁰ Even if true, a similar definition of "vulnerability" applies to many other

167. The observations in this paragraph are consistent with my experience as a post-conviction attorney. *See supra* note 158; *see also* ARIZ. REV. STAT. ANN. § 13-4433 (2017) (prosecutor may impose time and manner restrictions on interview with victim); FLA. R. CRIM. P. 3.575 (permitting court to enter an order determining time and place for the interviews, which are conducted in the presence of the court and both parties); *State v. Cabrera*, 984 A.2d 149, 150, 165 (Del. 2008) (affirming trial court's order that interview must take place in court with both parties and the judge present and that parties may direct and cross-examine jurors); *Marshall v. State*, 976 So. 2d 1071, 1080 (Fla. 2007) (holding that, in capital cases, court may require that attorney conduct formal interviewing in courtroom with adversary present); *State ex rel. Butler v. Howard*, No. WD 48096, 1994 WL 4300, at *4 (Mo. Ct. App. Jan. 11, 1994) (affirming habeas court has discretion as to time and place of juror interviews and may conduct questioning of jurors).

168. All states recognize the right of any witness to refuse an interview with post-conviction defense counsel. *See, e.g.*, Paul Schoeman, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 560 (1995) ("[D]efense lawyers can be expected to face significant practical resistance when they attempt to interview jurors, who are under no obligation and may have no inclination to talk to them."); Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425, 485-86 (1999) ("Jurors have no obligation to speak to the news media or anyone else about their service.").

169. Courts rely on their subpoena powers to bring witnesses in for questioning. *See, e.g.*, *Cabrera*, 984 A.2d at 165 (referencing trial court's order that jurors and alternates "available by subpoena" appear in court for questioning by the parties); *Marshall*, 976 So. 2d at 1074 (noting circuit court questioned six jurors whom it subpoenaed to appear). If a witness disobeys a subpoena, the court may hold the witness in contempt or issue a warrant for her arrest. *See, e.g.*, DEL. SUPER. CT. CIV. R. 45(e) ("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court."); DEL. CODE ANN. tit. 11, § 4351 (2017) (applying DEL. SUPER. CT. CIV. R. 45 to criminal matters); FLA. R. CRIM. P. 3.361(d) ("A witness who refuses to obey a subpoena or who departs without being excused properly may be held in contempt.").

170. There is simply no evidence this is the case, nor is there evidence that individuals in states that allow unrestricted juror interviews are more reluctant to serve as jurors. Instead, reluctance to serve as jurors is most commonly attributed to personal hardship. *See* David M. Sams et al., *Avoiding Jury Duty, Psychological and Legal Perspectives*, JURY EXPERT (Jan. 31, 2013) <http://www.thejuryexpert.com/2013/01/avoiding-jury-duty-psychological-and-legal-perspectives> [<https://perma.cc/99WU-EW8R>] (noting also that "[r]esearch on the reasoning behind jury duty avoidance points to four main causes: economic hardship, jury service being uncomfortable, distrust in

witnesses involved in criminal cases. Eye witnesses often have no interest or connection to the outcome of a case, but may testify as part of their civic duty. Unlike jurors, whose later interviews may overturn a verdict but carry no personal risk, eye witnesses run the risk of perjury charges if they recant their trial testimony when speaking with post-conviction counsel.¹⁷¹ Similarly, mitigation witnesses in capital cases possess their own vulnerabilities. Because the lives of capital defendants are fraught with trauma, mitigation witnesses are frequently parents, grandparents, siblings, and spouses who have abused or neglected the defendant.¹⁷² Like jurors, eye witnesses and mitigation witnesses frequently have no direct interest in speaking to post-conviction defense counsel and may suffer negative consequences from doing so, but the law makes no effort to single them out for heightened protection.

Importantly, special restrictions on post-conviction defense interviews are not needed to protect vulnerable witnesses, because these witnesses already receive adequate legal protection. State laws criminalize the harassment of any person, and state bar ethics codes proscribe certain conduct, including harassment, for lawyers communicating with witnesses.¹⁷³ Finally, in the many states that have no such restrictions,¹⁷⁴ there is no evidence jurors are less willing or unwilling to serve.¹⁷⁵

2. Free Juror Deliberations

The two additional justifications for restricting juror interviews have little to do with the interviews themselves and instead look ahead to curbing subsequent evidentiary hearings, which result when such interviews uncover information that serves as the basis for a potentially meritorious legal claim. The

government, and lack of punishment for non-response to summons. Other studies attribute this lack of response to jury summons to a decline in civic participation and activism in the young adult population.”).

171. See *infra* note 233 (discussing examples of recanting witnesses threatened with prosecution for perjury).

172. See Wayland, *supra* note 50, at 931 (“For many [capital defendants], the entire developmental course of childhood and/or adolescence was shaped by a series of profoundly traumatic events, usually within the context of profoundly destructive relationships, often at the hands of caregivers or others who should have provided safety, nurturance, and protection.”).

173. See MODEL PENAL CODE § 250.4 (AM. LAW INST. 2016) (Harassment); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-30 (AM. BAR ASS’N 1980) (“Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.”); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-108(D) (“After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.”); see also, e.g., COLO. R. PROF’L CONDUCT 3.5(c)(2) (forbidding attorneys from contacting jurors if “the juror has made known to the lawyer a desire not to communicate”); MASS. R. PROF’L CONDUCT 3.5(c)(2) (prohibiting post-verdict communications with juror when he indicates desire not to communicate with lawyer).

174. See Appendix for states that do place restrictions on post-conviction defense interviews.

175. See *infra* note 170.

first justification of this type is the contention that jurors will self-censor if they learn their deliberations could one day be the subject of public scrutiny at an evidentiary hearing.¹⁷⁶ A juror worried about future scrutiny may be less likely to engage in the kind of robust debate that courts have traditionally viewed as essential for a reliable verdict.¹⁷⁷ By preventing or limiting juror interviews, courts reduce the likelihood of a public evidentiary hearing where attorneys question jurors both about their own words and actions during deliberations and about the words and actions of their fellow jurors.¹⁷⁸

While opponents of unrestricted post-conviction juror interviews contend that a fear of later scrutiny could endanger free discussion during deliberations, there are no data to support this contention.¹⁷⁹ These opponents overlook the fact that today's jurors are well aware their verdict may be the subject of criticism in the press—an arena far more public than the courtroom. The jurors who acquitted O.J. Simpson or Casey Anthony or, more recently, “Juror 17,” who voted to save the life of Jodi Arias, all became the subjects of intensive media attention.¹⁸⁰ Capital jurors know that these cases tend to be high-profile, drawing

176. *Tanner v. United States*, 483 U.S. 107, 124 (1987) (“[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.”) (quotation marks omitted); *Clark v. United States*, 289 U.S. 1, 13 (1933) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”); *State v. Cabrera*, 984 A.2d 149, 171 (Del. Super. Ct. 2008) (“The freedom and independence of jury deliberations are best protected by court supervision and direction of post-verdict interviews.”) (citations omitted).

177. *See supra* note 184.

178. Without the ability to conduct juror interviews, post-conviction counsel will have no knowledge that juror misconduct occurred. Because post-conviction counsel will be unable to include a claim of juror misconduct in the state habeas petition, the habeas court will not grant an evidentiary hearing on the claim. *See supra* notes 161–166 and accompanying text.

179. Nicole B. Cásarez argues that the data that do exist on this point suggest post-verdict scrutiny has no impact on deliberations. *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT L.J. 499, 560 (2003). Professor Cásarez cites a 1996 Connecticut study that examined the question over a sixth-month period before concluding that “post-verdict jury interviewing ‘does not cast a shadow on the jury deliberation process in Connecticut.’” Professor Cásarez notes that her own review of close to seven hundred newspaper articles interviewing jurors in Houston compelled her to reach the same conclusion. *Id.* at 560–66.

180. *See, e.g.,* Mortimer B. Zuckerman, *The Bitter Legacy of O.J.*, U.S. NEWS & WORLD REPORT, Oct. 16, 1995, at 100 (“Now many whites have joined blacks and lost confidence in the ability of jurors of the opposite color to reach an honest verdict based purely on the evidence before them.”); *Not Guilty? The Simpson Verdict Is a Victory for Unreasonable Doubt*, PITTSBURGH POST-GAZETTE, Oct. 4, 1995, at A14 (“At least the O.J. Simpson case was consistent. Conceived in tragedy, it was often farcical through its many numbing months. And so it ended—in a combination of farce and tragedy, with a hugely impatient jury accepting the defense’s invitation to be illogical.”); *see also* Arizona Republic, *Angry Jodi Arias Jurors Say Holdout Had an ‘Agenda,’* USA TODAY (Mar. 5, 2015), <https://www.usatoday.com/story/news/nation/2015/03/05/angry-jodi-arias-jurors-say-holdout-agenda/24452177> [<https://perma.cc/JMW7-982R>] (“The jurors alternately expressed remorse that they were not able to reach a verdict and anger at the woman who held out against the death penalty, saying they suspected she had an ‘agenda.’”); Doyle Murphy, *Jodi Arias ‘Juror 17’ Fires Back at Critics After Mistrial*, N.Y. DAILY NEWS (Mar. 16, 2015), <http://www.nydailynews.com/news/national/jodi-arias-juror-17-fires-back-critics-mistrial-article-1.2151336> [<https://perma.cc/S2AJ-2XV4>] (quoting Juror 17:

community interest and media attention.¹⁸¹ Some jurors even court the press themselves or publish books about their experiences in deliberations.¹⁸² Jurors will likely remain objects of public scrutiny because courts have consistently held that the First Amendment protects media access to the jurors, routinely finding no contact orders and oversight requirements unconstitutional when applied to the press.¹⁸³ The possibility that a member of the defense team may one day attempt to interview a juror at his home is no more likely to chill speech in deliberations than the possibility that a national television network may broadcast the details of their deliberations. In the two decades since the O.J. Simpson trial, there is little evidence that jurors self-censor in deliberations.¹⁸⁴

“I feel like I’m being judged. . . . I didn’t ask for this. I just showed up for jury duty”); Elizabeth Erwin, *How Jodi Arias Jury Dissent Could Affect Future Trials*, YOUTUBE (Mar. 6, 2015), <https://www.youtube.com/watch?v=DH5Ggb5gXEE> (explaining that when the Arias jurors spoke to media and revealed that one female juror had spared Arias’s life, their comments “ignited a firestorm of criticism on social media toward this juror, many from those who religiously followed the trial” resulting in death threats and police protection for Juror 17).

181. Judges and attorneys also frequently inform jurors of this fact in voir dire. *See, e.g.*, *United States v. Eisen*, 974 F.2d 246, 267 (2d Cir. 1992) (noting judge “conducted a general inquiry of the jury, asking the jury to avoid all news media over the weekend”); Thomas R. Romano, *Modern Media and its Effect on High-Profile Cases*, 32 SYRACUSE J. SCI. & TECH. L. 136, 165 (2016) (“In high-profile cases, the judge will usually instruct the jury to disregard any statements made about the case, which they may have heard through the media or any other outside sources.”).

182. *See* Appellant’s Amended Opening Brief at 10, *Peña-Rodriguez v. People*, 350 P.3d 287 (Colo. 2015) (No. 13SC9), 2013 WL 12140027, at *10 (“There is no rule of juror secrecy and jurors are free to publish what occurs during deliberations on Facebook, in a blog, on twitter, or simply publish their story on-line or in the traditional magazine, book or television story. To think that jurors are obtuse and do not realize their deliberations can be exposed by other jurors is not realistic.”). Some examples of books written by jurors on high-profile cases include: GREG BERATLIS, *WE THE JURY: DECIDING THE SCOTT PETERSON CASE (2007)* (seven jurors discuss jury service on the Scott Peterson murder trial); AMANDA COOLEY ET AL., *MADAM FOREMAN: A RUSH TO JUDGMENT?* (1996) (three former jurors discuss jury service on O.J. Simpson trial); DENNIS DEMARTIN, *BELIEVING IN THE TRUTH* (2012) (former juror discusses jury service on vehicular manslaughter trial of polo mogul John Goodman); MICHAEL KNOX & MIKE WALLER, *THE PRIVATE DIARY OF AN O.J. JUROR* (1995) (account of an ousted juror of the O.J. Simpson trial). More recently, on February 14, 2017, nine jurors who served on the Etan Patz jury in New York City held a press conference to discuss their deliberations in the famed murder case. John Riley, *Etan Patz Jury: ‘Deliberations were Difficult’ but Divisions Overcome*, NEWSDAY (Feb. 14, 2017), <http://www.newsday.com/news/new-york/patz-jury-deliberations-were-difficult-but-divisions-overcome-1.13125184> [<https://perma.cc/XF4P-XR38>].

183. *See* Lawsky, *supra* note 22, at 1960–62 (discussing and citing cases holding that the broad restrictions placed on post-conviction juror interviews would violate the First Amendment if applied to the press); *see also* *Hall v. State*, 253 P.3d 716, 721 (Idaho 2011) (“[A]ttorneys acting as advocates in a judicial proceeding do not enjoy the same First Amendment protections as the general public, both due to their membership in a specialized profession and their status as officers of the court.”).

184. *See* Lawsky, *supra* note 22, at 1967 (stating there is no evidence that permitting attorney interviews of juror changes the jurors’ behavior and arguing that unrestricted media interviews are more likely to have a chilling effect on jurors than attorney interviews); *see also, e.g.*, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017) (describing juror’s racist beliefs during deliberations that defendant’s Mexican heritage made him more likely to be guilty). In addition to the possibility of media interviews, nearly all states and the federal government have exceptions to the juror secrecy rule. *See* discussion of FED. R. EVID. 606(b) and its state analogues, *infra* notes 191–193; *see also* Brief for Amici Curiae Professors of Law in Support of Petitioner, *supra* note 119, at 20 (arguing that as a result of these exceptions “jurors neither expect nor enjoy complete privacy”).

3. *Finality of Verdicts and Public Confidence in the Justice System*

The second justification of this type is the desire to preserve the finality of verdicts, which is unabashedly about reducing the number of potentially meritorious claims that could result in a new trial. The U.S. Supreme Court has bluntly stated that more information about deliberations would undoubtedly lead to more reversals of criminal convictions: “There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior.”¹⁸⁵ The Court warned that these additional reversals would, in aggregate, undermine public confidence in juries: “It is not at all clear . . . that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.”¹⁸⁶ Put another way, because the juror system, while inevitably flawed, is better than any known alternative, courts should prevent the public from peeking behind the curtain.¹⁸⁷

While it is true that restrictions on post-conviction interviews with jurors will preserve the finality of verdicts by reducing misconduct claims, a danger remains that states will imprison or execute capital defendants after trials that violate the U.S. Constitution.¹⁸⁸ While the goal of preserving verdicts is a worthy one if Americans are to have any confidence in the criminal justice system, the trade-off, as the *Tanner* Court acknowledged, is allowing some unfairly imposed verdicts to stand.¹⁸⁹ Seeking the right balance between finality and fairness does not require any front-end limitations on information gathering. Federal and state governments have already struck a balance between these competing goals by fashioning rules of evidence that limit the aspects of a jury’s deliberation that

185. *Tanner v. United States*, 483 U.S. 107, 120 (1987).

186. *Id.* (holding that the district court did not err in denying an evidentiary hearing for jurors to testify about juror drug and alcohol use during deliberations because such evidence was not admissible under FRE 606).

187. Echoing Justice Brennan’s dissent in *McCleskey v. Kemp*, in which he lamented that the majority opinion evinced a fear of “too much justice.” 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). Justice Marshall’s dissent in *Tanner* predicted that under the law established by the majority opinion, “the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.” *Tanner*, 483 U.S. at 142.

188. See Brief for Amici Curiae Professors of Law in Support of Petitioner, *supra* note 119, at 5 (arguing that “[p]ermitt[ing] verdicts tainted by racial or ethnic bias to remain in place in the interest of ‘finality’ does profound harm to the criminal justice system”).

189. *Cf. Tanner*, 483 U.S. at 120 (“There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.”).

courts may consider. These evidentiary rules narrow the scope of impermissible juror misconduct.¹⁹⁰

For example, Federal Rule of Evidence 606(b), of which nearly every state has an analogue,¹⁹¹ sets a general rule that evidence concerning the details of a jury's deliberations is inadmissible,¹⁹² but carves out three key exceptions for particularly egregious errors that merit a court's consideration. A juror may provide written or oral testimony about whether the jury considered extrajudicial information, fell prey to an outside influence, or made a mistake on the verdict form.¹⁹³ Instead of a front-end restriction on information gathering, these evidentiary rules place a back-end restriction on what a court may evaluate as constitutionally significant juror misconduct.¹⁹⁴

A second type of back-end control for preserving verdicts is the requirement that jury misconduct be prejudicial to the defendant to merit a reversal of his conviction or sentence. Juror misconduct is not per se reversible error;¹⁹⁵ while prejudice may be presumed in some cases, this presumption is

190. Indeed, the subject of *Tanner* was not an order restricting the interviews of jurors, but Federal Rule of Evidence 606(b). See *infra* notes 192–193 for the text of FRE 606(b).

191. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 865, 876 (2017) (noting that forty-two jurisdictions follow Federal Rule of Evidence 606(b), while nine more follow the more permissive “Iowa Rule,” which allows jurors to testify to anything other than their “subjective intentions and thought processes in reaching a verdict”).

192. Federal Rule of Evidence 606(b)(1) states: “During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.” FED. R. EVID. 606(b)(1).

193. Federal Rule of Evidence 606(b)(2) states: “A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.” FED. R. EVID. 606(b)(2).

194. In upholding attacks on the constitutionality of Rule 606(b), the U.S. Supreme Court has cited, without supporting empirical data, the same three questionable policy justifications that lower courts routinely cite to uphold restrictions on post-verdict juror interviews: fears of harassment, chilling deliberations, and upending finality. See *Warger v. Shauers*, 135 S. Ct. 521, 528 (2014) (citing encouragement of full and open debate during deliberations and discouragement of juror harassment as reasons Congress adopted Rule 606(b)); *Tanner*, 483 U.S. at 119–20 (finding prevention of juror harassment and promotion of free and fair debates supported common law rule against introduction of juror testimony to impeach verdict); *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915) (same). Recently, in *Peña-Rodriguez*, the Court held that Rule 606(b) must “give way” in the face of clear evidence. 137 S. Ct. at 869. Once again, these three policy justifications feature prominently in the majority opinion, *id.* at 866, and in Justice Alito’s dissent, *id.* at 876–77. And the court cites no data, examples, or even anecdotes to support these justifications.

195. See Brief of National Association of Federal Defenders as Amicus Curiae in Support of Petitioner, *supra* note 165, at 17 (“Juror misconduct only serves to impeach the verdict if it is prejudicial. Accordingly, if the judge finds there has been juror misconduct, the judge next assesses whether the misconduct was prejudicial.”); see also *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.”); 24 AM. JUR. PROOF OF FACTS 2D 633, § 1 (1980) (“To justify a grant of a new trial on the basis of juror misconduct, there generally must be some showing of prejudice to the losing party as the result of such misconduct.”).

rebuttable.¹⁹⁶ More commonly, states place the burden of proving prejudice on criminal defendants.¹⁹⁷ The result is that jury misconduct is responsible for a very small percentage of reversals.¹⁹⁸

Since state legislatures already preserve finality by limiting the categories of misconduct that could overturn a jury's verdict, and state courts do the same by limiting reversals to prejudicial misconduct, additional restrictions on juror interviews serve only to hide the existence of jury misconduct.¹⁹⁹ Restrictions that condition permission to interview on a showing of good cause result in an unfair catch-22: post-conviction counsel may not investigate whether juror misconduct occurred unless they already know juror misconduct occurred.²⁰⁰ These limitations threaten confidence in the fairness of the justice system, at a time when public confidence in the criminal justice system may be at an all-time

196. See, e.g., *State v. Hall*, 65 P.3d 90, 95 (Ariz. 2003) (“Once the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict.”); *People v. Vigil*, 191 Cal. App. 4th 1474, 1487 (Cal. Ct. App. 2011) (“The presumption of prejudice may be rebutted by an affirmative evidentiary showing that prejudice does not exist or ‘by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party.’”) (citations omitted).

197. See, e.g., *Williams v. Lawton*, 207 P.3d 1027, 1050 (Kan. 2009) (holding in juror misconduct case that “[a] party claiming prejudice has the burden to prove prejudice”); *State v. Bangulescu*, 832 A.2d 1187, 1203 (Conn. Ct. App. 2003) (“[W]hen, as in this case, the trial court is in no way responsible for the alleged juror misconduct, the defendant bears the burden of proving that the misconduct actually occurred and resulted in actual prejudice.”); *State v. Aldret*, 509 S.E.2d 811, 814 (S.C. 1999) (“Our decision is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial.”); *Dillard v. State*, 855 S.W.2d 909, 911 (Ark. 1993) (“The burden was on the appellant to prove that a reasonable possibility of prejudice resulted from juror misconduct and prejudice is not presumed in such situations.”); *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988) (“Generally, a defendant must prove he was identifiably prejudiced by the juror misconduct.”).

198. Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 213, 218–19 (2004) (finding, after an examination of 497 reversals from 1973 to 1995, that judge or juror bias accounted for only 3 percent of the reversals in capital cases at state post-conviction and federal habeas corpus stages).

199. See Goldstein, *supra* note 70 and accompanying text (discussing how the secrecy of jury deliberations makes some forms of jury misconduct unknowable without the ability to interview the jurors).

200. Scholars have noted the obvious flaw in these requirements: “Rules requiring attorneys to show good cause in order to interview jurors do not adequately account for the fact that often such good cause cannot be shown without interviewing jurors in the first place.” Lawsky, *supra* note 22, at 1970. Lawsky argues that “[p]recluding an attorney from interviewing jurors in this way may often limit the possibility of impeaching verdicts, which in turn inhibits a defendant’s constitutional right to a fair trial with due process.” *Id.* at 1963; see also Crump, *supra* note 22, at 528 (“In good cause jurisdictions the rules do not indicate how a losing litigant can show good cause without first conducting the interview he is petitioning to obtain.”); see also *supra* note 119 (citing sources that recognize that because juror misconduct often occurs in private, the jurors themselves may be the only people who have knowledge of it).

low.²⁰¹ Wide-spread exonerations²⁰² and critiques of mass incarceration as a form of racial apartheid tarnish public perception.²⁰³ Transparency, not secrecy, is what is likely to restore public confidence in the criminal justice system.²⁰⁴ What makes an institution great is not the absence of flaws; it is the institution's ability to detect and correct these flaws. To that end, a strong criminal justice system worthy of public confidence prioritizes truth.

An example of this principle in action is the U.S. Supreme Court's 2017 decision in *Peña-Rodriguez v. Colorado*,²⁰⁵ a case involving a Colorado juror who, during deliberations, espoused racist beliefs as a basis for convicting a defendant of sexual assault. Because Colorado provides no restrictions on post-verdict jury interviews,²⁰⁶ defense counsel were able to speak with several jurors.

201. See Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc., Nat'l Ass'n of Criminal Def. Lawyers & ACLU in Support of Petitioner at 24, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 3563930, at *24 ("Less than 45 percent of all Americans believe that racial groups are treated equally in the criminal justice system. Those numbers plummet further among racial minorities, into the low teens for African Americans.") (citations omitted).

202. NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/8NTZ-7UMN>] (having documented 2,066 exonerations that have occurred in the United States since 1989).

203. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (arguing that the current U.S. criminal justice system functions as a contemporary system of racial control); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (Spiegel & Grau 2015) (2014) (highlighting racism and inequity in criminal justice system through his account as a capital post-conviction lawyer); see also *United States v. Valdovinos*, 760 F.3d 322, 332 (4th Cir. 2014) ("Studies have shown that, controlling for legally relevant differences, black defendants are more likely to be confined before trial, more likely to be sentenced to prison when non-prison sentences are available, and more likely to receive longer sentences than their white counterparts.") (citing MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 70–76 (2011); Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in *THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION* 166 (Sandra M. Bucerius & Michael Tonry eds., 2014)). The *Valdovinos* court also cited a study by the Vera Institute of Justice determining "that racial disparities manifested in nearly every identifiable point of 'significant prosecutorial discretion.'" *Id.* (citing BESIKA LUKA KUTATELADZE & NANCY R. ANDILORO, *VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY* 217 (2014)).

204. Jonathan Jackson & Jacinta M. Gau, *Carving Up Concepts? Differentiating Between Trust and Legitimacy in Public Attitudes Towards Legal Authority*, in *INTERDISCIPLINARY PERSPECTIVES ON TRUST: TOWARDS THEORETICAL AND METHODOLOGICAL INTEGRATION* 49, 50 (Ellie Shockley et al. eds., 2016) ("When institutions of criminal justice demonstrate to citizens that they are just and proper, this encourages citizens to comply with the law, cooperate with legal actors, and accept the right of the state to monopolize the use of force in society.").

205. 137 S. Ct. 855 (2017).

206. Colorado has no explicit state statutes or court opinions that restrict post-verdict interviews with jurors. *Id.* at 861 (discussing Colorado jury instruction that informs jurors of *their right* to refuse to speak with attorneys after the trial). However, the trial judge in *Peña-Rodriguez* interpreted Rule 24(a)(4) of the Colorado Rules of Criminal Procedure as permitting him to restrict access to juror contact information. *People v. Peña-Rodriguez*, No. 11CA0034, 2012 WL 5457362, at *13 (Colo. Ct. App. Nov. 8, 2012), *aff'd*, 350 P.3d 287 (Colo. 2015), *rev'd*, 137 S. Ct. at 855. Rule 24(a)(4) provides that juror contact information "shall not be maintained in files open to the public" and that "[t]he trial judge shall assure that parties and counsel have access to appropriate and necessary locating information." COLO. CRIM. P. R. 24(a)(4). The *Peña-Rodriguez* trial judge then required affidavits demonstrating juror misconduct occurred before releasing contact information. *Peña-Rodriguez*, 2012 WL 5457362, at *14. On appeal, the reviewing court assumed that the trial judge's actions constituted an abuse of discretion,

These jurors revealed that another juror, H.C., stated he believed that “[the defendant] did it because he’s Mexican and Mexican men take whatever they want.”²⁰⁷ Although the defense attorneys argued that that Juror H.C.’s behavior constituted prejudicial jury misconduct, the Colorado Supreme Court upheld the jury’s verdict, finding testimony about H.C.’s statements inadmissible under Colorado’s equivalent of Federal Rule of Evidence 606(b).²⁰⁸ The U.S. Supreme Court reversed the Colorado Supreme Court, holding that statements demonstrating that a juror “relied on racial stereotypes or animus to convict a criminal defendant” are admissible under the Sixth Amendment.²⁰⁹

Peña-Rodriguez provided the public with evidence of what many likely already suspected: that racist beliefs continue to factor into jury deliberations.²¹⁰ This evidence was likely only discovered because of Colorado’s permissive juror investigation rules, which enabled trial counsel to speak with jurors following the verdict.²¹¹ Rather than undermining the jury system, discovery of this evidence strengthened it, by demonstrating that legal mechanisms exist to discover and correct those flaws.²¹² The majority of the Court recognized this point:

but deemed the error harmless because the relevant jurors ultimately testified at a subsequent evidentiary hearing. *Id.* at *15.

207. Petition for a Writ of Certiorari, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2015 WL 7008801, at *4.

208. *Peña-Rodriguez v. People*, 350 P.3d 287, 290–91, 293 (Colo. 2015).

209. *Peña-Rodriguez*, 137 S. Ct. at 869. Part of the Court’s reasoning was that states could take additional measures to protect jurors by placing limits on post-conviction jury investigation. *Id.* at 869–70. However, if good cause restrictions existed in Colorado, it is likely that evidence of Juror H.C.’s racism never would have come to light. Indeed, as it was, the trial court denied defense counsel’s post-verdict request for the contact information of additional jurors after two jurors had already disclosed H.C.’s racist comments during deliberations. *See* Amended Opening Brief at 4–5, *Peña-Rodriguez v. People*, 350 P.3d 287 (Colo. 2015) (No. 13SC9), 2013 WL 12140027, at *4–5. On the other hand, in his dissent, Justice Alito contends that the majority’s ruling opens the door to legal challenges to limits on post-conviction jury investigation: “Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today’s decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.” *Peña-Rodriguez*, 137 S. Ct. at 884 (Alito, J., dissenting).

210. *See* Brief of the Nat’l Ass’n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner at 7, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 94212, at *7 (“Racial and ethnic bias in the jury room remains a real threat, one that often lurks undetected beneath the surface of a trial.”) (citing Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race & Juries? A Review of Social Science Theory & Research*, 78 CHI.-KENT L. REV. 997, 1010 (2003) (“[S]ubstantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions.”)).

211. *See Peña-Rodriguez*, 137 S. Ct. at 861 (discussing Colorado jury instruction that informs jurors of their right to choose whether to speak with attorneys after the trial).

212. *See* Brief for Amici Curiae Professors of Law in Support of Petitioner, *supra* note 119, at 21 (“When a decision is based on bigotry, removing the deliberations from the court’s purview does nothing to preserve the integrity of the jury. Both defendants and society may become aware of express juror prejudice through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias.”). Even if the Court had failed to rule as it did, the act of bringing to light evidence of the juror’s racial bias still permitted corrective action. The legislature had both the authority

An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.²¹³

By reversing Mr. Peña-Rodriguez's faulty conviction, the Supreme Court repaired the jury's error and restored confidence in the notion that racism need not be a permanent characteristic of the criminal justice system.

C. Policy Justifications for Restrictions on Victim Interviews

As is the case with restrictions on juror interviews, the primary policy justification for imposing restrictions on defense contact with victims is preventing harassment.²¹⁴ In Arizona, victims' rights proponents argued that one of the protections victims required was freedom from overzealous defense counsel.²¹⁵ In Oregon, proponents of section 135.970 stated the law sought alternatively to protect victims from contact with criminal defendants or their representatives.²¹⁶ Concerns about harassment ranged from the fear that defense counsel would attempt to encourage victims to abandon support for a prosecution

and the opportunity to amend state evidentiary rules to admit evidence of a juror's racial bias in deliberations. *See Garcia v. People*, 213 P.2d 387, 389 (Colo. 1949) (noting the "general power of the legislature to prescribe rules of evidence").

213. *Peña-Rodriguez*, 137 S. Ct. at 868. Recently, in a second example of the Court's adherence to this principle, the Court stayed an execution and allowed a capital defendant to reopen his federal habeas corpus proceedings where an investigation conducted during state postconviction proceedings revealed that a juror harbored racist views against the defendant. *Tharpe v. Sellers*, 138 S. Ct. 53 (2017) (staying execution); *Tharpe v. Sellers*, No. 17-6075, 2018 WL 311568 (U.S. Jan. 8, 2018) (per curiam) (granting certiorari, vacating judgement, and remanding to federal court to determine if Tharpe was entitled to a certificate of appealability on the issue). Following an interview with postconviction investigators, the juror had signed an affidavit in which he employed a racial slur against the defendant and swore that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." No. 17-6075, 2018 WL 311568 at *1 (quoting juror's affidavit). Just as in *Pena-Rodriguez*, the juror's racial attitudes were only discovered because Georgia did not place restrictions on post-verdict jury investigations.

214. *See, e.g., State ex rel. Romley v. Superior Court*, 891 P.2d 246, 249 (Ariz. Ct. App. 1995) (under Arizona Victims' Rights Implementation Act, prosecutor "has standing at the request of the victim to protect the victim from harassment"); *Knapp v. Martone*, 823 P.2d 685, 687 (Ariz. 1992) (noting Arizona Victims' Bill of Rights was designed to decrease victim harassment).

215. Stellisa Scott, *Beyond the Victims' Bill of Rights: The Shield Becomes a Sword*, 36 ARIZ. L. REV. 249, 257 (1994) (referring to Victims' Rights Implementation Act as manifestation of "the state's interest in protecting victims from abuse by overzealous defense attorneys"); *see also* Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 ARIZ. ST. L.J. 531, 534 (2002) (VBR includes "rights that protect victims from harassment and abuse throughout the criminal justice process"); ARIZ. REV. STAT. ANN. § 13-4433(B) (2017) ("The defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office.").

216. *Johnson v. Dep't of Pub. Safety Standards & Training*, 293 P.3d 228, 232 (Or. Ct. App. 2012).

or that they would retraumatize victims with questions that challenged the victims' experiences or forced them to relive the events of the crime.²¹⁷

Arizona designates the prosecutor as the victim's protector, mandating defense outreach to the victim occur via the prosecutor's office and creating a default scenario where interviews occur, if at all, in the offices of the prosecutor with the prosecutor present.²¹⁸ Arizona goes so far as to grant prosecutors the discretion to determine whether to communicate defense requests to victims at all.²¹⁹

On the other hand, Oregon places the role of safeguarding victims on the shoulders of both parties, but in an asymmetrical way.²²⁰ Defense attorneys alone must inform victims of their rights before interviewing them.²²¹ Not only do prosecutors lack any such obligation, but they also may attend defense interviews of victims, if the victim so requests.²²²

Studies have shown that many aspects of participation in the criminal justice system, including interaction with police and prosecutors, run the risk of retraumatizing victims.²²³ Even interviews conducted with the best of intentions may trigger psychological stress in trauma victims.²²⁴ Both legal and strategic incentives exist for post-conviction attorneys to treat victims with respect. First, just like other witnesses, victims already receive adequate legal protection against harassment from state penal laws and state bar ethics codes.²²⁵ Second,

217. Respondent's Answering Brief at 16, *Clark v. Nooth*, 395 P.3d 32 (Or. Ct. App. 2017) (A155558), 2014 WL 10413516, at *16 ("There is no dispute that the legislature adopted ORS 138.625 to protect crime victims from being retraumatized by a post-conviction petitioner."); Harrison, *supra* note 215, at 543–44 (noting concern that defense interviews "hamper the state's interest in prosecuting wrongdoers who happen to be 'fortunate' enough, from their perspective, that they have victimized people who are either easily misled or intimidated into recanting their stories"); Scott, *supra* note 215, at 254–55 ("In conferring the right to refuse a defense interview, the Victims' Bill of Rights seeks to assure that a victim who has been traumatized by a violent crime is not further traumatized by contact with defense counsel.").

218. ARIZ. REV. STAT. ANN. §§ 13-4433(B)–(E).

219. ARIZ. REV. STAT. ANN. § 13-4433(C).

220. *See, e.g.*, OR. REV. STAT. §§ 135.970(2), 138.625(5) (2017) (applying requirement that interview inform victim of right to refuse only to defense counsel).

221. *Id.*

222. *Id.*

223. *See, e.g.*, Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182 (2010) (reviewing studies that show that victims of crime may experience trauma through their involvement in the criminal justice system, including during interviews with law enforcement, testimony in court, and conversations with prosecutors).

224. *See, e.g.*, Katrin Schock, Rita Rosner & Christine Knaevelsrud, *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, EUR. J. PSYCHOTRAUMATOLOGY 1 (2015) <http://onlinelibrary.wiley.com/doi/10.1002/jts.20505/epdf> [<https://perma.cc/L8DX-75WD>] (studying the psychological effects of asylum interviews on forty asylum seekers and concluding that these interviews "might decrease posttraumatic avoidance and trigger posttraumatic intrusions").

225. *See, e.g.*, MODEL PENAL CODE § 250.4 (AM. LAW INST. 2016) (Harassment); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.2 (3d ed. 1993) ("Defense counsel should not knowingly use illegal means to obtain evidence or information or employ, instruct, or encourage others to do so.").

defense expressions of compassion for victims are more likely to be reciprocated in the form of cooperation and occasionally support for settlement.²²⁶

Defense attorneys have additional incentives to treat victims with care in capital cases. In all non-homicide cases, the victim is also the complainant and thus may have the power to drop the case against the defendant.²²⁷ In death penalty cases, the victims are the surviving family members of the decedent. Capital case victims typically do not give fact testimony, and the State does not require their cooperation to prosecute the defendant.²²⁸ Consequently, there is little risk that capital victims could be pressured to drop charges by overzealous defense attorneys.²²⁹

Because post-conviction defense interviews are often conducted years or even decades after the crime, victims have had more time to process their loss and heal emotionally and thus may be more willing to support a life sentence for the defendant.²³⁰ While post-conviction counsel may wish to assess this support, they have little leverage with which to strong-arm agreement.²³¹

226. See Branham & Burr, *supra* note 68, at 1021–22 (“[T]he failure of the defense team to acknowledge and address in meaningful ways the suffering of the victim’s family, or simply to treat the family with kindness and respect, lessens the possibility that the proceedings will end with compassion for their client. . . . In short, the defense team’s expressions of compassion and kindness to the survivors are often reciprocated.”).

227. See, e.g., F. LEE BAILEY & KENNETH J. FISHMAN, *HANDLING MISDEMEANOR CASES* § 9:8 (2d ed. 2017) (withdrawal of charge) (explaining that complainant’s decisions to drop charges in a misdemeanor case may lead to favorable disposition); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 386 (2001) (discussing policies of prosecutors in domestic violence cases, which “range from strict no-drop policies, which deny victims the opportunity to freely withdraw a complaint once charges have been filed, to routinely dropping charges to satisfy victims’ wishes”).

228. Because the literal victim in a capital case is the decedent, most victims’ rights statutes define victim in the capital context to including the decedent’s surviving family members. See, e.g., ARIZ. REV. STAT. ANN. § 13-4401 (2017) (“‘Victim’ means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person’s spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person’s spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.”). Prosecutors have no obligation to follow the wishes of these family members. See Peter K. Daniel, *State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases*, 63 N.C. L. REV. 1136, 1138 (1985) (noting that while prosecutors have discretion on whether or not to seek the death penalty, “North Carolina may be the only state that has expressly permitted a prosecutor to consider the wishes of the victim’s family in a potential capital case”); Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 178 (2017) (observing that the federal Victims of Crime Act of 1984 “provides examples of prosecutors ignoring the wishes of victims who do not want to see capital punishment imposed in their names or in the names of their deceased loved ones”).

229. See *supra* note 228 and accompanying text.

230. See Branham & Burr, *supra* note 68, at 1030 (“Often family members are more receptive to communicating with the defense team when there is greater time and distance from the trial.”).

231. See *id.* at 1022 (arguing the most effective negotiation tactic that capital attorneys have with victims is “kindness”).

D. Policy Justifications for Restrictions on State Witness Interviews

Because the appointment of third party counsel for State witnesses is relatively rare, having occurred only in a few individual cases of which I am aware, the goals of these restrictions are less explicit. Prosecutors requesting these restrictions have cited a desire for witnesses to know their legal rights, options, and consequences.²³² While awareness of one's rights would be a positive for any testifying witness, prosecutors have only requested counsel for witnesses testifying for the State at trial, i.e., those whose testimony threatens the conviction, leading one to question whether their stated motives are genuine.²³³

The New Jersey Supreme Court has invalidated restrictions of this type on the grounds that they function as intimidation by conveying the implied threat of criminal prosecution to any witness who might change his testimony.²³⁴ By discouraging the recantation of false testimony, the Court found, these restrictions impeded the truth finding function of the criminal justice system:

In an adversarial criminal proceeding, "the search for truth" is not well served when the State attempts to fortify its case "by sealing the lips of witnesses." . . . The basic premise of our judicial system is "that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice."²³⁵

At best, appointment of counsel and warnings concerning perjury are premature at the interview stage.²³⁶ Prior to an interview, there is rarely advance notice that a witness intends to recant, let alone admit to facts that would expose him to a perjury charge,²³⁷ which typically requires the witness to have

232. See, e.g., State's Motion to Appoint Counsel, *supra* note 111 (prosecution's motion to appoint counsel for past State's witnesses who testified at Rose's trial in exchange for reduced sentences).

233. See, e.g., State v. Feaster, 877 A.2d 229, 232, 239–40 (N.J. 2005) (discussing prosecutor's "thinly veiled threat" that former State's witness could face perjury prosecution if he testified for the defendant in post-conviction proceedings); State's Motion to Appoint Counsel, *supra* note 111.

234. Feaster, 877 A.2d at 245 ("We hold that the State may not use threats or intimidating tactics that substantially interfere with a witness's decision to testify for a defendant. Such conduct, even if motivated by good faith, cannot be tolerated, particularly in a capital case.").

235. *Id.* at 239 (internal quotation marks and citations omitted).

236. Courts have affirmed cases in which state post-conviction judges advised recanting witnesses of their rights well after the interview stage, just prior to their testimony in an evidentiary hearing. See, e.g., Callier v. Warden, Nev. Women's Corr. Ctr., 901 P.2d 619, 628 n.3 (Nev. 1995) ("The district court had discretion to warn these witnesses of their right not to incriminate themselves."); see also United States v. Morrison, 535 F.2d 223, 227 (3d Cir. 1976) (finding, in trial context, prosecutor's repeated warnings "completely unnecessary" where trial court's warning prior to witness's testimony "would be adequate protection against an unknowing waiver of her right against self-incrimination"). At this point, the post-conviction team has already interviewed the witness and determined that the witness has something favorable to say in support of the defendant's claims. See *supra* Part I for discussion of the typical interview practices of post-conviction counsel, noting particularly, their informality with a typically unsworn witness.

237. My own experiences as post-conviction counsel, see *supra* note 158, have taught me that one rarely knows what a witness will say before interviewing him. Likely a consequence of this truth,

knowingly made a false statement under oath.²³⁸ State witnesses are often privy to information that has nothing to do with their own perjury. For example, they may have information concerning the State's misconduct—including the presentation of false evidence²³⁹ or the suppression of exculpatory evidence²⁴⁰—or the defendant's mitigation narrative.²⁴¹ Appointing an attorney for a State's witness at the interview phase creates the false impression that speaking with defense counsel is likely to result in harm to the witness and thus discourages cooperation.

State restrictions of post-conviction investigation are not only ill-fitting to goals of protection from harassment, preservation of verdicts, and protection of free discourse during deliberation, they are unnecessary in light of other existing laws that promote these goals. These restrictions do not merely fail to achieve their goals with respect to jurors, surviving victims, and State witnesses; they actively harm criminal defendants and cast a shadow on the fairness and reliability of the judicial process.

IV.

THE CONSTITUTIONAL IMPLICATIONS OF POST-CONVICTION INVESTIGATION RESTRICTIONS

Despite the negative consequences of these restrictions to criminal defendants, traditional legal attacks have typically failed. Courts have repeatedly upheld restrictions on juror, victim, and witness contact without lengthy constitutional analysis, instead justifying them with the policy arguments debunked above.²⁴² This is true even though many of the restrictions are not

the ABA Guidelines require the post-conviction team to interview prior State's witnesses in every case. See ABA GUIDELINES, *supra* note 31, r 1.1 cmt., at 935 (“Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness’s testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial.”).

238. See MODEL PENAL CODE § 241.1 (AM. LAW INST. 2016) (Perjury).

239. See *Napue v. Illinois* 360 U.S. 264, 265, 271 (1959) (reversing conviction where prosecutor sat silent while witness falsely testified he received no benefit for his testimony).

240. See *Giglio v. United States*, 405 U.S. 150, 151, 155 (1972) (reversing conviction where prosecutor failed to disclose promise made to key witness that in exchange for his testimony he would not be prosecuted).

241. See, e.g., *Holland v. Anderson*, 583 F.3d 267, 270 (5th Cir. 2009) (State’s witness at guilt phase testified to mitigating evidence in penalty phase).

242. See e.g., *Hall v. State*, 253 P.3d 716, 720–22 (Idaho 2011) (citing with approval federal cases upholding restrictions on post-verdict juror interviews based on public policy concerns); *Cape Publications, Inc. v. Braden*, 39 S.W.3d 823, 826 (Ky. 2001) (“Even after completing their service, jurors are entitled to privacy and to protection against harassment.”); *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407, 419 (Miss. 1993) (court supervision and regulation of juror interviews necessary to prevent juror harassment); *State v. Cabrera*, 984 A.2d 149, 170–72 (Del. Super. Ct. 2008) (rejecting First Amendment challenge based on the no-contact rule’s ability to prevent juror harassment and keep deliberations private); see also *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976) (“Historically, interrogations of jurors have not been favored by federal courts except where there is some *showing* of illegal or prejudicial intrusion into the jury process. . . . Courts simply will not denigrate jury trials by

applied uniformly; instead, they are inconsistently imposed by individual trial judges or local rules commissions.²⁴³

Opponents' best hope for a successful constitutional challenge lies in the Due Process Clause. But because traditional constitutional arguments are inadequate, courts should recognize that the fundamental fairness guarantee of the Due Process Clause supports a conclusion that criminal defendants have a constitutional right to investigate in state post-conviction proceedings.

A. *The First Amendment*

When challenging the constitutionality of interview restrictions, opponents have most frequently invoked the First Amendment, arguing that the restrictions are overly broad and amount to prior restraints on the defendant or defense counsel.²⁴⁴ Courts have almost universally rejected this argument, finding that defense counsel, unlike the press, have reduced First Amendment rights due both to their membership in a specialized profession and to their status as officers of the court.²⁴⁵ The U.S. Supreme Court has repeatedly held that states may restrict the free speech of attorneys, particularly defense attorneys: "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."²⁴⁶

afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial."); *In re Bowling*, No. 2004-SC-1000-MR, 2005 WL 924323, at *3 (Ky. Apr. 21, 2005) (rejecting without analysis argument that local rule requiring good cause to interview jurors violated fundamental fairness of Due Process clause). See also Appendix for a list of cases, organized by state, affirming these restrictions.

243. See Appendix for examples of appellate courts affirming actions of individual judges or application of local rules in individual cases.

244. See cases *infra* note 245.

245. Compare *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) ("Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations."); *State v. Cabrera*, 984 A.2d 149, 170–73 (Del. Super. Ct. 2008) (finding defendant's First Amendment rights outweighed by "the need for judicially controlled post-trial communication and the need to preserve it"); *Hall*, 253 P.3d at 721 ("It is well established that attorneys acting as advocates in a judicial proceeding do not enjoy the same First Amendment protections as the general public, both due to their membership in a specialized profession and their status as officers of the court."); *Braden*, 39 S.W.3d at 826 ("The media has less incentive to upset a verdict than does a losing party or attorney."); *State v. Marshall*, 690 A.2d 1, 97 (N.J. 1997) ("The compelling public interest in protecting jurors and their deliberations amply justifies the restriction on contacting them without good cause."); *State v. Loftin*, 670 A.2d 557, 574 (N.J. App. Div. 1996) ("In placing limitations solely on the attorney and the parties, the rule accommodates the fundamental First Amendment rights of the press to have access to jurors for post-trial interviews."); *State v. Danforth*, No. C3-01-959, 2002 WL 47792, at *5 (Minn. Ct. App. Jan. 15, 2002) (rejecting First Amendment argument); *with Rapp v. Disciplinary Bd. of Haw. Supreme Court*, 916 F. Supp. 1525, 1536 (D. Haw. 1996) (holding that while First Amendment does not prevent courts from imposing restrictions on post-verdict juror interviews, restriction at issue was unconstitutionally vague and overbroad).

246. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991); see also *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of

Courts addressing First Amendment challenges apply a balancing test, where they weigh the defense's First Amendment interest against the jurors' or victims' interests in privacy and the courts' interest in finality.²⁴⁷ Invariably, the courts have found the former lacking and have upheld the interview restriction.²⁴⁸ However, these courts typically take for granted that interviews pose a significant threat to juror privacy,²⁴⁹ of which there is little evidence,²⁵⁰ and ignore the court's own interest in ensuring accuracy in these proceedings.²⁵¹ Consequently, opponents of interview restrictions must seek to redefine these public and private interests if a First Amendment challenge has any chance of success.

B. Ineffective Assistance of State Post-Conviction Counsel

Because state restrictions interfere with post-conviction counsel's ability to conduct necessary investigation, there is an argument that they render post-conviction counsel ineffective, thereby violating a criminal defendant's right to counsel. While the Supreme Court has found that the right to counsel under the Sixth and Fourteenth Amendments does not apply to state post-conviction proceedings,²⁵² it has recognized a limited "equitable" right to counsel in state habeas proceedings.²⁵³ In *Martinez v. Ryan*, the Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause

disciplinary measures."); *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring) ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.").

247. See, e.g., *Marshall*, 690 A.2d at 97 ("The compelling public interest in protecting jurors and their deliberations amply justifies the restriction on contacting them without good cause."); *Gentile*, 501 U.S. at 1075 ("When a state regulation implicates First Amendment rights, the Court must balance those rights against the State's legitimate interest in regulating the activity in question.").

248. See cases cited in *supra* note 245.

249. See *supra* note 242.

250. See discussion *supra* Part III.

251. See Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1093 (2006) ("[P]rotecting against its unjust deprivation through a wrongful execution is not just a private interest of the prisoner. All actors in the criminal justice system—prosecutors, judges, and victims no less than defendants—share an interest in the accuracy of the decision to put a person to death by state authority.").

252. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (declining to find a right to counsel under Due Process clause or Eighth Amendment in state capital habeas); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (declining to find a constitutional right to counsel in state habeas proceedings).

253. See *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) ("[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances."). As Professor Uhrig has observed, *Martinez* recognized a limited right to counsel in state post-conviction proceedings grounded in equitable, rather than constitutional, authority. Emily Garcia Uhrig, *Why Only Gideon? Martinez v. Ryan and the "Equitable" Right to Counsel in Habeas Corpus*, 80 MO. L. REV. 771, 771 (2015). Uhrig explains that after *Martinez*, states are not required to appoint counsel in post-conviction proceedings, but "may simply implement the right at the back end of postconviction proceedings by waiving any default of a substantial trial ineffective assistance of counsel that arises as a result of the petitioner's pro se status or post-conviction counsel error." *Id.*

[in federal habeas proceedings] for a prisoner's procedural default of a claim of ineffective assistance at trial."²⁵⁴ Put another way, if state habeas counsel unreasonably fails to raise a claim that trial counsel was ineffective, federal habeas counsel may raise the claim and the federal habeas court may reach the merits of the claim.

Opponents of investigation restrictions may then argue that the restrictions imperil state review of federal constitutional issues.²⁵⁵ This is because the restrictions prevent post-conviction counsel from raising potentially meritorious claims in state court—including substantive claims of juror misconduct or suppressed exculpatory evidence in violation of *Brady v. Maryland*—but allow defendants to obtain merits review in federal court by later arguing the ineffectiveness of their post-conviction lawyers.²⁵⁶ As a result, the state court has no opportunity to weigh in on the merits of the issue, and no state court opinion exists to which the federal habeas judge need give deference.²⁵⁷

This argument has two limitations. First, the *Martinez* Court limited its ruling to claims regarding ineffective assistance of trial counsel.²⁵⁸ Second, the *Martinez* Court indicated that to overcome default, a criminal defendant must show that his underlying claim has “some merit.”²⁵⁹

Opponents may be able to clear the first hurdle. The *Martinez* Court limited its ruling to claims regarding ineffective assistance of counsel, in part because state habeas proceedings represent the first opportunity a criminal defendant has to raise the claim that trial counsel was constitutionally ineffective.²⁶⁰ This is true of many classic post-conviction claims, including juror misconduct²⁶¹ and *Brady*

254. 566 U.S. at 9. The *Martinez* Court explicitly left open the question of whether a constitutional right to counsel exists in state post-conviction proceedings: “This is not the case, however, to resolve whether [a right to counsel in initial-review collateral proceedings] exists as a constitutional matter.” *Id.*

255. See, e.g., Response to State’s Motion to Preclude Juror Contact Absent a Showing of Good Cause at 5, *State v. Rose*, No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. June 10, 2016) (arguing that limitations on juror interviews that impeded post-conviction counsel’s investigation would violate equitable right to counsel under *Martinez*).

256. See *Martinez*, 566 U.S. at 17 (excusing petitioner’s federal default due to post-conviction counsel’s ineffective performance).

257. See *id.* at 10 (“When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.”).

258. *Id.* at 9, 12 (“A prisoner’s inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system”).

259. *Id.* at 14.

260. *Id.* at 11.

261. In some states, it may be possible to raise a juror misconduct claim prior to post-conviction proceedings in the motion for new trial. However, where abbreviated deadlines make raising a claim impractical and where the state typically reviews the claims in post-conviction proceedings, the equitable right of counsel applies. See *Trevino v. Thaler*, 133 S. Ct. 1911, 1917–18 (2013) (extending *Martinez* to include state procedural regimes that do not on their face require petitioners to raise an ineffective assistance of counsel claim in state post-conviction review, but in practice make it “virtually impossible” to raise the claim in any other proceeding). Alternatively, discovery of jury misconduct in post-conviction investigation may serve as the basis for a claim that trial counsel was ineffective for

violations.²⁶² With respect to jurors,²⁶³ an extension of *Martinez* supports an argument that a state whose procedures interfere with defense post-conviction investigation of juror misconduct renders counsel ineffective in the first opportunity a criminal defendant has to raise a claim of juror misconduct.²⁶⁴ If the State, by foreclosing defense investigation, interferes with post-conviction counsel's ability to effectively present juror misconduct claims, the State will

failure to discover the issue and raise it in the motion for new trial. This amounts to a traditional ineffective assistance of counsel claim, which is covered by *Martinez*.

262. See, e.g., *Buck v. State*, 70 S.W.3d 440, 445–46 (Mo. Ct. App. 2000) (finding post-conviction proceeding constituted first opportunity for petitioner to raise a *Brady* claim, because he “cannot be faulted for failing to raise the nondisclosure of evidence that he did not know about” at trial and because it would have been impossible to raise the claim on appeal because “[a]ppellate courts consider only the record made in the trial courts”).

263. The connection between juror interviews and the post-conviction claim of juror misconduct is obvious; however, victim interviews may also be essential to gather facts in support of traditional post-conviction claims that the conviction or sentence rests of false evidence or that newly discovered evidence exculpates the defendant. See, e.g., *State v. Martinez*, 189 P.3d 348, 358 (Ariz. 2008) (arguing for new sentence based on presentation of an allegedly false victim impact testimony); *State v. Roscoe*, 912 P.2d 1297, 1302 (Ariz. 1996) (arguing statute limiting access to victim denied him access to evidence “favorable to an accused”); *Ex parte Pinkard*, No. WR-43112-02-04, 2008 WL 2521226, at *1 (Tex. Crim. App. June 25, 2008) (arguing for new sentencing proceeding based on contention that prosecutor knowingly presented false impact evidence).

264. Many have argued that the logic of *Martinez* applies with equal force to other claims that can be raised for the first time in post-conviction proceedings. See *Martinez v. Ryan*, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting) (“There is not a dime’s worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised.”). See generally Uhrig, *supra* note 253. Profess Uhrig argues that “by limiting the relief that provided by the equitable right of counsel to substantial ineffective assistance of trial counsel, the Court drew a line that is unsustainable” and that equity demands relief “where counsel fails to present any other substantial constitutional violation that compromises the fundamental fairness or the accuracy of the criminal process.” *Id.* at 771–72. The Supreme Court recently rejected arguments that *Martinez* should be extended to ineffective assistance of appellate counsel claims not raised by post-conviction counsel. *Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017). While the 5–4 opinion includes rhetoric that is damaging to arguments that *Martinez* should apply to juror misconduct and *Brady* claims, see, e.g., *id.* at 2065 (“On its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims.”), its reasoning focuses on the unique nature of ineffective assistance of appellate counsel claims. Specifically, the Court declined to extend *Martinez* to IAC appellate claims because (1) appellate rights are not as fundamental as trial rights, which enjoy special constitutional protection, *id.* at 2066; (2) in the case of IAC appellate claims premised on preserved trial errors, the underlying substantive claim was already considered by a state trial court, *id.* at 2067–68; (3) the states did not actively choose to make post-conviction proceedings the first opportunity for a petition to raise a claim of ineffective assistance of appellate counsel; instead, appellate courts inherently cannot review such a claim because an appellate attorney cannot raise his own effectiveness, *id.* at 2068; and (4) extending *Martinez* is likely to flood the courts with meritless claims, *id.* at 2068–69. Of these four reasons, only the fourth could arguably apply to juror misconduct and *Brady* claims. Unlike ineffective assistance of appellate counsel claims, both of these claims seek redress of trial rights—those of a fair trial and due process, respectively. They are substantive claims that have never been considered by a trial judge, and many states have elected to make them cognizable for the first time in post-conviction proceedings. See *supra* note 262. Consequently, because jury misconduct and *Brady* claims have more in common with ineffective assistance of trial counsel claims than they do with appellate counsel claims, *Davila* is no bar for their inclusion under *Martinez*.

also forego its ability to prevent a federal court from later ruling on the merits of these claims.²⁶⁵

The second hurdle is typically insurmountable for opponents of investigation restrictions. An attorney simply cannot demonstrate that a claim is meritorious without the ability to investigate the facts of that claim.²⁶⁶ For example, counsel forbidden from speaking to jurors cannot determine if prejudicial juror misconduct occurred. As a consequence, the *Martinez* requirement of demonstrating that a claim has “some merit” may be a higher barrier than proffering good cause to interview jurors based on evidence of admissible juror misconduct.²⁶⁷ Thus, the interviewing restrictions that were in place in the state post-conviction proceedings would continue to hamstring defense counsel in federal habeas litigation.

C. *The Due Process Right of Fundamental Fairness in State Post-Conviction*

The most promising constitutional avenue to challenge restrictions on witness interviews is the Due Process Clause. While a criminal defendant has far fewer constitutional rights in state post-conviction proceedings than at trial, the defendant’s due process rights are the most robust.²⁶⁸ The U.S. Supreme Court has made clear that state post-conviction review itself is not a federal constitutional right;²⁶⁹ however, it has also held that when a state elects to provide such a remedy, the process the state employs must comport with the basic tenets of due process, particularly fundamental fairness.²⁷⁰ This is

265. One obstacle to presenting this argument is the fact that many federal jurisdictions also favor limitations on juror interviews. *See Crump, supra* note 22, at 526–28; Lawsky, *supra* note 22, at 1970.

266. Post-conviction counsel are much less likely to know what possible constitutional claims a victim interview could support prior to interviewing the victim.

267. A “some merit” standard would likely require a showing of prejudice for a jury misconduct claim, whereas the requirements for a showing of good cause, although they vary across jurisdictions, typically do not require establishing that the jury error would be reversible. *Compare supra* notes 79–81 (discussing good cause standard), *with supra* notes 195–197 (discussing burden to show prejudice).

268. *See District Attorney’s Office v. Osborne*, 557 U.S. 52, 68–69 (2009) (“A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. . . . The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief.”).

269. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (holding there is no federal constitutional right to counsel in state post-conviction review because states have “no obligation” to provide opportunity for post-conviction litigation). The U.S. Constitution refers only to the federal “Privilege of the Writ of Habeas Corpus” and provides that it may be suspended “when in Cases of Rebellion or Invasion or the public Safety may require it.” Art. I, § 9, cl. 2. The right to pursue state post-conviction review may be enshrined by statute or in the state’s constitution.

270. *Osborne*, 557 U.S. at 89–90 (Stevens, J., dissenting) (citing *Evitts v. Lucy*, 469 U.S. 387, 393 (1985)) (“Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause . . . by providing litigants with fair opportunity to assert their state-created rights.”); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463, (1981) (“A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.”).

consistent with the Court's line of procedural due process cases that hold more generally that if the state provides a remedy for the violation of federal constitutional rights, then it must provide a meaningful opportunity to obtain that remedy.²⁷¹

Although the Supreme Court has made clear that the Due Process Clause guarantees fundamental fairness in the state post-conviction process,²⁷² it has been unclear both about the scope of this guarantee and about how a violation should be assessed.²⁷³ The Court has been reluctant to hold that the Due Process Clause imposes specific affirmative procedural requirements on states: “[W]hen a State chooses to offer help to those seeking relief from convictions, due process does not ‘dictat[e] the exact form such assistance must assume.’”²⁷⁴

Further, the Court has employed two different tests to assess if state procedures violate fundamental fairness. First, it has relied on the traditional due process balancing test from *Mathews v. Eldridge*,²⁷⁵ taking into consideration (1) the private interest affected by the State's action; (2) the governmental interest affected by additional safeguards; and (3) the value of additional safeguards and the risk of an erroneous deprivation if they are not provided. Deeming the *Mathews* test “a general approach for testing challenged state

271. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 76–83 (1985) (holding that state's failure to provide fair adequate opportunity for capital defendant to present insanity defense at trial violated “the Fourteenth Amendment's due process guarantee of fundamental fairness”); *Ford v. Wainwright*, 477 U.S. 399, 411–16 (1986) (holding that, where execution of the insane is prohibited, Florida failed to provide a meaningful procedure to contest a finding of the defendant's sanity); *Griffin v. Illinois*, 351 U.S. 12, 16–20 (1956) (holding that indigent defendant must have access to appellate record for state to provide adequate opportunity for appellate review).

272. *Osborne*, 557 U.S. at 69–70 (recognizing a due process “fundamental fairness” requirement in the state procedures that allowed a defendant to establish innocence after his conviction based on new evidence).

273. See Wiseman, *supra* note 23, at 1001 (“The Court in *Osborne* did not, however, explain what fundamental fairness in postconviction review requires. . . .”); see also Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 100 (1990) (arguing that the Supreme Court has provided a “lack of guidance for the constitutional analysis” in cases decided under the Due Process Clause, “which permits the Court to play fast and loose with the amount and quality of process afforded in capital post-conviction cases”).

274. *Osborne*, 557 U.S. at 69 (quoting *Finley*, 481 U.S. at 559).

275. 424 U.S. 319, 335 (1976).

procedures under a due process claim,²⁷⁶ the Court repeatedly applied the test in criminal cases,²⁷⁷ including capital cases.²⁷⁸

However, in several cases,²⁷⁹ a plurality of the Court turned away from this approach, indicating a preference for the analytical framework set forth in *Patterson v. New York* for criminal cases involving state procedural rules.²⁸⁰ The *Patterson* Court determined that a state's criminal procedure does not run afoul of the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁸¹ To assess whether a principle is fundamental, the Court looked at the history of the principle, the operation of the challenged state procedure, and U.S. Supreme Court precedent.²⁸²

In *Patterson*, the Court was evaluating the constitutionality of New York's statute that placed the burden on a criminal defendant to prove the affirmative defense of extreme emotional disturbance as defined by New York law.²⁸³ The Court held that the state statute did not violate the federal Due Process Clause because it concerned the administration of what has historically been state substantive law—the scope of crimes and the burden of proving defenses.²⁸⁴

276. *Parham v. J.R.*, 442 U.S. 584, 599 (1979); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (referring, in the context of determining the due process rights of detained citizen enemy combatants, to the *Mathews* test as "the ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law'") (quoting U.S. CONST., amend. V).

277. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 29 (1989) (Stevens, J., dissenting) (using the *Mathews* test to conclude that Virginia failed to assert a compelling government interest that justified denying counsel to post-conviction petitioners in capital cases); *United States v. Raddatz*, 447 U.S. 667 (1980) (applying *Mathews* test to conclude that a federal statute that allowed the district court to decide a suppression motion based on a record and finding of facts developed by a magistrate judge did not violate the Due Process Clause).

278. *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring) (citing *Mathews* and agreeing with plurality opinion that state procedures to determine prisoner's sanity prior to execution did not "comport with basic fairness" because they did not provide the prisoner a meaningful opportunity to contest the determination); *Ake v. Oklahoma*, 470 U.S. 68, 76–83 (1985) (applying the *Mathews* test in holding that state's failure to provide adequate opportunity for capital defendant to present insanity defense at trial violated "the Fourteenth Amendment's due process guarantee of fundamental fairness").

279. *See, e.g., Medina v. California*, 505 U.S. 437, 445 (1992) (applying the *Patterson* test in lieu of the *Mathews* test to determine whether California's allocation of the burden of proof in competency hearings comports with due process); *see also Herrera v. Collins*, 506 U.S. 390, 407–08 (1993) (applying the *Patterson* test in holding that Texas procedures for introducing newly discovered evidence in a motion for new trial did not offend fundamental fairness). *But see Medina*, 505 U.S. at 453 (O'Connor, J., joined by Souter, J., concurring) (rejecting majority's holding the *Mathews* test is inappropriate for evaluation of state criminal procedures under Due Process Clause).

280. 432 U.S. 197 (1977).

281. *Id.* at 202 (quotation marks omitted). This approach was also used in *Osborne*, 557 U.S. at 69 (quoting *Medina*, 505 U.S. at 446, 448) ("[T]he question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'").

282. *Medina*, 505 U.S. at 446.

283. *Patterson*, 432 U.S. at 198.

284. *Id.* at 201–02, 211.

Fifteen years later, a plurality of the Court revived this test in *Medina v. California*, which once again involved state-created substantive law as expressed in the burden of proof: this time, a criminal defendant's burden to demonstrate incompetence.²⁸⁵ In eschewing the *Mathews* test, the plurality stated that the *Patterson* test was more appropriately used to evaluate whether state criminal procedures violated due process because it was a "narrower inquiry" that gave more deference to the states' traditional expertise in criminal matters.²⁸⁶ In their concurring opinions, Justices Sandra Day O'Connor and David Souter rejected the notion that the *Mathews* test was inappropriate to assess whether state procedures violated due process, citing cases where the procedures at issue limited the defendant's ability to vindicate his federal constitutional rights.²⁸⁷ The dissent pointed out that under the facts of *Medina*, the two tests were similar in operation: "[I]t is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews v. Eldridge* test it earlier appears to forswear."²⁸⁸

Although the Court has moved away from it in recent years,²⁸⁹ the *Mathews* test is the appropriate test to evaluate state procedures—like the investigation restrictions at issue here—that limit a criminal defendant's ability to seek redress for the violation of his federal constitutional rights because of its emphasis on fairness. The problem with the *Patterson* test is that it privileges historical practice at the expense of procedural fairness. This emphasis, which may be appropriate in situations like *Patterson* and *Medina* that concern the scope of what has historically been the realm of state substantive law, is simply inappropriate when evaluating how state procedures interfere with a criminal petitioner's ability to seek redress for a violation of his *federal* constitutional rights. Justice O'Connor made a similar point in her concurrence in *Medina*, when she noted that a historical approach might prove too limiting in the due process context: "The concept of due process is, 'perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.'"²⁹⁰ Justice O'Connor counseled that the Court must also give weight to "fairness in operation" or "many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly

285. *Medina*, 505 U.S. at 439, 445.

286. *Id.* at 445–46.

287. *Id.* at 453–54 (citing with approval decisions in *Griffin v. Illinois* and *Ake v. Oklahoma*).

288. *Id.* at 462.

289. See *Osborne*, 557 U.S. at 69–70 (recognizing a due process requirement of "fundamental fairness" in the state procedures that allowed a defendant to establish innocence after his conviction based on new evidence); *Herrera v. Collins*, 506 U.S. 390, 407–08 (1993) (applying *Patterson* test in holding that Texas procedures for requiring newly discovered evidence in a motion for new trial did not offend fundamental fairness).

290. *Medina*, 505 U.S. at 454.

commanded by the text of the Constitution” would be called into doubt.²⁹¹ The cases Justice O’Connor referred to included several in the Court’s line of procedural due process cases holding that state procedures providing a remedy for the violation of federal constitutional rights must be meaningful.²⁹²

Another danger of privileging a historical approach is its reductionist tendencies. The *Medina* dissenters contended that the true danger of the *Patterson* approach was that it enabled the Court to reduce complex due process concerns to discrete historical practices: “The protections of the Due Process Clause . . . are simply not ‘a series of isolated points pricked’ out in terms of their most specific level of historic generality.”²⁹³

I believe the *Mathews* test, with its emphasis on fairness, is the appropriate test to apply in evaluating state restrictions that prohibit the post-conviction interviewing of jurors, victims, or State witnesses, because these restrictions interfere with a criminal petitioner’s ability to vindicate their federal constitutional rights in state habeas proceedings, thus rendering state habeas a hollow procedure. However, the restrictions lack fundamental fairness under either test.

In the juror context, under the *Mathews* approach, the private interest is the interest inherent in every criminal case: “the accuracy of a criminal proceeding that places an individual’s life or liberty at risk.”²⁹⁴ Unencumbered juror interviews are critical to a determination of whether the defendant received a fair trial.²⁹⁵ Jurors who are biased or who commit misconduct by considering extrajudicial evidence jeopardize the accuracy of criminal trials and sentences.²⁹⁶

The governmental interests adversely affected by allowing unencumbered juror interviews include the risks of juror harassment and chilled deliberations,

291. *Id.* (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process right to psychiatric examination when sanity is significantly in question); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process right to hearing and counsel before probation revoked); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence); *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process right to trial transcript on appeal)).

292. *Medina*, 505 U.S. at 454 (citing *Ake*, 470 U.S. at 68; *Griffin*, 351 U.S. at 12).

293. *Id.* at 459.

294. *Ake*, 470 U.S. at 78.

295. *See Remmer v. United States*, 350 U.S. 377, 378, 382 (1956) (finding jury misconduct was violation of defendant’s right to fair trial); *see also supra* Part III.A (discussing harms that interview restrictions cause criminal defendants).

296. The Supreme Court has long-recognized that a jury’s consideration of evidence not subjected to adversarial testing jeopardizes truth and accuracy. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 61 (2004) (holding that the reliability of evidence is best assessed “by testing in the crucible of cross-examination.”); *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981) (“The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”); *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (“Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.”).

along with decreased finality of verdicts.²⁹⁷ As discussed in Part III, there is no evidence that juror harassment or chilled deliberations have occurred with any frequency. Moreover, removing limitations on interviewing would not force witnesses to cooperate; a witness may always decline an interview.²⁹⁸ Preserving finality is not in the State's interest when an unconstitutional process determines the verdict.²⁹⁹

Finally, the value of unencumbered jury interviews is that they are more likely to uncover unconstitutional misconduct during the trial; the risk of not providing them is that a state's criminal justice system will be less accurate.³⁰⁰ All actors in the criminal justice system, including prosecutors, victims, and defendants, have an interest in preventing wrongful executions.³⁰¹ Thus, in balancing these three parts, a reviewing court should find in favor of allowing unencumbered post-conviction interviews under the *Mathews* test.

While the *Patterson* approach presents a greater challenge, it also ultimately demonstrates that state interference with post-conviction juror interviews offends fundamental principles of justice. Restrictions on juror interviews decrease the ability to seek redress for convictions based on juror bias or consideration of extrajudicial evidence.³⁰² Jury misconduct may infringe on two different Sixth Amendment rights: the right to a fair trial by an impartial jury and the right to confrontation.³⁰³ Juror bias against the accused or in favor of the States implicates the right to a trial by impartial jury.³⁰⁴ A juror's consideration

297. See *supra* Part II (discussing policy justifications).

298. See *supra* note 169.

299. See *Engle v. Isaac*, 456 U.S. 107, 135 (1982) (“[T]he principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration.”).

300. See Randy Hertz & James S. Liebman, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.2 (7th ed. 2015) for a similar analysis in support of a right to effective assistance of counsel in state post-conviction proceedings.

301. See *Freedman*, *supra* note 251, at 1093 (“[P]rotecting against its unjust deprivation through a wrongful execution is not just a private interest of the prisoner. All actors in the criminal justice system—prosecutors, judges, and victims no less than defendants—share an interest in the accuracy of the decision to put a person to death by state authority.”).

302. See *supra* Part III.A (discussing harms that interview restrictions cause criminal defendants).

303. The Sixth Amendment guarantees an accused “a speedy and public trial, by an impartial jury” and the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. The Due Process Clause of the Fourteenth Amendment makes these guarantees applicable to the states. See *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (“We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that ‘the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him. . . .’”). Some U.S. Supreme Court cases treat juror misconduct more generally as an offense to the right to a fair trial—likely the most fundamental right afforded to an accused. See, e.g., *Remmer v. United States*, 350 U.S. 377, 378 (1956) (evaluating argument that a third party's attempt to bribe a juror constituted a violation of the defendant's right to a fair trial).

304. See, e.g., *People v. Weatherton*, 59 Cal. 4th 589, 600 (2014) (granting new trial where juror “abandoned the role of an impartial juror, adopting the mantle of an advocate” and attempted to lobby other jurors to vote guilty before deliberations started); *Tomlin v. State*, 695 So. 2d 157, 174 (Ala. Crim.

of extrajudicial evidence or contact with a third party implicates the Confrontation Clause because the defendant never had the opportunity to confront the evidence through cross-examination or by introducing evidence in rebuttal.³⁰⁵ Both rights have historical roots in English common law and favored status in U.S. Supreme Court precedent.

The right to trial by impartial jury was esteemed in England long before the founding of the United States.³⁰⁶ Sixteenth-century barrister Lord Edward Coke declared that a juror must “be indifferent as he stands unsworn.”³⁰⁷ In the trial of Aaron Burr, Chief Justice John Marshall emphasized that, when apparent, biased jurors should be excused for cause: “[T]hose strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.”³⁰⁸ The modern Court has ascribed special importance to the need for impartial jurors, holding that any violation of the right to a trial or capital sentencing hearing by an impartial jury is a structural error.³⁰⁹ These errors render the trial fundamentally unfair because “[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.”³¹⁰

Similarly, the right of confrontation has roots in English common law, developing in the late sixteenth and early seventeenth centuries in response to the practice of using written depositions or confessions of co-conspirators as evidence against the accused.³¹¹ Dating back to the nineteenth century, the U.S. Supreme Court has emphasized the importance of the Confrontation Clause,

App. 1996) (holding that juror’s failure to disclose potential biases on voir dire violated defendant’s right to be tried by an impartial jury).

305. See, e.g., *Parker*, 385 U.S. at 364–65 (holding that bailiff’s comments to jurors that defendant was guilty violated defendant’s constitutional rights because they were never subjected to cross-examination and confrontation); *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (“In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”).

306. See JOHN GUINTEHER, ROSCOE POUND FOUNDATION, *THE JURY IN AMERICA* 17 (1988) (noting that early seventeenth-century English jurors “were expected to be chosen on the basis of their impartiality”); see also James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 274–77, 275 n.24 (1988) (chronicling the shift in England from partial to impartial jurors).

307. *Reynolds v. United States*, 98 U.S. 145, 154 (1878) (quotation marks omitted).

308. *Id.* at 155 (citing *United States v. Burr*, 25 F. Cas. 49, 51 (Va. Cir. Ct. 1807)) (quotation marks omitted).

309. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (finding violation of right to capital sentencing proceeding by impartial jury is a structural error not subject to harmless error analysis); *Rose v. Clark*, 478 U.S. 570, 577–78 (1986) (finding violation of right to trial by impartial jury structural error not subject to harmless error analysis).

310. *Rose*, 478 U.S. at 578.

311. *White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., concurring); see also *Mattox v. United States*, 156 U.S. 237, 242 (1895) (“The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness.”).

deeming it “one of the fundamental guaranties of life and liberty.”³¹² The Court’s subsequent precedent underscored the importance of protecting the confrontation right in jury trials, in cases in which jurors were exposed to extrajudicial evidence or third party contacts.³¹³

Critics of these arguments might point to Justice Clarence Thomas’s recent dissent in *Peña-Rodriguez v. Colorado*, which makes a historical case for the superiority of the competing principle of juror secrecy.³¹⁴ Thomas contends that “[a]lthough partiality was a ground for setting aside a jury verdict, [] the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct.”³¹⁵ Yet Justice Thomas himself notes evidence that sometimes courts *did* consider juror affidavits to evaluate misconduct claims: “Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only ‘with great caution.’”³¹⁶ Thomas then concedes that at the time of the Founding of the American Republic, while some states refused to consider juror affidavits, many others did not.³¹⁷ Indeed, the Court has long considered the testimony of jurors in specific circumstances to evaluate the constitutionality of juror misconduct.³¹⁸ The majority notes that in modern times, even states with the most restrictive evidentiary rules still consider juror affidavits and testimony in support of certain types of misconduct, including exposure to extraneous evidence and third party conduct.³¹⁹ Thus, at no point in our nation’s history did the principle of juror secrecy extinguish the process of gathering information from the jurors to establish misconduct.

A violation of either the right to an impartial jury or the right to confrontation not evident on the trial record may only be uncovered by

312. Kirby v. United States, 174 U.S. 47, 55 (1899).

313. See, e.g., Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (“We have followed the undeviating rule . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial.”) (quotation marks omitted); Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (citing Patterson v. State of Colorado *ex rel.* Attorney General, 205 U.S. 454, 462 (1907)) (“The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago . . . : ‘The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.’”); Turner v. Louisiana, 379 U.S. 466, 472 (1965) (“The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.”).

314. 137 S. Ct. 855, 871–73 (2017) (Thomas, J., dissenting).

315. *Id.* at 872.

316. *Id.* at 872 & n.1.

317. *Id.* at 872–73.

318. See *Mattox v. United States*, 146 U.S. 140, 150 (1892) (“[A]s to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny.”).

319. *Peña-Rodriguez*, 137 S. Ct. at 863–65.

conducting a juror investigation.³²⁰ Because these claims rely on information outside the scope of the trial record, the first opportunity for a defendant to raise them is in post-conviction.³²¹ Thus, without an ability to investigate these claims without impediment, a capital defendant will have no opportunity to seek redress for a violation of these rights.³²² The effect would be to insulate juror misconduct from meaningful appellate review. A state procedure compelling this result violates the fundamental fairness test under *Patterson*.

For victims and State witnesses, these arguments are less straightforward because they depend on the relevance of the witness to a particular case. For example, if a witness gave fact or victim impact testimony at trial, then the analysis resembles that of jurors.

Under the *Mathews* approach, the private interest continues to be accuracy in the criminal proceeding. Ex parte interviews allow post-conviction counsel to assess the accuracy of the victim or witness's testimony. The State's interest in the restrictions is minimizing the risk of harassment. However, this risk is already reduced by the individual's right to refuse an interview and by defense counsel's disincentives to harass the victim or witness, such as fear of legal and ethical repercussions and harm to the case.³²³

The value of unencumbered witness interviews is that they are more likely to uncover false testimony, and the risk of not providing them is that a state's criminal justice system will be less accurate. Thus, just as it does with jurors, a

320. EQUAL JUSTICE INITIATIVE OF ALA., *supra* note 29, at 83–84 (discussing the importance of interviewing every juror on a client's jury to learn about misconduct, consideration of extraneous information, and "external influences that may warrant a new trial").

321. See Brief of Amicus Curiae North Carolina Academy of Trial Lawyers at 8, *State v. Moses*, No. 574 A 97-4 (N.C. 2006), 2006 WL 6086008, at *8 ("Post-conviction review is crucial because, for a significant class of important claims, post-conviction proceedings are the first opportunity for presentation. Among the claims in this class are ineffective assistance of counsel ("IAC") claims, *Brady v. Maryland* claims, other prosecutorial misconduct claims, and *juror misconduct claims*." (emphasis added); see also, e.g., *Ex parte Burgess*, 21 So. 3d 746, 754 (Ala. 2008) (overturning ruling of the intermediate court that held juror misconduct claim raised in post-conviction petition was precluded because defendant learned of misconduct years after his trial). *But see supra* note 261 (acknowledging that in some states it may be possible to raise a juror misconduct claim prior to post-conviction proceedings in the motion for new trial).

322. This is likely the argument Justice Alito was anticipating in his dissent in *Peña-Rodriguez*, when he espoused concern that the Court's holding that evidence of racial bias during deliberations trumped jury secrecy would imperil restrictions on juror investigation:

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.

Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 884 (2017) (Alito, J., dissenting).

Of course, Justice Alito's dissent overlooks that American courts have recognized that some forms of juror misconduct require relief since the Founding. Adding racial bias to the list is unlikely to fundamentally change how courts see jury investigation.

323. For a discussion of the disincentives of harassing victims and witnesses, see *supra* Part III.B.1 and corresponding footnotes.

balancing of factors under the *Mathews* test supports unencumbered post-conviction interviews.

The *Patterson* approach is less certain. A witness's trial testimony may implicate several constitutional rights, including the right to effective trial counsel³²⁴ and the rights of due process and a fair trial. Some may wish to recant or alter their testimony or may possess exculpatory or mitigating information. They may have information that supports a claim that trial counsel was ineffective or that the State suppressed exculpatory evidence. The witness's value to the case is purely theoretical before an interview; only the content of the interview can reveal their actual value to the case. Because the witness's actual value is unknown in advance of the interview, it is difficult to make a specific argument that restrictions on the interviews of victims and State witnesses generally "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."³²⁵

Thus, while there are strong cases that both the *Mathews* test and the *Patterson* test support a finding that procedural due process requires unencumbered juror interviews, the case is less certain with respect to victim and witness interviews. One way to make a stronger case against restrictions on interviews with victims and State's witnesses is to reconceptualize the harm by divorcing it from the specific facts of the case. It is the rare case where the post-conviction attorney will know what a witness interview would uncover. The true harm of these restrictions is more fundamental: they prevent the discovery of constitutional errors, which makes it impossible for courts to correct or compensate for them. The true harm is that they impede a criminal defendant's right to investigate in state post-conviction proceedings.

D. Towards a Constitutional Right of Investigation in State Post-Conviction

A better path is to sever the concepts of representation and investigation and recognize a freestanding constitutional right of investigation in state post-conviction litigation, as guaranteed by the fundamental fairness prong of the Due Process Clause. As Justice John Paul Stevens observed, state post-conviction procedures comport with due process only when they "provid[e] litigants with

324. See, e.g., *United States v. Kreuzer*, 59 M.J. 773, 783 (A. Ct. Crim. App. 2004), *aff'd*, 59 M.J. 773 (C.A.A.F. 2005) (holding trial counsel ineffective in part for failure to interview wife of deceased victim before she testified).

325. *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quotation marks omitted). A still harder case exists for restrictions on interviews of nontestifying victims. While it is possible these witnesses possess fact evidence, their most likely value is as supporters of a reduced sentence. Historically, the American system of justice has not considered the preferences of victims in capital sentencing. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991) (preserving holding of *Booth v. Maryland*, 482 U.S. 496 (1987), that admission of victim's family member's opinion of appropriate sentence in capital case violates Eighth Amendment).

fair opportunity to assert their state-created rights.”³²⁶ Investigation is the cornerstone of state post-conviction litigation. Criminal defendants must investigate to raise legal claims in their state post-conviction cases because the only claims that are typically cognizable at this stage are those based on facts outside the record on appeal.³²⁷ In other words, these claims—which include juror misconduct, ineffective assistance of counsel, and *Brady* violations—may not be raised on direct appeal because they do not rest on facts evident from the court reporter’s transcript or the clerk’s record of pleadings and orders filed in the case. Rather, the first and only mechanism to redress these constitutional errors is through the filing of a post-conviction petition.³²⁸ Accordingly, for the state post-conviction process to have any purpose or meaning, the ability to investigate these errors must exist.

Recognition of a right to investigation benefits criminal defendants under both the *Mathews* and *Patterson* approaches. Defining the accused’s interest more broadly as a constitutional right to investigate facts in support of federal constitutional claims, as opposed to an interest in conducting discrete interviews, tips the scales of the *Mathews* balancing test more strongly in favor of the convicted criminal defendant. Analysis under the *Patterson* approach attains a new simplicity because party-led investigation easily qualifies as a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³²⁹

A review of historical practice supports the conclusion that a defendant’s right of investigation is fundamental. Party-led investigation is the hallmark of the adversary system, and thus it is what differentiates our criminal justice system from European and European-influenced justice systems.³³⁰ Yet the

326. *District Attorney’s Office v. Osborne*, 557 U.S. 52, 89–90 (2009) (Stevens, J., dissenting) (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)).

327. *See* 53 OHIO JUR. 3D HABEAS CORPUS § 91 (“Postconviction relief is appropriate only when it concerns errors based upon facts and evidence outside the record.”); *see also* *Buck v. State*, 70 S.W.3d 440, 445–46 (Mo. Ct. App. 2000) (finding post-conviction proceeding appropriate time for petitioner to raise a *Brady* claim, because it would have been impossible to raise the claim on appeal because “[a]ppellate courts consider only the record made in the trial courts”); Alper, *supra* note 25, at 843–44 (“Most ineffectiveness claims depend on discovery and investigation of facts that are outside of the trial record. For this reason, such claims are typically brought, if at all, in postconviction collateral proceedings.”).

328. The Supreme Court has consistently noted the significance of state post-conviction proceedings when they represent the first opportunity to raise a constitutional claim. *See* *Martinez v. Ryan*, 566 U.S. 1, 8–9 (2012) (recognizing that initial-review collateral proceeding functions as prisoner’s “one and only appeal” for certain constitutional claims); *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (leaving open questions of whether Due Process Clause required counsel “in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction”); *see also* *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (“It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.”).

329. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

330. *See* 1 WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.5(c) (4th ed. 2016). European justice systems favor an “inquisitorial” or “nonadversary” system where the court assumes primary

adversary system did not take root either in England or in the United States until the eighteenth century; prior to this time, not only did those accused of crimes typically proceed without counsel, they were typically forbidden counsel.³³¹ The early Anglo-American criminal courts functioned more like modern European ones; courts investigated crimes, gathered evidence, and questioned witnesses.³³² This was true, not only at trial, but in habeas corpus proceedings, when courts used the writ to order transfer of the defendant from confinement to the courtroom wherein the court might investigate the legality of the confinement.³³³

Lawyer participation in criminal proceedings arose and developed in England and the United States in tandem, as lawyers began to appear in limited form for complainant and defendant alike.³³⁴ Representation began modestly with lawyers primarily appointed to make legal arguments on their clients' behalves; examination of witnesses was initially forbidden.³³⁵ In America, the nineteenth-century rise of the public prosecutor spurred a corresponding rise of defense counsel.³³⁶ Attorneys began to question witnesses and confront them through cross-examination.³³⁷ The role of investigator shifted from the courts to the parties as defense attorneys began to investigate and gather evidence to confront the State's witnesses and evidence, and the adversarial system was born.³³⁸

By demonstrating that criminal defendants were entitled to investigation by the courts well before they were entitled to representation by counsel, this history also reveals that a right to investigate is distinct from a right to counsel and that it may be more fundamental. The adoption of an adversarial system did not create the concept of investigation; it simply shifted the responsibility for investigation from the courts to the parties. Thus, today, when a trial court interferes with the parties' ability to conduct post-conviction investigation, it eschews the

responsibility for the development of facts, the presentation of evidence, and the questioning of witnesses. *Id.* In short, under the inquisitorial system, the court investigates the case. *See id.*

331. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 326–28 (2009) [hereinafter Jonakait, *Rise*]; *see also* John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314 (1999) (detailing rise of right to defense counsel in criminal trials).

332. *See* Jonakait, *Rise*, *supra* note 331, at 325; Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 86 (1995) [hereinafter Jonakait, *Origins*] (“Judges . . . controlled English common law trials through their dominance over the development of facts at trial.”).

333. NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 4–6 (2011).

334. *See generally* Jonakait, *Rise*, *supra* note 331 (tracing the history of the rise of the American adversary system).

335. *See id.* at 324–25, 330.

336. *See id.* at 327–29, 332.

337. *See id.* at 334.

338. *See id.* at 332–35, 344, 353 (citing evidence defense attorneys acted as advocates in criminal trials, participating at every stage of trial and marshaling evidence to support defense theory).

adversarial system, either by denying investigation outright or by usurping the investigative role of the parties.

E. The Special Case for a Constitutional Right of Investigation in Capital Cases

While untethering the right to investigate from the right to counsel may solve doctrinal difficulties, it raises practical concerns. How could a post-conviction litigant, who is by definition incarcerated, undertake meaningful investigation without the assistance of counsel?³³⁹ If courts recognize a right to investigate to what extent must states facilitate this investigation? Is funding required? Must a state appoint an investigator for an unrepresented inmate? It is hard to avoid the conclusion that recognition of a constitutional right to investigate in state post-conviction proceedings could place a significant burden on states.³⁴⁰

One solution is that courts could cabin recognition of the right to investigate to capital cases. From a practical standpoint, there are far fewer capital cases than non-capital cases, and very few capital defendants are pro se.³⁴¹ In addition, a doctrinal basis exists for distinguishing capital and non-capital cases. The Eighth Amendment recognizes that a sentence of death is “qualitatively different from a sentence of imprisonment.”³⁴² At the trial level, state capital punishment systems must work to minimize the risk of “wholly arbitrary and capricious

339. In their article, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, capital defenders Clive A. Stafford Smith and Rémy Voisin Starns argue that the need for investigation is “the most critical reason to require the help of a lawyer.” See Smith & Starns, *supra* note 70, at 64.

340. One way states could avoid this burden is by abandoning state habeas corpus review. Federal habeas review would continue to be an option for criminal defendants, and federal habeas courts would no longer be required to give deference to state court decisions when reviewing their claims. Justice Kennedy has explained that when states make choices that diminish a post-conviction litigant’s ability to raise constitutional claims, the consequence is a corresponding increase in a federal court’s ability to hear the claim. See *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (“[T]here are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage, but this decision is not without consequences for the State’s ability to assert a procedural default in later proceedings. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims. It is within the context of this state procedural framework that counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.”).

341. Alabama is the only state that does not provide legal assistance to capital defendants in state post-conviction proceedings. See *The Crisis of Counsel in Alabama*, EQUAL JUST. INITIATIVE, <http://eji.org/alabama-inadequate-counsel-death-penalty-cases> [https://perma.cc/V7BB-VLJR]. In 2010, capital cases made up just 124 of 15,807, or .78 percent, of criminal cases resolved by state courts of last resort. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL APPEALS IN STATE COURTS 4 (2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf> [https://perma.cc/ZBU8-PCU9]. That same year, capital cases made up only ten of 45,233, or .02 percent, of criminal cases disposed of by state intermediate courts. *Id.* at 5. These numbers include both direct appeals and appeals from post-conviction cases. *Id.* at 10, 12.

342. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); see *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

action.”³⁴³ But unlike other constitutional rights, a capital defendant’s Eighth Amendment protection does not end with their conviction and sentence; it follows them into the appellate and habeas processes.³⁴⁴

Moreover, because of the severity of the punishment of death, investigation restrictions have the potential for the greatest harm in capital cases. At a minimum, courts should recognize a constitutional right of state post-conviction investigation in death penalty cases, supported not only by the Fourteenth Amendment’s Due Process Clause, but also by the Eighth Amendment.

With the exception of Arizona and Oregon’s victim statutes, states do not uniformly impose restrictions on post-conviction investigation. Instead, individual judges enact most of these restrictions via court order. The frequency of these restrictions varies from state to state, and sometimes from county to county or courtroom to courtroom, creating arbitrary results.³⁴⁵ An inability to investigate the conduct of the jury or the veracity of State witnesses at trial increases the likelihood that any unreliability in the trial or sentencing process will go undiscovered. To minimize the risk of error in these cases, trial courts must acknowledge the capital defendant’s right to investigate in state post-conviction proceedings.

To argue that a stronger case exists for recognition of a right to investigate in capital cases does not mean to imply that the practical concerns associated with recognition of the right in non-capital cases are insurmountable. The Supreme Court has long allowed states to serve as laboratories,³⁴⁶ allowing them to develop different procedures that conform to the federal Constitution. In fact, the Court has been reluctant to hold that the guarantees of the Due Process Clause impose specific affirmative procedural requirements on states: “[W]hen a State

343. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

344. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 580, 584 (1988) (holding that denial of defendant’s motion for post-conviction relief violated Eighth Amendment, where his death sentence was based, in part, on a felony conviction that was later vacated); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.”); *see also Parker v. Dugger*, 498 U.S. 308, 321 (1991) (noting the “crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally”).

345. *See* Appendix (demonstrating most limitations are imposed by individual trial judges and then affirmed on appeal).

346. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.”).

chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.'"³⁴⁷ It is possible that the Court would only penalize states for creating procedures, like interview restrictions, that *interfere with* the right to investigate. Courts could thus choose to recognize that states have negative, rather than affirmative responsibilities; they cannot interfere with a convicted defendant's right to investigate, but they need not create specific affirmative procedures to facilitate this right.

CONCLUSION

Just as it is with other witnesses, the decision as to whether to participate in a post-conviction interview should be left to the jurors, victims, and State witnesses themselves—not to courts and prosecutors. State legislatures and rules commissions have the authority to address this problem now by enacting laws that affirmatively protect a post-conviction defendant's right to conduct unencumbered interviews. States that remain convinced that these witnesses exhibit a particular vulnerability should follow the examples of California and Colorado, which require trial courts to issue special instructions informing jurors of their rights following the verdict in a criminal case. Colorado simply mandates that trial courts inform jurors that it is "entirely the jurors' decision whether to talk to anyone about the case or their service as a juror."³⁴⁸ California goes a step further, requiring trial judges not only to inform jurors of their "absolute right" to refuse to discuss their deliberations with anyone, but also that they may be contacted by both the prosecutor and the defense following their discharge.³⁴⁹ Because these instructions come from the trial court and explicitly reference both parties, they both appear neutral and avoid the pitfalls of asymmetry.³⁵⁰ Thus, while the jurors themselves gain no special rights, they are specially informed that they need not participate, striking a balance between protecting jurors from harassment and preserving a defendant's right to investigate. The statute also empowers the jurors to seek recourse; jurors who feel harassed are encouraged to contact the trial court and offending attorneys are subject to contempt charges.³⁵¹

347. *District Attorney's Office v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)).

348. *People v. Harlan*, 109 P.3d 616, 636 (Colo. 2005). Massachusetts has recently adopted a similar instruction: "[J]urors are instructed, both before trial (in the Trial Juror's Handbook) and after trial (in jury instructions), that they are under no obligation to disclose anything about their deliberations to either the media or to counsel. In effect, they are encouraged to make clear whether or not they wish to speak to anyone post-verdict and counsel are obliged to respect their wishes." Brief of Amici Curiae Retired Judges in Support of Petition for a Writ of Certiorari, *supra* note 152, at 5.

349. CAL. CIV. PROC. CODE §§ 206 (a)–(b) (2017). The California statute also places duties on attorneys who contact jurors more than twenty-four hours after the verdict: these attorneys must identify themselves and the party they represent; they must conduct interviews at a reasonable time and place; and they must explicitly inform jurors of their right to refuse an interview. *Id.* § 206(c).

350. Compare *supra* notes 348–349, with *supra* notes 137–138.

351. CAL. CIV. PROC. CODE §§ 206 (d)–(e).

Similar instructions could address the rights of surviving victims and their family members to refuse interviews, while instructing them that the prosecutor does not serve as their representative in the case and may have different goals. Given that many states now recognize a victims’ bill of rights and require that victims receive notice of these rights, clarifying their rights in the context of attorney interviews would not be burdensome.³⁵²

Despite their negative consequences, courts continue to uphold restrictions on the ability of post-conviction counsel to interview witnesses. Traditional arguments based on the First Amendment, the right to counsel, or an appeal to fair process fail, in part, because they require attorneys to proffer specific harms that are unknowable without the ability to conduct investigation. Because the ability to investigate is essential to the state post-conviction process, courts should recognize that fundamental fairness guarantees a criminal defendant a constitutional right to investigate in this setting. Investigation is the hallmark of post-conviction death penalty work. Without it, defense attorneys have no way to learn about constitutional errors that occurred in their client’s trial that were not captured in the court reporter’s transcripts, and state habeas corpus becomes a hollow avenue for relief.

APPENDIX

State	Witness	Authority	Restriction	Scope
AL*	Jurors	Mobile County Trial Court Order	Good cause required to interview	Individual trial court order
AZ*	Jurors	<i>State v. Paxton</i> , 701 P.2d 1204, 1205 (Ariz. Ct. App. 1985)	Good cause required to interview	Affirming discretion of individual trial court
	Victims	ARIZ. REV. STAT. ANN. § 13-4433 (2017) (<i>see id.</i> §§ 13-4401–13-4438)	Must initiate contact through prosecutor’s office; prosecutor may be present at interview unless victim opts out; prosecutor conveys to defense any time and manner restrictions on interview by victim; prosecutor may refuse to pass on defense correspondence	State statute

352. See *Victims’ Rights*, NAT’L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims'-rights> [https://perma.cc/4KU5-HTA6] (“Victims also usually have the right to receive notification of important events in their cases. Although state laws vary, most states require that victims receive notice of the following events: the arrest and arraignment of the offender, bail proceedings, pretrial proceedings, dismissal of charges, plea negotiations, trial, sentencing, appeals, probation or parole hearings, release or escape of the offender.”).

State	Witness	Authority	Restriction	Scope
	State's Witness	<i>State v. Rose</i> , No. CR2007-149013-002 (Ariz. Super. Ct. Maricopa Cty. Apr. 6, 2016)	Third party counsel appointed for State witnesses with testimonial agreements	Individual trial court order
CA*	Jurors	CAL. CIV. PROC. CODE § 206(c) (West 2017)	Defense counsel must affirmatively inform juror of right to refuse interview	State statute
		CAL. CIV. PROC. CODE § 237(b)	Good cause required to release jurors' identifying information	State statute
		CAL. CIV. PROC. CODE § 192	Indicating statutes in chapter, including §§ 206(c) and 237(b), apply to both criminal and civil cases	State statute
		<i>Townsel v. Superior Court</i> , 979 P.2d 963, 970 (Cal. 1999)	Good cause required to interview	Affirming discretion of individual trial court
	Victims	CAL. PENAL CODE § 679.04(a) (2017)	Sexual assault victim can have advocate present during defense interviews	State statute
CO*	Jurors	<i>People v. Harlan</i> , 109 P.3d 616, 636 (Colo. 2005) (Rice, J., dissenting)	Court must instruct juror on right to refuse	Case law noting post-verdict jury required instruction in criminal cases
DE	Jurors	<i>State v. Cabrera</i> , 984 A.2d 149, 150 (Del. Super. Ct. 2008)	Interview must take place in court with both parties and judge present; parties may direct and cross-examine jurors.	Affirming discretion of individual trial court
FL*	Jurors	FLA. R. CRIM. P. 3.575	"Reason to believe that the verdict may be subject to legal challenge" required for interviews; court determines time and place for the interviews; interviews are conducted in the presence of the court and both parties	State statute
		FLA. STATE BAR R. 4-3.5	Attorneys may conduct juror interviews to determine if there is "reason to believe" grounds for legal challenge exist; required to file notice of intention to interview specific jurors with notice to court and adversary	State rules of professional conduct
		<i>Marshall v. State</i> , 976 So. 2d 1071, 1079-81 (Fla. 2007)	Court may require that the juror be questioned by the court in the courtroom with both sides present; court may limit content of questioning	Affirming discretion of individual trial court in capital case
ID*	Jurors	<i>Hall v. State</i> , 253 P.3d 716, 722 (Idaho 2011)	Good cause of admissible juror misconduct required to interview	Affirming discretion of individual trial court
IL	Jurors	<i>People v. Williams</i> , 807 N.E.2d 448, 454-45 (Ill. 2004) (capital case)	Good cause required for juror contact information; court informed jurors by mail of right to refuse; court required jurors to contact court if wished to be interviewed	Affirming discretion of individual trial court

State	Witness	Authority	Restriction	Scope
IN*	Victims	<i>Lewis v. State</i> , 451 N.E.2d 50, 55 (Ind. 1983)	Presence of victim advocate or prosecutor required to interview	Affirming discretion of individual trial court
KY*	Jurors	FAYETTE CTY. CIR. CT. LOCAL R. 32	Good cause required to interview	Local court rule
ME	Jurors	<i>State v. St. Pierre</i> , 693 A.2d 1137, 1140–41 (Me. 1997)	Trial court conducted interviews in presence of defense counsel, without permitting defense counsel to question the jurors	Affirming discretion of individual trial court
MA	Jurors	<i>Commonwealth v. Moore</i> , 52 N.E.3d 126, 136 (Mass. 2016)	Leave of court no longer required to contact jurors; notice to opposing counsel required five days before interview	Case law requiring notice to adversary in all cases
MN	Jurors	<i>Schwartz v. Minneapolis Suburban Bus Co.</i> , 104 N.W.2d 301, 303 (Minn. 1960)	No interviews permitted; court summons jurors to court for formal examination by both parties	Case law forbidding ex parte interviews and requiring formal courtroom examination in civil cases
		<i>Walker v. State</i> , No. C4-96-2039, 1997 WL 435873, at *1 (Minn. Ct. App. Aug. 5, 1997)	No interviews permitted prior to court's juror misconduct hearing in a criminal case	Affirming discretion of individual trial court; unpublished case
		<i>State v. Danforth</i> , No. C3-01-959, 2002 WL 47792, at *1 (Minn. Ct. App. Jan. 15, 2002)	Court may prohibit contact with jurors in a criminal post-conviction proceeding	Affirming discretion of individual trial court; unpublished case
MS*	Jurors	<i>Gladney v. Clarksdale Beverage Co.</i> , 625 So. 2d 407, 419 (Miss. 1993)	Written permission of trial court required to interview; trial court may supervise interviews if harassment alleged or if interviews involve inadmissible information	Case law requiring written permission of trial court to interview jurors in civil cases
		<i>James v. State</i> , 777 So. 2d 682, 703 (Miss. Ct. App. 2000)	Applying <i>Gladney</i> to criminal case	Case law applying <i>Gladney</i> to criminal cases
MO*	Jurors	<i>Strong v. State</i> , 263 S.W.3d 636, 643–44 (Mo. 2008)	Permission required to interview; interpreting Rule 53.3 of the twenty-second Judicial Circuit to require proffer of basis for suspicion of admissible juror misconduct	Affirming discretion of individual trial court in interpretation of local rule
		<i>State ex rel. Butler v. Howard</i> , No. WD 48096, 1994 WL 4300, at *4 (Mo. Ct. App. Jan. 11, 1994)	Good cause required to interview; court may question jurors; court should conduct interview under "the conditions that are reasonable"	Affirming discretion of individual trial court in capital case; unpublished case
NJ	Jurors	RULES GOVERNING THE COURTS OF THE STATE OF N.J. R. 1:16–1	Good cause required to interview	State court rule
		<i>State v. Harris</i> , 859 A.2d 364, 430–31 (N.J. 2004)	Good cause required to interview	Case law requiring attorneys show good cause to interview

State	Witness	Authority	Restriction	Scope
		<i>State v. Koedatich</i> , 548 A.2d 939, 971–72 (N.J. 1988)	Hearsay is insufficient to establish good cause, except in cases involving racial or religious bigotry or jury consideration of extraneous evidence	Case law holding hearsay is insufficient to establish good cause
		<i>State v. Loftin</i> , 680 A.2d 677, 719 (N.J. 1996)	Good cause is “some event or occurrence that injected into the deliberation in which the capacity for prejudice inheres.”	Case law defining good cause
	State’s Witness	<i>State v. Feaster</i> , 877 A.2d 229, 245 (N.J. 2005)	Interfering with a witness’s decision to testify for a defendant in a post-conviction proceeding violates defendant’s due process and compulsory process rights under the state constitution	Case law forbidding interference with witness’s decision to testify for criminal defendant at post-conviction hearing
OH*	Jurors	CUYAHOGA CTY. LOCAL R. 22(E)	Good cause required to interview	Local court rule
OK*	Jurors	<i>Crider v. State ex rel. Dist. Court of Oklahoma Cty.</i> , 29 P.3d 577, 578 (Okla. Crim. App. 2001)	Court may impose no contact order if jurors report harassment	Affirming discretion of individual trial court
		OKLA. BAR ASS’N ETHICS COUNSEL, ETHICS OP. NO. 248 (1967)	Unethical for a lawyer to interview jurors on matters other than legal issues regarding the validity of the verdict	Opinion of Bar Association legal ethics counsel
OR*	Jurors	<i>State v. Smith</i> , 458 P.2d 687, 693 (Or. Ct. App. 1969)	Good cause required to interview	Affirming discretion of individual trial court
	Victims	<i>Johnson v. Dep’t of Pub. Safety Standards & Training</i> , 293 P.3d 228, 232–33 (Or. Ct. App. 2012)	ORS 135.970(2) does not impose a duty on anyone other than the defendant’s attorney to inform the victim of her rights	Case law interpreting state statute
		OR. REV. STAT. ANN. § 135.970 (West 2017)	Victim may request that court require good cause to release contact information; defense must inform victim of counsel’s identity and victim’s right to refuse interview	State statute
		OR. REV. STAT. ANN. § 138.625(5)	Post-conviction attorney must inform victim of counsel’s identity and victim’s right to refuse; victim may have a district attorney, assistant attorney general or other attorney or advocate present during any post-conviction interview	State statute
TN*	Jurors	<i>State v. Gaddis</i> , No. E2011-00003-CCA-R3CD, 2012 WL 2370636, at *11 (Tenn. Crim. App. June 25, 2012)	Defense has a right to interview but local rules may place reasonable restrictions on time, place, and manner	Case law affirming validity of local rules; unpublished case
		<i>State v. Thomas</i> , 813 S.W.2d 395, 396 (Tenn. 1991)	Counsel may interview jurors without prior court approval provided interview	Case law recognizing right to interview jurors

State	Witness	Authority	Restriction	Scope
			concerns only matters of admissible juror misconduct	concerning admissible juror misconduct
TX*	Jurors	TEX. CRIM. PROC. CODE ANN. art. 35.29(b)-(c) (West 2017)	Good cause required for juror contact information except for situations where post-conviction counsel acquires information from trial counsel	State statute
WA*	Victims	WASH. REV. CODE ANN. § 7.69.030(10) (West 2017)	Victims of violent and sex crimes have a right to have victim advocate or support person present at any prosecutorial or defense interviews	State statute
		<i>State v. Merrill</i> , 335 P.3d 444, 447-48 (Wash. Ct. App. 2014)	Attorney may be sanctioned for contacting victim without advocate present, where victim had invoked right to have advocate present	Affirming discretion of individual trial court
WI	Victims	WIS. STAT. ANN. § 950.045 (West 2017)	Victims of certain sex crimes have a right to have victim advocate present at any prosecutorial or defense interviews, including post-conviction interviews	State statute
Key * State that authorizes capital punishment.				

