

AN APPEALING CHOICE: AN ANALYSIS OF AND A PROPOSAL FOR CERTIFICATES OF APPEALABILITY IN “PROCEDURAL” HABEAS APPEALS

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Introduction: AEDPA and Its Discontents	792	R
I. Defining Terms: “Procedural” and “Merits”	801	R
II. The Pre-AEDPA World and Appellate Review of Procedural Issues	804	R
III. The Enactment of AEDPA and the New § 2253	807	R
IV. Post-AEDPA, Pre- <i>Slack</i> : The Struggle	810	R
V. The Supreme Court Weighs in: <i>Slack</i> and Its Progeny	813	R
A. <i>Slack</i> Itself	813	R
B. Post- <i>Slack</i> Supreme Court Decisions.....	816	R
VI. The Circuits Respond	819	R
A. The First School: Permissive Scrutiny, Cognizability, and the “Quick Look”	820	R
B. The Second School: The Strict Standard and Fealty to the Language of § 2253(c) (2)	822	R
C. The <i>Pabon</i> Problem: The Third Circuit’s Third Way	825	R
VII. The Best Approach Is the Most Permissive	829	R
VIII. What Does a “Compliant” COA Order Look Like in 2013?	840	R
Conclusion: The Modest Proposal	840	R

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INTRODUCTION: AEDPA AND ITS DISCONTENTS

One of the few universal truths in the law is this: the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)¹ is not well loved. As enacted, AEDPA departed from earlier efforts to reform the federal postconviction process² by implementing strict new procedural and substantive barriers to successful federal habeas corpus relief (as well as to relief under 28 U.S.C. § 2255, which is the primary pathway to collateral relief for federal prisoners).³ AEDPA was intended, in part, to streamline and limit collateral attacks on con-

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

2. Earlier efforts took a markedly different approach to solving the problem of protracted postconviction processes. For example, an AEDPA predecessor statute would have “eliminate[d] certain procedural barriers to consideration of the merits” because “[p]rocedural barriers have not only created new issues for litigation that cause unnecessary and artificial delays, but they have also barred the Federal courts from correcting constitutional errors.” H.R. REP. NO. 103-470, at 3 (1994); see also Marianne L. Bell, Note, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J.L. & PUB. POL’Y 607, 609–12 (2000) (discussing the history of the Powell Committee); David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES MAGAZINE, Oct. 6, 1996, § 6, at 65.

3. In federal court, postconviction attacks on convictions and sentences, which generally occur after the direct appeal process has concluded, take two primary forms: petitions for a writ of habeas corpus under 28 U.S.C. § 2254 (filed by state prisoners) and motions to vacate a sentence under 28 U.S.C. § 2255 (filed by federal prisoners). The latter are not technically habeas corpus proceedings. See, e.g., *Swain v. Pressley*, 430 U.S. 372, 377–78 (1977) (discussing briefly the distinction between § 2255 and habeas relief itself); *Williams v. Carlson*, No. 86-5503, 1987 U.S. App. LEXIS 14207, at *4–5 (D.C. Cir. Aug. 14, 1987) (“An attack on the imposition of sentence or the underlying conviction, as opposed to an attack on the execution of the sentence, is more properly within the ambit of a motion to vacate under 28 U.S.C. § 2255 which superseded habeas corpus, 28 U.S.C. § 2241, and provides nearly the exclusive remedy for such an attack by a federal prisoner.”); 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 41.1 (6th ed. 2012) [hereinafter *FHCPP*]; RONALD P. SOKOL, *FEDERAL HABEAS CORPUS: A SECOND AND REVISED EDITION OF A HANDBOOK OF FEDERAL HABEAS CORPUS* § 24 (1969) (“Section 2255 . . . is a statutorily compelled substitute for habeas corpus applicable to federal prisoners only.”). It has been my experience that sticklers for accuracy in language dislike when a 28 U.S.C. § 2255 motion is referred to as a “petition for habeas corpus,” while others fail to see the big deal with lumping everything under the umbrella of “petitions.” See, e.g., *Matias v. Artuz*, 8 F. App’x 9, 10 n.1 (2d Cir. 2001) (order denying certificate of appealability) (“[W]e use ‘petition’ to refer to the document seeking collateral relief, whether filed pursuant to 28 U.S.C. § 2254 or 28 U.S.C. § 2255.”). While this Article does, on occasion, distinguish between habeas petitions and § 2255 motions in specific instances, I will risk the wrath of the majority by using “petition” and “petitioner” as shorthand in other contexts, and will invoke “habeas corpus” to signify the realm of postconviction remedies available to state and federal prisoners to challenge their convictions and sentences.

victions and sentences with the goals of “curb[ing] the abuse of the statutory writ of habeas corpus” and “address[ing] the acute problems of unnecessary delay and abuse in capital cases.”⁴ However, AEDPA succeeded instead in perplexing the judiciary, practitioners, and prisoners alike. Partly to blame was the statute’s adherence to a labyrinthine process of review. But equally at fault, if not more so, was AEDPA’s broad, ambiguous, and inconsistent language. Unlike many popular legislative bêtes noires, AEDPA draws condemnation on both its substance *and* the quality of its drafting, a sign of its quick construction and hasty passage.⁵ The ultimate task of its interpretation has been placed back with the federal judiciary, the very entity that it was designed to constrain. And in defining AEDPA’s contours through more than a decade of opinions, the judiciary has demonstrated inconsistent fealty to both the text of and the intent behind the statute.⁶

Warning signs were there from the beginning, to be sure. In his signing statement, President Clinton went so far as to rely on *Marbury v. Madison*,⁷ assuring skeptical onlookers that “the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems,”⁸ would make lemonade from lemons. But the verdict on AEDPA, fifteen or so years on, has not been kind. Courts are still struggling to make sense of the statute’s most

4. H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.); *see also* Hohn v. United States, 524 U.S. 236, 264–65 (1998) (Scalia, J., dissenting) (“The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court’s habeas corpus jurisprudence.”). An earlier committee report on a previous version of AEDPA announced similar goals. *See* H.R. REP. NO. 104-23, at 9–10 (1995). Of course, this path toward habeas reform drew strongly worded dissent as well. *See, e.g., id.* at 34 (“[The bill] sacrifices the last hope of the falsely accused and the wrongly convicted—the Great Writ of Habeas Corpus—to a facile expediency driven by misguided passion for ‘finality.’”); *see also* 141 CONG. REC. 15,018, 15,096 (1995) (“Our membership consists of both supporters and opponents of the death penalty, Republicans and Democrats, united in the belief that the federal habeas corpus process can be dramatically streamlined without jeopardizing its constitutional core.”).

5. *See* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 546 (2006) (discussing briefly the background of AEDPA’s origins and passage).

6. *See, e.g.,* FHCPP, *supra* note 3, § 3.2 (describing the Supreme Court’s give and take on AEDPA interpretation); *Supreme Court Upholds Limits on Appeals*, SEATTLE POST-INTELLIGENCER, June 29, 1996, at A8.

7. 5 U.S. (1 Cranch) 137 (1803).

8. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 24, 1996).

fundamental provisions—for example, what “State . . . collateral review” means⁹—and a welter of onlookers has weighed in on a range of defects in the statute, including its poor drafting, its questionable underlying assumptions, and its efficacy at accomplishing its goals.¹⁰

Habeas corpus has long implicated doctrinally difficult areas, like retroactivity, and fascinating questions of federalism, which have simmered since the very day that the great writ “launched . . . on its brilliant career as a post-conviction remedy.”¹¹ Understandably, a great quantity of post-AEDPA habeas scholarship has focused on the “big concepts” of the statute. Possibly the most debated and discussed portion of the statute is the amended 28 U.S.C.

9. See, e.g., *Wall v. Kholi*, 131 S. Ct. 1278, 1287 (2011) (holding that “a motion to reduce sentence under Rhode Island law is an application for ‘collateral review’ that triggers AEDPA’s tolling provision”).

10. See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“[I]n a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”); Bell, *supra* note 2, at 630 (“The AEDPA is redundant and Chapter 154 is ineffective, but more important, Chapter 154 is simply not well written.”); Christopher Q. Cutler, *Friendly Habeas Reform—Reconsidering a District Court’s Threshold Role in the Appellate Habeas Process*, 43 WILLAMETTE L. REV. 281, 282 (2007) (“The proverbial army of chimps pounding on typewriters could repeatedly recreate the AEDPA’s shoddy language before reproducing even one melodious Shakespearean sonnet.”); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 75 (2002) (describing AEDPA as a “new and poorly drafted statute that has required almost agonizingly intense interpretation by the judiciary”); Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43, 46–47 (2000); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1228 (2012) (explaining that, in the wake of AEDPA, “[t]he resulting body of law is inordinately complex and vexing to even the most experienced of jurists”); Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1741 n.62 (2000) (lamenting AEDPA’s “incomprehensible substantive standards”); see also John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 263 (2006) (remarking that AEDPA’s poor drafting significantly contributes to its not having had the effects its proponents envisioned). My favorite indictment of AEDPA would have to be Professor Anthony Amsterdam’s foreword to the current edition of FHCPP, in which he describes AEDPA as an “atomic bomb” that “shatter[ed] the preexisting structure of habeas corpus law,” with federal courts as the unfortunate toilers who are “still trying to reconstruct a bit of order” in the “blind killing ground” of post-AEDPA federal habeas jurisprudence. Anthony G. Amsterdam, *Foreword to the Sixth Edition* of RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (2012). Unsurprisingly, in Professor Amsterdam’s list of four primary AEDPA defects, its “elaborate and obscure” text occupies pole position. *Id.*

11. GRAHAM HUGHES, *THE DECLINE OF HABEAS CORPUS* 2 (1990).

§ 2254(d), which greatly enhanced the deference due by federal courts to state-court decisions. Despite arguably being the centerpiece of the post-AEDPA habeas regime, 28 U.S.C. § 2254(d) is oblique even in the context of AEDPA's general standard of legislative bunts.¹² The section's ambiguity, amplified by its daily relevance to habeas petitions arising out of state court convictions and sentences, has made it a justifiably popular topic for both scholars¹³ and the Supreme Court, which continues to correct courts that fail to show the proper deference.¹⁴

This Article, by contrast, examines a more obscure part of AEDPA that is of equal daily importance to the federal courts: the certificate of appealability ("COA") requirement contained in 28 U.S.C. § 2253(c).¹⁵ It may surprise the uninitiated to learn that habeas petitioners do not, strictly speaking, have an appeal of right in the federal courts, and must obtain COAs before a federal court

12. Compare 28 U.S.C. § 2254(d) (1994) (establishing, with multiple caveats, that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct."), with 28 U.S.C. § 2254(d)(1)–(2) (2012) (restricting granting writ of habeas corpus to claims where the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

13. See, e.g., Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223 (2002); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677 (2003); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998).

14. These reversals often come in the form of *per curiam* opinions which draw the occasional dissent. See, e.g., *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (per curiam); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam).

15. During the pendency of this Article's creation, Jonah Horowitz published an excellent piece addressing another narrow question arising out of the COA requirement: "What happens when a federal district court judge rejects a federal magistrate judge's recommendation to grant habeas relief and then rules on a [COA]?" Jonah J. Horowitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 ROGER WILLIAMS U. L. REV. 695, 698 (2012). Mr. Horowitz intended his article to be a "scholarly exploration of the lower courts' everyday work-product," *id.*, and I intend this Article to do the same.

of appeals may hear their appeals.¹⁶ The process, stated simply, requires the district court to decide, in the first instance, whether it will grant a COA on any, a few, or all issues. Pursuant to a timely-filed notice of appeal and/or a separate application for a COA, the petitioner can request a COA or an expansion of the ambit of a COA from the court of appeals, which, in turn, is free to develop its own procedures for expanding, constricting, granting, and denying COA applications.¹⁷ But the *substantive* requirements for obtaining a COA, which are set out by § 2253(c), are anything but clear, and courts have struggled to articulate what a prisoner must do to earn a COA. This Article explores one component of this test: to what extent federal appellate courts, in deciding whether to grant a COA,¹⁸ should scrutinize the “merits” of a habeas corpus petition—the strength of a petitioner’s substantive claims—when the district court rests its decision on a procedural ground that does not implicate the merits of the petition.

This issue, while undoubtedly specific, is neither as arcane nor as technical as one might assume and has split the circuits even after a Supreme Court case ostensibly settled the issue in 2000. The problem arises from the multi-stage, restrictive habeas appeals process. Before AEDPA, and since the beginning of the twentieth century, federal law required that habeas petitioners make a showing of merit—a demonstration of “probable cause”—before engaging in a full appeal. Supplanting the prior “probable cause” regime, AEDPA purported to adopt, but instead altered, a key component of the previous standard, replacing the word “federal” with the word “constitutional.” This small change immediately caused a great deal of confusion over whether appeals of nonconstitutional matters, such as basic procedural questions, were still possible. Since AEDPA’s slate of new procedural pitfalls—the one-year statute of limitations, for example—meant that more and more petitions would be denied on grounds other than on the merits, solving AEDPA’s appellate riddle was a pressing task. Increasing the urgency of the affair

16. See *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[T]here is no constitutional right to an appeal.”); *United States v. Brooks*, 245 F.3d 291, 293 (3d Cir. 2001) (noting that certain provisions of 28 U.S.C. § 2253 denying a right to an appeal did not violate the Suspension Clause of the United States Constitution, U.S. CONST. art. I, § 9, cl. 2).

17. See *FHCPP*, *supra* note 3, § 35.4(b)(ii); see also *Slack v. McDaniel*, 529 U.S. 473, 483–85 (2000) (discussing procedures for treating a notice of appeal as a COA application).

18. Technically, courts grant an “application” for a COA, not a COA itself. For substantially the same reasons discussed above, *supra* note 3, I will employ the less-convoluted shorthand in this piece.

was the fact that appellate review would be necessary to clarify some of AEDPA's more opaque provisions.

Further complicating matters was the development and implementation of the actual COA-issuing procedure at the appellate level. The text of AEDPA suggested (but did not mandate) a two-step inquiry: First, does the petition or motion warrant granting a COA; and second, should the judgment of the district court be altered? As Federal Rule of Appellate Procedure 22(b) (as amended by AEDPA § 103) establishes, when a district judge has not issued a COA, an appellant may seek one from “a circuit judge or judges, as the court prescribes.”¹⁹ Rule 22(b) emphasizes the role a COA plays in the “triage” of habeas appeals, as does the fact that most merits cases in the circuit courts are decided by three-judge panels.²⁰ Because many litigants are pro se, and because full briefing is generally not required at this stage,²¹ the COA requirement can easily become a gatekeeper of enhanced importance. For example, the Third Circuit appoints counsel as a matter of course to those pro se appellants who earn COAs.²² Granting a COA, then, becomes a source of added expense and additional delay—an inefficient, and thus unappealing, proposition with regard to those appellants whose claims appear marginal at best.

Moreover, and in part because the COA stage precedes full appellate review, COA determinations are often brief orders or short, summary decisions. Many of these dispositions are not provided to legal publishers and, as a result, are not available on LexisNexis or Westlaw, are not easily searched (being available only on PACER), and may not become part of the relevant “case history” in online databases. Since COA orders are generally unreported, they rarely carry the weight of precedent, and provide few indications as to the extent of the court's reasoning, although subsequent merits decisions may shed light on the rationale underlying those orders or contain additional discussion of COA-related issues.²³ Indeed, as of 2013, most of the relevant federal circuit courts routinely issued or-

19. FED. R. APP. P. 22(b)(2).

20. Arising out of 28 U.S.C. § 46(c) (2013).

21. *See, e.g.*, 10TH CIR. R. 22.1 (2013) (requiring a brief from the appellant, but not the appellee, before a COA is granted).

22. *See* 3D CIR. I.O.P. 10.3.2 (2010) (“When a certificate of appealability is granted on behalf of an indigent appellant pursuant to 28 U.S.C. § 2254 or § 2255, the clerk appoints counsel for the appellant unless the court instructs otherwise.”); *see also* Cutler, *supra* note 10, at 348 (articulating the “three tracks” upon which habeas appeals proceed).

23. *See, e.g.*, Darden v. Sobina, 477 F. App'x 192, 916–17 (3d Cir. 2012) (discussing attempt to expand COA in a later merits decision).

ders of varying length that were not indexed by legal databases and, with certain exceptions, contained little reasoning.²⁴

24. This is readily apparent from a survey of the underlying district court decisions. *See, e.g.*, United States v. Pujols-Tineo, CR No. 05-137-04S, 2011 U.S. Dist. LEXIS 25112, at *19 (D.R.I. Mar. 11, 2011), *COA denied*, No. 11-2002 (1st Cir. Oct. 24, 2011); Platt v. Ercole, No. 05-CV-6050(JS), 2008 U.S. Dist. LEXIS 101368, at *12–13 (E.D.N.Y. Dec. 12, 2008), *COA denied*, No. 08-6263 (2d Cir. June 11, 2009); Rucker v. Curley, No. 11-82, 2011 U.S. Dist. LEXIS 97223, at *12 (W.D. Pa. Aug. 30, 2011), *COA denied*, C.A. No. 11-4617 (3d Cir. Mar. 9, 2012); Copeland v. Quarterman, CV-07-77, 2008 U.S. Dist. LEXIS 75219, at *11–13 (S.D. Tex. Sept. 28, 2008), *COA denied*, No. 08-41154 (5th Cir. July 30, 2009); Barnes v. Lafler, No. 2:07-CV-10782, 2010 U.S. Dist. LEXIS 39077, at *27–29 (E.D. Mich. Apr. 21, 2010), *COA denied sub nom.* Barnes v. Howes, No. 10-1613 (6th Cir. Oct. 13, 2010); Rodgers v. Pfister, No. 11-3120(SEM), 2011 U.S. Dist. LEXIS 94862, at *30–31 (C.D. Ill. Aug. 24, 2011), *COA denied*, No. 11-3145 (7th Cir. Mar. 29, 2012); Harris v. United States, No. 11-5081-CV-SW-RED, 2012 U.S. Dist. LEXIS 5792, at *6 (W.D. Mo. Jan. 18, 2012), *COA denied*, No. 12-1991 (8th Cir. June 7, 2012); Baldonado v. Ryan, No. CV-11-0090-PHX-FJM, 2011 U.S. Dist. LEXIS 146024, at *6–7 (D. Ariz. Dec. 16, 2011), *COA denied*, No. 11-18081 (9th Cir. July 9, 2012); Reese v. United States, No. 6:11-cv-57, 2012 U.S. Dist. LEXIS 41364, at *1 (S.D. Ga. Mar. 26, 2012), *COA denied*, No. 12-11500-F (11th Cir. July 30, 2012). All of these decisions were procedural denials in the district court, and in each case a COA application was denied by the relevant court of appeals. Most of the orders were quite short; however, the Sixth Circuit and Eleventh Circuit issued lengthier memoranda that, nevertheless, were not available on either Lexis or Westlaw. The Seventh Circuit and Ninth Circuit utilized two-judge panels to issue their respective orders. *See* Santiago Salgado v. Garcia, 384 F.3d 769, 772–75 (9th Cir. 2004) (discussing differing composition of panels by circuit, while establishing the statutory basis for such a variance).

The Fifth Circuit makes some of its COA denials available to legal publishers. *See, e.g.*, Gates v. Thaler, 476 F. App'x 336 (5th Cir. 2012). Others are not available. It may be that COA orders deemed to be more “important” are submitted, whereas rote dispositions are not; or, alternatively, it simply may be the caprice of the various panels. The Sixth Circuit also makes some of its COA dispositions available. *See, e.g.*, Lathan v. Duffey, No. 10-3253, 2010 U.S. App. LEXIS 27415 (6th Cir. Nov. 3, 2010).

By contrast, the Fourth and Tenth Circuits make what appears to be the bulk of their COA decisions available to legal publishers. The Fourth Circuit's decisions are often rote and utilize standard language; in that sense, the decisions do not markedly differ from the summary orders of sister circuits. *See, e.g.*, Wilson v. United States, No. 5:09-CR-63-BR, 2011 U.S. Dist. LEXIS 79236, at *5 (E.D.N.C. July 20, 2011), *COA denied per curiam*, 459 F. App'x 240, 241 (4th Cir. 2011). However, the Tenth Circuit issues full opinions to dispose of its COA applications, and often these read like complete decisions on the merits. *See, e.g.*, Warren v. Milyard, No. 10-cv-02557-BNB, 2011 U.S. Dist. LEXIS 17986, at *9–10 (D. Colo. Feb. 9, 2011), *COA denied*, 427 F. App'x 670, 673 (10th Cir. 2011). As discussed further *infra*, the Tenth Circuit's approach can, at times, appear to contravene the Supreme Court's insistence that the COA stage is not the proper place to evaluate the full spectrum of the petitioner's or movant's arguments. But even in circumstances where the Tenth Circuit grants a COA, a separate stage (requiring additional briefing, *see supra* p. 797) precedes a full merits determination. *See, e.g.*, United States v.

These factors—trriage and unavailability—collide when appellants seek review of procedural questions. In the aforementioned case from 2000, *Slack v. McDaniel*,²⁵ the Supreme Court clarified that federal appellate courts could review the procedural decisions of the district courts, even if those decisions themselves were not of “constitutional” dimension.²⁶ While *Slack* settled the broader question raised by the passage of AEDPA, it did little to solve an equally thorny concern: What attention should be paid to the merits of a petition when the district court resolved the matter on a procedural ground? *Slack* says that jurists of reason must, in part, find it debatable whether a petition “states a valid claim of the denial of a constitutional right,”²⁷ but this pronouncement does not explicitly track the language of 28 U.S.C. § 2253(c) and lacks an obvious antecedent in the Supreme Court’s habeas corpus jurisprudence. Both before and after *Slack*, courts have struggled to set a workable standard for evaluating the merits of these petitions. But despite the regularity of procedural COA grants and denials, vanishingly little law has been made on the question.

In this Article, I analyze the various standards used by the federal appellate courts and demonstrate that an undemanding standard is ideal. My thesis is this: petitioners who comply with the procedural requirements of AEDPA, or whose petitions are otherwise unfairly dismissed for other procedural reasons, should not be denied their “one bite of the [postconviction] apple,” as provided by AEDPA,²⁸ and should be afforded a full review of their claims on the merits. As I will demonstrate, the wide reach of § 2253(c), combined with the innumerable ways that a petition can fail other than

Roberts, 492 F. App’x 869, 873–74 (10th Cir. 2012) (granting COA and directing additional briefing); *United States v. Roberts*, 500 F. App’x 757, 759 (10th Cir. 2012) (per curiam) (issuing limited remand to the district court). Curiously, the odd order by the “nonpublisher” courts does end up on Lexis or West, although I imagine this to be due to operator error or the eccentricity of individual chambers’ procedures. For example, *Wanger v. Hayman*, No. 11-1375, 2011 U.S. App. LEXIS 18466 (3d Cir. May 26, 2011), is a rote denial of a COA, but the Lexis reproduction of the order also contains the Third Circuit’s boilerplate clerk order reflecting an entry of judgment, which surely was not intended for even summary publication. And, of course, courts may choose to publish the occasional COA determination, even if doing so is not the regular practice of the court. *See, e.g.*, *Jefferson v. Welborn*, 222 F.3d 286 (7th Cir. 2000).

25. 529 U.S. 473 (2000).

26. *Id.* at 484.

27. *Id.*

28. *See In re Davis*, 565 F.3d 810, 817–18 (11th Cir. 2009) (collecting congressional statements about the importance of a single round of federal habeas review); FHCPP, *supra* note 3, § 3.2.

on the merits, suggests that a more searching singular standard is simply unworkable, especially when the background of the case has not been developed and a record is not available. Adopting a single, lenient standard also provides numerous direct and indirect benefits, such as increased transparency and hastening of the development of case law. Even though more COAs would be issued, this need not have a deleterious effect on a court's ability to conserve resources. While AEDPA interposes the COA stage between initial appeal and a final merits determination, it does not affect an appellate court's power to take summary action without briefing or to affirm on an alternative basis not relied upon by the district court.²⁹

Because COA grants on procedural grounds also implicate the actual *form* of a COA order itself, this Article also briefly discusses unresolved formal questions stemming from § 2253(c). Remarkably, what constitutes a fully § 2253(c)-compliant COA order is not yet a closed question in 2013. While a recent Supreme Court case, *Gonzalez v. Thaler*,³⁰ may have muddied the issue further, it also announced that certain defects would not deprive a court of appeals of jurisdiction³¹—and that, in any case, a court is free to revise a COA at any time in order to correct a defect. So as to forestall confusion, however, I argue that an order granting a COA on a procedural ground should indicate one or more specific claims in the underlying petition that satisfy subsection § 2253 (c) (2)'s "substantial claim" requirement. While not necessary as a matter of jurisdiction post-*Thaler*, such a practice is still "mandatory" under the statutory language of § 2253.

This Article is structured as follows. Part I establishes a working definition of "procedural," positing three "soft categories" that are useful for thinking about various kinds of procedural dismissals—

29. *See, e.g.*, *Hemphill v. Hudson*, 483 F. App'x 118, 120 (6th Cir. 2012) (per curiam) ("Because we can dispose of Hemphill's claims on the merits, however, we decline to address the district court's determination that Hemphill's claims are procedurally defaulted."). Indeed, as I argue further herein, the biggest problem with thinking of a COA as a strict gatekeeper is that it has the potential to add a needless stage to the quick reversal of simple mistakes by a lower court, such as computational errors. *See also* *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) ("[A] court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause."); *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam) ("[W]here an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited.").

30. 132 S. Ct. 641 (2012).

31. *Id.* at 646.

both those unique to habeas and those common to other kinds of civil litigation. In Part II, I recite a brief history of appealability procedures pre-AEDPA in order to provide a basis for understanding the departure of (and confusion caused by) AEDPA's revisions. Part III looks at the statutory revisions to § 2253 and related provisions made by AEDPA, and discusses them from a "first impressions" perspective. Part IV examines the post-AEDPA, pre-*Slack* period, when the circuit courts attempted to square the new § 2253 with previous approaches to appealability, creating various circuit-specific tests. Part V tackles *Slack*, the primary Supreme Court decision on point, and also discusses subsequent decisions—most notably, *Miller-El v. Cockrell*³²—that have addressed COAs. In Part VI, I show how *Slack* both replaced the individual tests marshaled by the circuit courts and caused new fractures, with courts (by this point well versed in parsing AEDPA's text) adopting markedly different interpretations of *Slack*. Part VII argues that the most lenient of these tests best pays fealty to *Slack* itself, as well as positing numerous legal, procedural, and prudential reasons for adopting a universal standard. In Part VIII, I describe what a "compliant" COA order should look like after *Thaler*.

So as to narrow the arena of discussion, I have generally restricted my analysis to the perspective of a court of appeals, because this Article contains greater implication for appellate courts than for trial courts. That is not to suggest that many of these questions do not also apply to a district court, which—in adjudicating close procedural issues—may be called upon to determine whether the merits of an uncertain or marginal petition are sufficient to warrant a COA grant on a complex (or simply opaque) procedural question.

I.

DEFINING TERMS: "PROCEDURAL" AND "MERITS"

Before starting a discussion on habeas corpus and procedural issues, it is helpful to first pin down a working definition of "procedural," as that term is extraordinarily broad and inconsistently used. Because this Article discusses "procedural" in the context of federal habeas corpus, the situations immediately evoked are those indelibly associated with habeas—for example, procedural default or AEDPA-related timeliness or successiveness concerns.³³ But fed-

32. 537 U.S. 322 (2003).

33. For example, a determination that a petition is time-barred under the AEDPA one-year statute of limitations is a procedural outcome for the purposes of

eral habeas cases are conducted like ordinary civil cases in many, but not all, respects.³⁴ Thus, they are subject to more “mundane” procedural devices as well, such as dismissals for failure to prosecute.³⁵

Perhaps the easiest way to think about the term “procedural” is to contrast it with its counterpart: the “merits” of the claims contained in a habeas petition. Take, for example, a habeas petition in which a state prisoner is alleging ineffective assistance of trial counsel (a commonly raised collateral claim). To resolve the claim on the merits, the district court would determine whether trial counsel’s performance passed the test established in *Strickland v. Washington*³⁶ or, in the context of a post-AEDPA petition, whether the state court resolved the claim within the wide range considered acceptable under the statute.³⁷ A disposition on procedural grounds, on the other hand, would not necessarily lead to a resolution of the substantive content of the petitioner’s constitutional claim in federal court, but would instead look to whether the petition was timely filed, whether the petitioner properly exhausted his state-

granting a COA. *See, e.g.*, *Holmes v. Spencer*, 685 F.3d 51, 57–58 & n.3 (1st Cir. 2012) (applying procedural standard in COA deriving from timeliness issue). But these same time-bar issues render the previous petition disposed of “on the merits” if the petitioner later tries to file a second or successive action. *See, e.g.*, *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam); *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (per curiam); *see also Quezada v. Smith*, 624 F.3d 514, 518–19 (2d Cir. 2010) (discussing possible exceptions to the rule); *Carter v. United States*, 150 F.3d 202, 205 (2d Cir. 1998) (“[T]he denial of a first § 2254 petition for procedural default, which default is not overcome by a showing of cause and prejudice, ‘must be regarded as a determination on the merits in examining whether a subsequent petition is successive.’”).

34. *See Day v. McDonough*, 547 U.S. 198, 212 (2006) (Scalia, J., dissenting) (observing that the Federal Rules of Civil Procedure govern habeas cases unless they are inconsistent with the Habeas Corpus Rules); *United States v. Fiorelli*, 337 F.3d 282, 285–86 (3d Cir. 2003) (discussing the applicability of the Federal Rules of Civil Procedure to 28 U.S.C. § 2255 motions); *see also FHCPP, supra* note 3, § 2.2 (“For example, although the ‘custody’ prerequisite for habeas corpus jurisdiction usually limits review to the legality of criminal prosecutions and sentences, the Court typically describes the writ as a ‘civil’ remedy—one that, indeed, is partly governed by the Federal Rules of *Civil Procedure*.”) (footnotes omitted); *Sokol, supra* note 3, at § 18.

35. *See, e.g.*, *United States v. Hyatt*, No. 2:05-cr-216, 2012 U.S. Dist. LEXIS 105310, at *1–2 (E.D. Cal. July 27, 2012); *see also Jeffrey, supra* note 10, at 74–91 (discussing various kinds of procedural dismissals, ranging from the general to the habeas-specific, in the context of determining whether a later petition may be counted as “second or successive”).

36. 466 U.S. 668, 687 (1984).

37. *See, e.g., Patel v. Dormire*, 609 F. Supp. 2d 884, 887–90 (E.D. Mo. 2009).

court remedies before commencing a federal action, or whether it adhered to other filing and pleading requirements.³⁸

In this Article, I will define as “procedural” all of those devices that lead to a case-dispositive order on grounds other than the merits. They can be separated into three broad, porous categories. In the first category are those procedural grounds that grow out of standard civil practice, and have nothing to do with habeas petitions *per se*. The aforementioned dismissal on the basis of failure to prosecute is one, but so would be failure to comply with *in forma pauperis* requirements, not following court orders, and so on. Many of these dismissals may also be ostensibly without prejudice,³⁹ although residual concerns might limit a petitioner’s ability to correct certain errors in his filings. In the second category are grounds specific to habeas but not directly derived from AEDPA, such as dismissals for failure to exhaust state court remedies or dismissals based on the “in custody” requirement of the federal habeas statute.⁴⁰ In the third category are those dismissals based on the explicit statutory text of AEDPA, such as for failure to file within the one-year statute of limitations period. Each category involves a “procedural” dismissal that, despite being contained under that broad category, can involve markedly different scrutiny of the merits of a petition; indeed, for some pre-filing dismissals, a petition may not even have been properly lodged in the district court.

A few words of caution: these categories are but a fiction, and actions can and do overlap. The categories are mostly a useful device for thinking about the development of the merits at the stage of dismissal. Furthermore, some “procedural” actions blur the lines between an evaluation of the merits and a procedural termination of a petition.⁴¹

38. *See, e.g.*, *Rouse v. Iowa*, 110 F. Supp. 2d 1117 (N.D. Iowa 2000).

39. *See, e.g.*, *Patrick v. Erie Cnty.* Court of Common Pleas, No. 12-156, 2012 U.S. Dist. LEXIS 142389, at *1–2 (W.D. Pa. Aug. 30, 2012), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 142390 (W.D. Pa. Oct. 2, 2012).

40. *See, e.g.*, *Maleng v. Cook*, 490 U.S. 488, 490–94 (1989) (per curiam).

41. In a common example, an analysis of whether to enforce a waiver of appellate or collateral-attack rights often includes a discussion of the merits of the underlying claims, because the test for enforcing the waiver considers whether limiting postconviction rights would work a “miscarriage of justice.” *See, e.g.*, *Sotirion v. United States*, 617 F.3d 27, 36–39 (1st Cir. 2010).

II. THE PRE-AEDPA WORLD AND APPELLATE REVIEW OF PROCEDURAL ISSUES

Any discussion of the changes wrought by AEDPA must begin with a quick overview of the law prior to its passage.⁴² Appeals as of right in habeas proceedings arising out of state court detentions were restricted as early as the first years of the twentieth century, when Congress passed “An Act Restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings.”⁴³ These restrictions did not apply to collateral review of federal convictions. Subsequent amendments to the law focused on the circuit courts of appeal, which were granted jurisdiction over habeas petitions in 1925.⁴⁴ The familiar “2253” designation came into being during the 1948 codification of the Judicial Code,⁴⁵ and, outside of a few mid-century modifications, the statute remained largely unchanged through 1996. The relevant pre-AEDPA text of § 2253, in its final amended form, was as follows:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.⁴⁶

As before, § 2253 applied to collateral attacks on state convictions only.⁴⁷ And nowhere did the text of this new section provide for an explicit limitation on the issues upon which appeal could be

42. For an in-depth look at the evolution of habeas appellate procedure, see Cutler, *supra* note 10, at 285–309.

43. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 (1908); *see also* Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1983) (“In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so.”).

44. *See* Ira Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, 313 & nn.36, 39 (1983).

45. *See* Act of June 25, 1948, ch. 646, 62 Stat. 967 (1948) (revising, codifying, and enacting into law title 28 of the U.S. Code entitled “Judicial Code and Judiciary”).

46. 28 U.S.C. § 2253 (1994).

47. *See* Feldman v. Perrill, 902 F.2d 1445, 1449 n.2 (9th Cir. 1990) (“Certificates of probable cause are required only where the detention complained of arises out of process issued by a State court.”) (internal quotation marks omitted).

taken if a certificate was granted, implying that no restriction was warranted.⁴⁸

Jurisprudence on the showing required for a certificate of probable cause (“CPC”) was itself slow to develop in the circuits. As late as 1979, the Second Circuit observed that it had “not directly passed on the question” and noted a dearth of “Supreme Court precedent clearly on point.”⁴⁹ At the very least, however, CPCs granted on procedural questions were seen to be implicitly within the ambit of the statute.⁵⁰

The Supreme Court addressed the CPC requirement head-on in a landmark opinion, *Barefoot v. Estelle*.⁵¹ In *Barefoot*, the Court squarely aligned itself with “the weight of opinion in the Courts of Appeals that a certificate of probable cause requires petitioner to make a ‘substantial showing of the denial of [a] federal right.’”⁵² It also required “more than the absence of frivolity,” which was a more exacting standard than one premised on mere “good faith.”⁵³ Recognizing, too, that a “substantial showing of the denial of a federal right” might be otherwise hard to qualify, the Court offered up a now-familiar standard: a petitioner must simply show that the issues he raises “are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are ‘adequate to deserve encouragement to proceed further.’”⁵⁴ While *Barefoot* was decided in the context of a capital case, and habeas procedures in capital and noncapital cases are not al-

48. See *Sherman v. Scott*, 62 F.3d 136, 138–39 (5th Cir. 1995). As of 1995, the circuits were split on this question, with the Second Circuit departing from its brethren in allowing a court to limit the issues to be heard on appeal, with the proviso that (in accordance with later COA practices) a court could always expand the issues to be decided after the fact. See *id.* at 138 n.1. By contrast, other circuits viewed the certificate to apply to the entire appeal. See *Tompkins v. Moore*, 193 F.3d 1327, 1330 (11th Cir. 1999).

49. *Alexander v. Harris*, 595 F.2d 87, 89–90 (2d Cir. 1979) (per curiam); see also *id.* at 90–91 (observing that “federal courts have variously articulated the standard for issuance of a certificate of probable cause to appeal,” citing several cases, and then holding that “the standard of probable cause to appeal requires the district court to find that the petition is not frivolous and that it presents some question deserving appellate review”); Horowitz, *supra* note 15, at 701–03 (detailing history of pre-AEDPA appealability requirements).

50. See, e.g., *Piercy v. Parratt*, 579 F.2d 470, 471 (8th Cir. 1978) (granting CPC on failure to exhaust state remedies).

51. 463 U.S. 880 (1983).

52. *Id.* at 893 (alteration in original).

53. *Id.* (citations omitted).

54. *Id.* at 893 n.4 (alteration in original) (quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

ways perfectly alike,⁵⁵ the case nevertheless became an important standard-bearer for determining whether an appeal was warranted in habeas cases.⁵⁶

Because the *Barefoot* standard requires only that prisoners demonstrate a denial of a federal right, review of procedural questions was largely uncontroversial. For example, courts readily exercised de novo review of exhaustion questions without otherwise addressing the merits of a petition. In *Story v. Kindt*,⁵⁷ the Third Circuit reversed a determination that state court remedies had not been exhausted and remanded for consideration by the district court of the petition's merits in the first instance.⁵⁸ In a non-precedential opinion, the Ninth Circuit approved of a certificate of probable cause that explicitly disclaimed an analysis of the merits of the underlying habeas petition.⁵⁹ Much of the Supreme Court's "category 2" procedural habeas doctrine was established during this time, including landmark cases on procedural default,⁶⁰ exhaustion,⁶¹ and abuse of the writ.⁶²

55. See, e.g., *Rowell v. Dretke*, 398 F.3d 370, 373 (5th Cir. 2005) ("In death penalty cases, doubts on whether a COA should issue are resolved in the petitioner's favor.").

56. See, e.g., *Lozada v. Deeds*, 498 U.S. 430, 431–32 (1991) (applying *Barefoot* in the context of a state controlled-substances conviction); *Hill v. Beyer*, 62 F.3d 474, 480 n.5 (3d Cir. 1995); *Fliieger v. Delo*, 16 F.3d 878, 882 (8th Cir. 1994); *Cuppert v. Duckworth*, 8 F.3d 1132, 1149 (7th Cir. 1993) (Ripple, J., concurring) (observing a "growing tendency in some of the district courts of this circuit to measure [certificate of probable cause] applications, either explicitly or implicitly, by an inappropriately high standard"); *Gee v. Shillinger*, 979 F.2d 176, 178 (10th Cir. 1992). Of course, because orders granting or denying CPCs were also generally not sent to legal publishers, it is difficult to gauge the exact rationale relied upon by the appellate courts in the interim, especially as many orders did not otherwise specify why they were granting a certificate. See, e.g., *Zilich v. Reid*, Order Granting Request for Certificate of Probable Cause, C.A. No. 93-3459 (3d Cir. Feb. 17, 1994).

57. 26 F.3d 402 (3d Cir. 1994).

58. See *id.* at 407. The dissenting judge would have considered the merits of the petition on appeal in the first instance, although he otherwise joined the exhaustion finding of the majority. See *id.* at 407–12 (Cowen, J., dissenting).

59. *Nilsen v. Borg*, No. 94-15145, 1994 U.S. App. LEXIS 32933, at *1 n.1 (9th Cir. Nov. 18, 1994).

60. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

61. See *Rose v. Lundy*, 455 U.S. 509, 522 (1982); see also *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

62. See *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

III. THE ENACTMENT OF AEDPA AND THE NEW § 2253

In 1996, § 102 of AEDPA substantially amended 28 U.S.C. § 2253. The relevant part of the reworked statute, subsection (c), states the following:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).⁶³

Before examining the judicial construction of the new statute, it is helpful to take a step back and take in these substantial changes from an analysis of the statutory text itself.

The most obvious change was one of nomenclature: the revised § 2253(c) did away with the old “certificate of probable cause” designation, ushering in the era of the “certificate of appealability.”⁶⁴ For those petitions filed after AEDPA’s effective date, the COA requirement would supplant the CPC requirement.⁶⁵

The COA’s innovations, however, were more than semantic. The new § 2253 departed from its predecessor by extending its filtering mechanism to federal prisoners, eliminating their appeals as of right. As stated explicitly in § 2253(c)(1)(B), federal prisoners would now need to obtain a COA to appeal the denial of their 28

63. 28 U.S.C. § 2253(c) (2012). Section 2253 has not been amended since 1996.

64. This was a newish coinage. When the phrase appears in the federal judicial lexicon prior to AEDPA, it generally refers to interlocutory certification of appeals under 28 U.S.C. § 1292(b). *See, e.g.*, *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 633 n.14 (4th Cir. 1978); *Rollins v. United States*, 286 F.2d 761, 762 (9th Cir. 1961).

65. *See United States v. Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997) (discussing the circuit split regarding petitions to which the COA requirement should apply).

U.S.C. § 2255 motions to vacate.⁶⁶ Hence, the new COA would be applied to a broad class of litigants that was previously exempt from the strictures of its predecessor.⁶⁷

The new § 2253 also appeared to discard the “non-specification” regime of the CPC, and instead imposed something akin to the “questions presented” model of the Supreme Court: COAs would only be granted on certain issues; moreover, briefing and appellate decision making would then be confined to those issues, unless the ambit of the appeal was expanded by a court (either on motion or *sua sponte*).⁶⁸ Even here, however, the statute is maddeningly opaque on the specifics. For one, are the issues “indicated” in subsection (3) the same issues upon which a COA is to be

66. *Compare* United States v. Perez, 129 F.3d 255, 259 (2d Cir. 1997), *Herrera v. United States*, 96 F.3d 1010, 1011 (7th Cir. 1996), *Thye v. United States*, 96 F.3d 635, 636 (2d Cir. 1996) (per curiam), FHCPP, *supra* note 3, § 35.4, Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. APP. PRAC. & PROCESS 177, 180 (2003), and Brian Serr, *Criminal Procedure*, 29 TEX. TECH L. REV. 547, 578 (1998) (discussing recent Fifth Circuit developments in habeas procedure, and noting that “prior to the AEDPA’s amendment of federal procedures for collaterally attacking a conviction, section 2255 petitioners possessed an automatic right to appeal”), *with Payne v. United States*, 539 F.2d 443, 445 (5th Cir. 1976), *Fisher v. United States*, 317 F.2d 352, 354 n.3 (4th Cir. 1963), and *In re Marmol*, 221 F.2d 565, 566 (9th Cir. 1955) (per curiam) (“Movant is a federal prisoner and a certificate of probable cause to appeal is unnecessary.”).

67. Federal prisoners or detainees who brought proper challenges to their confinement under 28 U.S.C. § 2241 were still generally exempt from the COA requirement, however, as long as their detention was not the product of state court action. *See Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005) (per curiam).

68. *See Holmes v. Spencer*, 685 F.3d 51, 58 (1st Cir. 2012); FHCPP, *supra* note 3, § 35.4(b)(i) & n.48; *see also Herrera*, 96 F.3d at 1012 (“The two certificates differ only in scope: a certificate of probable cause places the case before the court of appeals, but a certificate of appealability must identify each issue meeting the ‘substantial showing’ standard, see the amended § 2253(c)(3).”). AEDPA also amended FED. R. APP. P. 22, but much of the work at making coherent procedure out of AEDPA was the responsibility of the courts. *See, e.g., Harkins v. Roberts*, 935 F. Supp. 871, 872 (S.D. Miss. 1996) (“[T]his Court will proceed under the assumption that it has the ability to grant a certificate of appealability.”). In other words, the idea of the COA as a document of limitation has never quite come to pass. *See, e.g., United States v. Shipp*, 589 F.3d 1084, 1087–88 (10th Cir. 2009) (collecting cases and local-rule citations about COA expansions); *see also Coady v. Vaughn*, 251 F.3d 480, 486 (3d Cir. 2001) (“Our conclusion that a certificate of appealability is required for this appeal to go forward does not compel dismissal. Because Coady filed a timely notice of appeal, we construe this notice as a request for a certificate of appealability . . .”).

granted?⁶⁹ Moreover, since the “certificate” itself is not a distinct, physical document, was any process required to amend it, and could it be amended by implication?⁷⁰ And was the COA limitation requirement intended to impose restrictions on an appellate court’s review, or simply to function as triage to be disregarded if necessary?⁷¹ In AEDPA’s wake, courts would be left to determine the answers to these questions.

By far AEDPA’s most notable alteration, however, was contained in some linguistic sleight of hand. In *Barefoot*, the Supreme Court had spoken of a petitioner’s obligation to show a “substantial denial of a *federal* right” in order to obtain a COA. Suddenly, however, the new § 2253 required that a substantial showing be made of the denial of a *constitutional* right.⁷² Given that what limited legisla-

69. Generally, no, which is intriguing given this part of the statute’s ostensible origination of the requirement to specify the issues certified for appeal. *See, e.g.*, *Satizabal v. Folino*, 318 F. App’x 78, 81 (3d Cir. 2009) (“But if [the district court] issues a certificate of appealability, the Court should indicate the specific issue or issues on which Satizabal has made his substantive showing even if it issues the certificate of appealability solely on the procedural question involving equitable tolling.”); *Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (“Here, it is noteworthy that the district court granted the certificate of appealability on the constitutional merits issue, but not the procedural ground on which it based its decision . . .”).

70. Generally, yes. *See, e.g.*, *Post v. Bradshaw*, 621 F.3d 406, 413 (6th Cir. 2010) (noting that the court, by setting a briefing schedule including additional issues, “impliedly” expanded the COA to cover those issues); *see also* *Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (“There is no statutory or doctrinal prohibition against an appellate court issuing a COA *sua sponte* on issues not specified by a habeas petitioner.”) (Tjoflat, J., specially concurring). *But see* *Smaldone v. Senkowski*, 273 F.3d 133, 139 (2d Cir. 2001) (per curiam) (finding lack of appellate jurisdiction when argued claim was not within amended COA). A court may also dismiss a COA as improperly granted, although the distinction between this device and summary affirmance is slight. *See, e.g.*, *United States v. Sylvester*, 258 F. App’x 411, 412 (3d Cir. 2007); *Khaimov v. Crist*, 297 F.3d 783, 786 & n.2 (8th Cir. 2002) (noting explicitly the similarity to the Supreme Court’s practice of dismissing petitions for certiorari that have been improvidently granted); *see also* *Cutler*, *supra* note 10, at 325–26 (discussing how “[t]he circuits have divided into three separate camps concerning what procedure appellate courts must follow if the district court’s certificate possibly fails to comply with section 2253(c)(2)’s substantial-showing-of-the-denial-of-a-constitutional-right standard”).

71. Indeed, whether a COA order *must* conform with § 2253(2) and § 2253(3) as jurisdictional prerequisites was the subject of a circuit split until recently. *See* *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001). In *Gonzalez v. Thaler*, the Supreme Court determined that noncompliance with subsections 2 and 3 did not cost the reviewing court its jurisdiction over the appeal. 132 S. Ct. 641, 649 (2012). I will return to *Gonzalez* later in this piece.

72. *See* *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996) (noting the changed standard); *Herman v. Johnson*, 98 F.3d 171, 173 (5th Cir. 1996) (same).

tive history exists on § 2253 suggests that Congress, at least initially, intended to “enact[] the standard of *Barefoot*,”⁷³ this was a puzzling substitution. The punt of *Barefoot* was one by the judiciary for the judiciary, and had time to mature for years before AEDPA. This new language, a legislative creation, was—assuming that Congress meant what it said—untested. In the next few years, courts would struggle to determine the reach of the new § 2253—a matter of some urgency, given the multitudinous new (and often quite vague) restrictions contained in the rest of AEDPA.⁷⁴

IV.

POST-AEDPA, PRE-SLACK: THE STRUGGLE

In the wake of the revisions to § 2253(c), the lower courts were confronted with a deceptively simple question with broad implications: Were there issues that were appealable under the old probable cause regime that were no longer so? Caught up in this inquiry were the first attempts to set in stone the now-familiar aspects of habeas practice post-AEDPA, particularly the new relationship between the district and appellate courts forged by the transition from CPC to COA.⁷⁵

Courts first were required to confront the transition from “federal” to “constitutional,” and with it the shift in substantive standards, under the new regime. In an early post-AEDPA decision, the Second Circuit concluded that the COA requirement was, at least for substantive questions presented by state prisoners, functionally identical to the old *Barefoot* standard, although it acknowledged that other courts were not all in agreement.⁷⁶ By contrast, while federal prisoners could still invoke nonconstitutional matters in

73. H.R. REP. NO. 104-23, at 9 (1995). As the Third Circuit would point out, the silent switch to “constitutional” has no clear explanation in the subsequent legislative history. See *United States v. Cepero*, 224 F.3d 256, 263–64 (3d Cir. 2000) (en banc), *overruled on other grounds by Gonzalez*, 132 S. Ct. at 649–50.

74. Some courts would, on occasion, give up entirely. See *Miller-El v. Cockrell*, 537 U.S. 322, 348–49 & n.* (2003) (Scalia, J., concurring) (indicating several cases where courts of appeal either applied flatly incorrect COA standards or ignored the COA prerequisite entirely).

75. It is easy to forget, these many years on, what an astonishing departure from precedent AEDPA was when it was first enacted. Given that the Illegal Immigration Reform and Immigrant Responsibility Act and the Prison Litigation Reform Act were passed around the same time, much of the basic jurisprudence associated with both detainees and prisoners changed in a few short years.

76. See *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *accord Lennox v. Evans*, 87 F.3d 431, 433 (10th Cir. 1996), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997). The Ninth Circuit had described the new COA gateway as “more demanding” than the old standard, but had declined to elaborate on that

their § 2255 motions to vacate, they would no longer be able to seek appellate review of the district court's resolution of those claims—an odd outcome.⁷⁷

Judicial effort was also spent determining how, if at all, the new COA standard affected an appellant's ability to seek review of procedural questions. In this regard, the Fifth Circuit issued a series of trailblazing decisions foreshadowing the direction eventually taken by the Supreme Court. In *Whitehead v. Johnson*,⁷⁸ the court held that when “the applicant for COA challenges the district court's dismissal for a reason not of constitutional dimension,” he must first “make a credible showing that the district court erred.” If he does so, the reviewing court must then determine “whether the petitioner has made a substantial showing of the denial of a constitutional right on one or more of his underlying claims,” with doubts to be resolved in the applicant's favor.⁷⁹ But the Fifth Circuit also recognized that if a district court were to discuss only procedural questions, conducting an in-depth analysis of the merits of a petition at the COA stage would be premature, possibly prejudicial to the petitioner, and could run afoul of correct COA procedure.⁸⁰ Thus, despite language in earlier cases “suggest[ing] that we should proceed to examine the constitutional claims before granting a

interpretation in the particular opinion cited by the *Reyes* court. See *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).

77. *United States v. Gordon*, 172 F.3d 753, 754 (10th Cir. 1999); *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997); see also *Mateo v. United States*, 310 F.3d 39, 41 (1st Cir. 2002) (“The prospect of a constitutional argument is needed to permit the COA to be granted; but once back in district court Mateo is free—on a first section 2255 motion—to proffer non-constitutional claims. Section 2255, which governs federal habeas, extends beyond constitutional claims.”). Intriguingly, the Seventh Circuit allows for the appeal of purely statutory issues as long as *one* of the claims upon which a COA is granted implicates a constitutional right. See *Davis v. Borgen*, 349 F.3d 1027, 1029 (7th Cir. 2003); see also *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001). No other circuit appears to have explicitly adopted this approach. See, e.g., *United States v. Hadden*, 475 F.3d 652, 660 n.5 (4th Cir. 2007); *United States v. Taylor*, 454 F.3d 1075, 1078–79 (10th Cir. 2006). Of course, this debate may be much ado about nothing; “[d]espite the language of the statute, the right alleged violated on a [Section] 2255 motion virtually always must be a [c]onstitutional right” to have a chance of success. JOSEPHINE R. POTUTO, *PRISONER COLLATERAL ATTACKS: FEDERAL HABEAS CORPUS AND FEDERAL PRISONER MOTION PRACTICE* § 5.8, at 178 (1991).

78. 157 F.3d 384 (5th Cir. 1998).

79. *Id.* at 386. *Whitehead* followed other Fifth Circuit cases that dealt with specific procedural questions, such as the reviewability of procedural default. See *Robinson v. Johnson*, 151 F.3d 256, 262 (5th Cir. 1998); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997).

80. *Whitehead*, 157 F.3d at 388.

COA,” the court decided: “once we conclude that the district court erred in dismissing an application because of failure to exhaust, we vacate and remand to the district court to address the merits of the habeas claims in the first instance,” thereby granting a COA and summarily vacating.⁸¹

The Fifth Circuit affirmed its approach in the later *Sonnier v. Johnson*.⁸² There, the court determined that the appellant “ha[d] made a credible showing that the district court erred in dismissing his § 2254 application as barred by the post-AEDPA one-year statute of limitations.”⁸³ But, given the state of the proceedings below, the court recognized that an analysis of the applicant’s “substantial showing” would be premature, especially as the district court never reached the merits, again granting a COA and remanding in the same step.⁸⁴

Other circuits also struggled to reconcile the AEDPA revisions with prior practices. The Eleventh, for example, faced head-on whether its prior holding that the pre- and post-AEDPA standards for adjudicating *merits* COA questions extended to its analysis of procedural questions. The court answered in the affirmative, determining that “the language of *Barefoot* provides the analytical framework for determining when COAs should be granted to permit such appeals.” Furthermore, the court declined to decide whether it would deny a COA on procedural grounds “when the substantive claims are facially meritless,” noting only that the petitioner’s were not.⁸⁵ The Eighth Circuit, meanwhile, endorsed a more radical view. It determined that the statutory language addressing “constitutional” rights was directed only at:

the sort of showing required for a petitioner to obtain appellate review of the merits of his or her claims for habeas corpus or § 2255 relief; [o]therwise, a final order entered by a district court based upon a question antecedent to the merits, if adverse to the petitioner, could never be reviewed on appeal.⁸⁶

81. *Id.*

82. 161 F.3d 941 (5th Cir. 1998) (*per curiam*).

83. *Id.* at 945.

84. *Id.* at 945–46.

85. *Henry v. Dep’t of Corr.*, 197 F.3d 1361, 1364–66 & n.2 (11th Cir. 1999).

86. *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (*en banc*), *abrogated on other grounds by* *Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008). The dissenting Judge Arnold would have preferred a rule in which the prisoner’s appeal would be contingent upon “some kind of abbreviated showing on the merits.” *Id.* at 1078 (Arnold, J., dissenting).

Other circuits have observed that any analysis of the merits of a petition was not, apparently, a requirement of the COA process.⁸⁷

The approaches may have differed, but all courts agreed on the basic idea: appeals from procedural dispositions were still possible. In *Morris v. Horn*,⁸⁸ a decision issued not long before *Slack*, the Third Circuit surveyed the landscape and agreed with the petitioner that (despite the Commonwealth's contention to the contrary) "courts, including this one, have granted certificates of appealability" on procedural questions that did not implicate the merits of the underlying petition.⁸⁹ The Third Circuit rejected the Eighth Circuit's approach, and instead adopted the Fifth Circuit's test as modified by *Sonnier* and *Whitehead*: a petitioner must make: "(1) a credible showing that the district court's procedural ruling was incorrect, and (2) a substantial showing that the underlying habeas petition *alleges a deprivation* of constitutional rights."⁹⁰

It was into this breach that the Supreme Court finally tread. In doing so, it aimed to set a standard that would apply, universally, across the various circuits. However, as I will show, while its opinion would establish some uniformity—it would jettison the Eighth Circuit's approach, for example—it would lead to no greater consensus on what kind of merits showing was required by a prisoner seeking a COA.

V.

THE SUPREME COURT WEIGHS IN: *SLACK* AND ITS PROGENY

A. *Slack Itself*

In 2000, the issue of procedural appeals came before the Supreme Court, and Justice Kennedy's opinion in *Slack v. McDaniel*⁹¹ allowed the lower courts to breathe a sigh of relief. Kennedy clarified that the "reasonable jurists" standard still held true and that appeals of both substantive and procedural questions were possible under AEDPA. But while Justice Kennedy's opinion made some headway in deciphering the requirement of a "substantial showing,"

87. See, e.g., *Gaskins v. Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999) (per curiam) (collecting cases).

88. 187 F.3d 333 (3d Cir. 1999).

89. *Id.* at 340 (collecting cases).

90. *Id.* at 340 & n.4 (emphasis added).

91. 529 U.S. 473 (2000). For an excellent, contemporaneous summary of the factual background of *Slack*, see Laurence A. Benner et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999 – October 1, 2000)*, 37 CAL. W. L. REV. 239, 273–79 (2001).

it introduced a new variable—the “valid claim”—into the equation, while arguably modifying sub silentio the actual statutory language.

In *Slack*, the Court was tasked with resolving whether an appeal may be taken if “the District Court relies on procedural grounds to dismiss the petition.”⁹² The State argued that “only constitutional rulings may be appealed.”⁹³ Writing for the Court, Justice Kennedy disagreed. “The writ of habeas corpus plays a vital role in protecting constitutional rights,” he explained, and “[i]n setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.”⁹⁴ He first emphasized that AEDPA codified the language of *Barefoot*, with the substitution of “constitutional” for “federal.”⁹⁵ He then applied the *Barefoot* standard—focusing on its “jurists of reason” verbiage—to both substantive and procedural COA processes, effectively setting the standard for each category.

Under Justice Kennedy’s construction, the showing required to satisfy § 2253(c) was “straightforward” when a district court denied a petition on the merits: “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”⁹⁶ Less “straightforward,” and admittedly “somewhat more complicated,” was the application of § 2253(c) to procedural denials made “without reaching the prisoner’s underlying constitutional claim.”⁹⁷ To this situation, Justice Kennedy applied a modification to the *Barefoot* standard:

[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.⁹⁸

This construction for procedural appeals, according to Justice Kennedy, would “give[] meaning to Congress’ requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the ‘substantial showing’ standard provided in *Barefoot*.”⁹⁹ Kennedy further emphasized that this

92. *Slack*, 529 U.S. at 483.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 484.

97. *Id.*

98. *Id.*

99. *Id.*

test was a two-part inquiry; courts should feel free to “dispose of [a COA] application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.”¹⁰⁰

At this juncture, it is helpful to examine what *Slack* purports to do in a procedural context. First, it is hard to escape the conclusion (despite Kennedy’s statements to the contrary) that he has fundamentally, if not unjustifiably, re-written the poorly drafted § 2253(c)(2) to eliminate some of its ambiguity. In this interpretation, Kennedy’s “state a valid claim/procedurally correct ruling” text *supplants* the “substantial showing” language in § 2253(c)(2). In other words, a petitioner is not required to satisfy both Kennedy’s test and the “substantial showing” language. Rather, in doing the first, a petitioner has also accomplished the second. Alternatively, *Slack* can be read to modify “substantial showing” with “states a valid claim,” while adding on the “procedurally correct ruling” language as an addendum to the statutory requirement. In this reading, a petitioner satisfies the gatekeeping requirement of *Barefoot* with his procedural argument, while fulfilling the “substantial showing” requirement by stating a valid constitutional claim.¹⁰¹ Both of these approaches, while analytically distinct, arrive at the same destination: Kennedy’s test, whether marshaled in tandem with or separately from § 2253(c)(2), is the operative guide for appealability of procedural issues.

Second, regardless of the path one chooses with regard to supplanting versus supplementing, Kennedy has replaced one vagary with another. What is required, the reader wonders, to “state a *valid claim*” of the denial of a constitutional right? Kennedy did not explicitly anchor his language in any prior Court precedent. “Valid”

100. *Id.* at 485.

101. The Seventh Circuit has apparently chosen the latter construction, which animates, in part, its reading that *Slack* allows statutory claims to piggyback on constitutional claims. *See Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001). Further, I note that Justice Scalia saw no difference between “state a valid claim” and “make a substantial showing” in his *Miller-El* concurrence, characterizing it instead as an *additional burden* habeas petitioners must meet in order to obtain review of their procedural claims. *See Miller-El v. Cockrell*, 537 U.S. 322, 349–50 (2003) (Scalia, J., concurring). Justice Scalia takes pains in his *Miller-El* concurrence to emphasize that § 2253(c)(2) contains a necessary, but not sufficient, requirement for a COA; courts are free to demand more. *Id.* at 349. The idea that § 2253(c)(2) sets a floor is at odds with the general tenor of the Supreme Court’s habeas jurisprudence as developed, as with the basic idea that § 2253(c)(2) was intended to incorporate, in some form, the prevailing *Barefoot* standard.

could mean meritorious or genuine,¹⁰² yet “stating a claim” is indelibly associated (in federal practice, at least) with a minimal proffer—with satisfying a pleading standard that requires little to no demonstration of likely success.¹⁰³ Combining the two possible meanings leads to some dissonance. The Supreme Court had never invoked this exact language of a “valid claim” in the context of habeas, and its use in any other context was scanty. Indeed, *Slack* left the precise nature of the showing completely undefined.

Finally, a subordinate aside in the opinion raised other questions regarding the *minimum* showing required to gain a COA on a procedural question. Kennedy presents the “jurists of reason” test, but qualifies it with a cautionary “at least.”¹⁰⁴ A petitioner could, of course, far exceed the minimum requisite showing and still obtain a COA. As we will see, applications of *Slack* would struggle to define the minimum showing required for success.

B. *Post-Slack Supreme Court Decisions*

Slack is, at the time of writing, the final Supreme Court case directly on point. Although the Court has revisited COAs as a category, it has not precisely revisited the procedural question that gave rise to its formulation in that case. But subsequent Supreme Court opinions *do* emphasize the Court’s view that the COA requirement, far from being an impassable gatekeeper, is not meant to allow only the extraordinary and exceptional cases.

By far the most notable post-*Slack* case on the topic of COAs is *Miller-El v. Cockrell*,¹⁰⁵ the other cornerstone of modern COA juris-

102. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 444 (1982) (Powell, J., concurring) (contrasting “valid” claims with “frivolous” claims).

103. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). At the time *Slack* was decided, the seismic shift of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), was still several years in the future.

104. *Slack*, 529 U.S. at 484.

105. 537 U.S. 322 (2003). Like so many path-setting habeas cases, *Miller-El* is a death penalty case, and its holding, while obviously resilient, may be subject to a certain degree of a “death is different” distinction. Certainly, courts often err on the side of caution in death-penalty cases. See, e.g., *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (“[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner.”). I take it, as have the circuit courts generally, at face value. See, e.g., *McLaughlin v. Shannon*, 454 F. App’x 83, 85 & n.2 (3d Cir. 2011) (per curiam) (using *Miller-El* in a noncapital case); cf. *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001) (“While we do not necessarily disagree with the view that trial courts should err on the side of caution when it comes to the certification of claims that arguably have merit, there is nothing to suggest that *Slack* does not apply with equal force in capital cases.”). For an

prudence. Unlike *Slack*, *Miller-El* is firmly rooted in the simpler of Justice Kennedy's two COA scenarios, a denial on the merits:

The United States District Court for the Northern District of Texas, after reviewing the evidence before the state trial court, determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Fifth Circuit, concluding there was insufficient merit to the case, denied a [COA] from the District Court's determination. The COA denial is the subject of our decision.¹⁰⁶

Again writing for the Court, Justice Kennedy reemphasized that the COA determination is distinct from a full analysis of the merits of a petitioner's claims. Instead, it is a "threshold inquiry," one that "requires an overview of the claims in the habeas petition and a general assessment of their merits."¹⁰⁷ In fact, Justice Kennedy wrote that a full merits analysis is explicitly forbidden by the statute, because a circuit court that races to a merits disposition is essentially "deciding an appeal without jurisdiction."¹⁰⁸ Invoking language that stretched back to *Barefoot*, Justice Kennedy stressed that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."¹⁰⁹ In summary:

A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.¹¹⁰

Turning to the specific matter on appeal—an alleged violation of *Batson*¹¹¹—Justice Kennedy took the chance to apply the abstract *Slack* standard to a distinct constitutional fact pattern, concluding that a COA should be granted if there was "any evidence demon-

overview of *Miller-El* itself, see Kristy Bowling, Note, *Miller-El v. Cockrell: Procedural Rules to Protect Prisoners' Rights*, 35 U. TOL. L. REV. 723 (2004).

106. *Miller-El v. Cockrell*, 537 U.S. 322, 326–27 (2003).

107. *Id.* at 336.

108. *Id.* at 336–37.

109. *Id.* at 327.

110. *Id.* at 338 (citations omitted).

111. *Batson v. Kentucky*, 476 U.S. 79 (1986).

strating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based.”¹¹² But Kennedy emphasized that, from the circuit’s perspective, the relevant inquiry was not whether or not it could agree or disagree with the state court’s analysis in the first instance—even though that might be the thrust of a final merits evaluation—but whether it could agree with *the district court’s decision*. Here, Kennedy decided, the circuit court should have found plenty to quibble with, because “the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case;”¹¹³ in doing the same thing, the circuit compounded the lower court’s error. The proper question, as Kennedy stressed in his closing, was whether “the District Court’s decision was debatable.” Determining that it was, the Supreme Court remanded to the Fifth Circuit.¹¹⁴

Miller-El is hardly a skeleton key to the mysteries of COAs; like *Slack* before it, it raises almost as many questions as it answers, and, as a capital case, it prompts reasonable concerns about whether the Supreme Court expected adherence to its bipartite level of scrutiny in noncapital matters.¹¹⁵ But Justice Kennedy states rather firmly that the appellate court’s gaze should be focused on the district court’s decision and should not leapfrog to a full analysis of AEDPA deference, bypassing the district court entirely; *Miller-El* clearly forbids a functionally de novo, premature appellate review of the state court’s decision, AEDPA deference notwithstanding. Nor should the firm impression that the petitioner simply will not succeed stand as a bar to a COA.

Supreme Court cases since may not have expanded on *Miller-El* or *Slack*, but they do show that the Supreme Court is at least facially serious about adhering to its pronouncements in both. In *Tennard v. Dretke*,¹¹⁶ for example, the Court once again affirmed the line of demarcation between: (1) the COA standard, focusing on the district court’s performance; and (2) the later question of AEDPA deference at the merits stage, focusing on the state court’s

112. *Miller-El*, 537 U.S. at 340.

113. *Id.* at 341.

114. *Id.* at 348. For a critical look at this outcome, see Cutler, *supra* note 10, at 341 (calling *Miller-El* “intellectually unsatisfying” because of its inconsistency with pre-AEDPA jurisprudence on CPCs).

115. See Jordon T. Stanley, Comment, “Deference Does Not Imply Abandonment or Abdication of Judicial Review”: *The Evolution of Habeas Jurisprudence under AEDPA and the Rehnquist Court*, 72 UMKC L. REV. 739, 762–64 (discussing “meaning” of *Miller-El*).

116. 542 U.S. 274 (2004).

determination as viewed through 28 U.S.C. § 2254(d).¹¹⁷ Ultimately, *Miller-El* and *Slack* have been the last word.¹¹⁸ The baton has been passed to the lower federal courts to put the Supreme Court's new guidance to the test.

VI. THE CIRCUITS RESPOND

Slack largely replaced the individual tests the circuits had employed in their COA determinations; from this point onward, both *Slack* and *Miller-El* would become the go-to references in opinions and orders.¹¹⁹ But while the Supreme Court had handed the courts of appeals a single unified standard, they would diverge markedly on how to interpret that standard, especially in the context of procedural COAs and Justice Kennedy's "state a valid claim" pronouncement.

Two major interpretations have since developed. The first, which I will call the "permissive" standard, sees in Justice Kennedy's "valid claim" language a basic "screening" function. In this interpretation, a petitioner's proffer on the merits in a procedural appeal would need to pass only the most cursory scrutiny. The second, which I will call the "strict" standard, focuses on the original statutory requirement of a substantial showing of the denial of a constitutional right, often applying *Miller-El*'s language about merits denials to the intrinsically distinct realm of procedural denials—in some cases, seeming to combine the two. In this more demanding model, an underlying claim that lacks merit, and/or that has been definitively denied by a state court (implicating AEDPA deference),

117. *Id.* at 282.

118. With one exception: *Harbison v. Bell*, 556 U.S. 180 (2009), a small case that may be anything from transformative to utterly inconsequential. For more on *Harbison*, see *infra* note 182.

119. There are numerous exceptions to this, of course. For example, in *Satizabal v. Folino*, the Third Circuit relied on both *Slack* and its pre-*Slack* opinion in *Morris v. Horn*, observing that "a certificate of appealability may issue only if the petitioner makes both a credible showing that the procedural ruling was incorrect and a substantive showing that the underlying habeas corpus petition alleges a deprivation of constitutional rights." *Satizabal v. Folino*, 318 F. App'x 78, 80–81 (3d Cir. 2009) (citing *Morris v. Horn*, 187 F.3d 333, 340–41 (3d Cir. 1999)). It is notable, however, that the Third Circuit has apparently not relied on *Morris* again in quite this way, although it has relied, on occasion, on opinions that were near-contemporaneous with *Slack*, such as *United States v. Brooks*, 230 F.3d 643 (3d Cir. 2000), where it held that it could not grant a COA "unless the issue is procedural and the underlying petition raises a substantial constitutional question." *Id.* at 646; see also *Hubley v. Superintendent, SCI Camp Hill*, 57 F. App'x 927, 929–30 (3d Cir. 2003) (citing *Brooks*, 230 F.3d at 646).

can be cause for denying a COA. For example, a court might invoke the “valid claim” language, but then immediately retreat to the “substantial showing” statutory requirement. Still other courts have been noncommittal, or appear to inconsistently grant COAs across various cases. And, of course, simply because a court applies a particular standard in a high-profile, published case does not mean that it utilizes the same standard internally for the purposes of mundane, day-to-day case management, and especially in those orders not provided to legal publishers.

A. *The First School: Permissive Scrutiny, Cognizability, and the “Quick Look”*

At one end of the spectrum is a standard focusing on cognizability—literally, “stating a valid claim.” Developed in an array of circuits, and deployed in what is undoubtedly a haphazard fashion, this approach to procedural COAs involves only a cursory analysis of the merits of the underlying petition. Namely, if the petition conceivably states a cognizable federal habeas claim, then the appeal should be allowed to proceed in some fashion. The “debate” by the jurists of reason is over the cognizability of the claim, not the underlying merits of the claim. This approach, which takes Justice Kennedy’s language from *Slack* at its word, would in theory allow all appeals of procedural denials or dismissals that are both debatable and affect a claim that is not indisputably meritless.

One variant of this permissive approach germinated in the Seventh Circuit shortly after *Slack* was decided. In *Jefferson v. Welborn*,¹²⁰ the underlying habeas corpus petition had been dismissed by the district court as untimely filed.¹²¹ Jefferson sought a COA from the Seventh Circuit so that he might have “an opportunity to have the district court consider his claims on the merits.”¹²² Because the district court had not reached those merits, the COA determination turned on “whether the district court correctly applied the rules governing the limitations period for filing § 2254 petitions that are found in 28 U.S.C. § 2244(d).”¹²³ In its opinion, the Seventh Circuit did not merely find the timeliness analysis by the district court to be debatable by jurists of reason, it flatly disagreed with the outcome, determining that the petitioner’s state court action was “‘properly filed’ for purposes of § 2244(d)(2),” rendering the eventual federal habeas petition filed “within the permitted time” to do

120. 222 F.3d 286 (7th Cir. 2000).

121. *Id.* at 287.

122. *Id.*

123. *Id.* at 288.

so by statute.¹²⁴ But what of the merits of Jefferson's petition, which had not yet been addressed? Referencing *Slack*, the court took a "quick look at the claims Jefferson want[ed] to raise in his petition," and "did not find them so thoroughly lacking that such a step would be appropriate right now," because at least some of the allegations (such as ineffective assistance of counsel) "facially allege[d] the 'denial of a constitutional right.'"¹²⁵ Hence, in a single maneuver, the court granted a COA, vacated the judgment of the district court, and remanded for further proceedings.¹²⁶

Jefferson is a fascinating case because it relies directly on *Slack* for the proposition that the merits scrutiny should be minimal. Judge Wood saw no need to parse Justice Kennedy's statement about "stating a valid claim," instead finding it uncontroversial—or at least not deserving of a tortured exegesis—that *Slack* had cautioned the lower courts to avoid an in-depth analysis of the merits of the petition before considering a COA.

Other courts adopted similar standards, at least for a time. In *Lambright v. Stewart*,¹²⁷ the Ninth Circuit employed a "quick look" analysis of its own, emphasizing that Justice Kennedy's articulation of "state a valid claim" was meant to echo the plaintiff-favoring application of FED. R. CIV. P. 12(b)(6).¹²⁸ The First,¹²⁹ Fourth,¹³⁰ and Tenth¹³¹ Circuits have also mentioned taking a "quick look" at a petition. The Tenth has clarified that its "quick look" is intended to discern whether the petitioner has "facially alleged" a constitutional

124. *Id.* at 289.

125. *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000)). The court also suggested that, if Jefferson's claims were all "utterly without merit," it could "affirm the dismissal on that alternative ground." *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000). It is unclear whether the court was suggesting that it would "deny a COA if the claims were not cognizable," "deny a COA if the claims were cognizable but facially meritless," or "grant a COA and summarily affirm if the claims were cognizable but facially meritless."

126. *Id.*

127. 220 F.3d 1022 (9th Cir. 2000).

128. *Id.* at 1026–27 & n.5.

129. *See, e.g.*, *St. Yves v. Merrill*, 78 F. App'x 136, 137 (1st Cir. 2003); *Mateo v. United States*, 310 F.3d 39, 41 (1st Cir. 2002).

130. *See, e.g.*, *Rouse v. Lee*, 314 F.3d 698, 702 (4th Cir. 2003), *vacated on other grounds en banc*, 339 F.3d 238, 243 (4th Cir. 2003); *Hernandez v. Caldwell*, 225 F.3d 435, 437 (4th Cir. 2000).

131. *See, e.g.*, *Gibson v. Klinger*, 232 F.3d 799, 802–03 (10th Cir. 2000); *see also Frazier v. Colorado*, 405 F. App'x 276, 278 (10th Cir. 2010) (concluding that a "pure matter of state law is simply not cognizable in habeas" and, therefore, cannot support a COA request).

claim,¹³² language also briefly adopted by the Fifth Circuit and hinted at in some opinions by the Third.¹³³ The First Circuit, in *Mateo v. United States*, alternatively referred to its “quick look” goal as seeking to determine whether “the constitutional claim is . . . colorable.”¹³⁴ While acknowledging that *Slack* did not mandate the “quick look” approach, Judge Boudin thought it presented “the same impulse as *Slack* to protect nascent constitutional claims; and it certainly does not bend the language of § 2253 any more than *Slack* itself.”¹³⁵

Despite gaining prominence in some circuits immediately after *Slack* was decided, the permissive standard either fell out of favor among those courts or simply faded into the background soon after it was established. For example, although an early adopter, the Ninth Circuit has referenced its “quick look” standard only a few times since *Lambright*, and has forsaken it entirely in its published output since 2008.¹³⁶ Only the Tenth Circuit, which, as stated above, has the intriguing tendency to release all of its COA determinations for archiving by legal publishers (and which, as a possible consequence, tends to write full opinions for use at this screening stage), has recently invoked the permissive approach to COA determinations.¹³⁷

B. The Second School: The Strict Standard and Fealty to the Language of § 2253(c)(2)

Some courts have found that a more searching analysis of the merits is appropriate at the COA stage. In these cases, whether the petitioner has “stated” a cognizable habeas claim is simply one part of the overall inquiry. If a sufficient record exists to allow the appellate court to ascertain that the petitioner’s claims are of little overall merit, it may deny a COA on that ground without reaching the district court’s procedural ruling.

132. *Fleming v. Evans*, 481 F.3d 1249, 1259 (10th Cir. 2007) (quoting *Gibson*, 232 F.3d at 803).

133. *United States v. Asemani*, 77 F. App’x 264, 265 (5th Cir. 2003); *Hublely v. Superintendent, SCI Camp Hill*, 57 F. App’x 927, 930 (3d Cir. 2003).

134. *Mateo*, 310 F.3d at 40.

135. *Id.* at 41.

136. *Sechrest v. Ignacio*, 549 F.3d 789, 803–04 (9th Cir. 2008); *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007); *Nardi v. Stewart*, 354 F.3d 1134, 1139–40 (9th Cir. 2004).

137. *See, e.g., McCosar v. Standifird*, 488 F. App’x 311, 313 n.1 (10th Cir. 2012). Reflecting the Tenth Circuit’s unorthodox approach to COAs, the *McCosar* panel both granted a COA and deferred to the district court’s procedural determination in a single opinion. *See id.* at 313–14.

The Fifth Circuit has perhaps most explicitly articulated this “sliding scale” approach. In *Houser v. Dretke*,¹³⁸ where a petition had been dismissed by the district court as procedurally barred for failure to exhaust administrative remedies,¹³⁹ the court tackled the difficult question of “what *Slack* had in mind” for procedural appeals:¹⁴⁰

Assume that petitioner has stated a “debatable” issue concerning the correctness of the district court’s procedural denial of habeas relief. Then, if the district court pleadings, the record, and the COA application demonstrate that reasonable jurists could debate whether the petitioner has *made a valid claim* of a constitutional deprivation, a COA will issue. If those same materials make it clear that reasonable jurists could not debate whether the petitioner has made a valid claim of a constitutional deprivation, the COA will be denied. If those materials are unclear or incomplete, then COA should be granted, and the appellate panel, if it decides the procedural issue favorably to the petitioner, may have to remand the case for further proceedings.¹⁴¹

Note what the court has done here. For cases in which it is impossible to analyze anything other than the wisdom of the lower court’s procedural ruling, a “quick-look-like” approach is endorsed. However, in cases where the record is available, a COA should be denied when the petitioner has not “made” a valid claim of the denial of a constitutional right.¹⁴² The court, in “looking to [the] application for a COA, [the] original petition, the district court’s opinion, the record, and the briefs filed in the district court on [the respondent’s] behalf,” determined that “no reasonable jurist could debate that [the petitioner] fails to state a constitutional deprivation *for which habeas relief is warranted*.”¹⁴³ In other words, a more searching merits standard is employed when the record allows for it.

In another recent decision, the Fifth Circuit suggested that the *Slack* “state a valid claim” language should be interpreted to require the petitioner to raise “reasonably debatable claims of the denial of

138. 395 F.3d 560 (5th Cir. 2004).

139. *Id.* at 561. *Houser* involved an unusual substantive issue: a challenge to a good-time credit revocation proceeding by a state prisoner. *Id.* at 561–62.

140. *Id.* at 562.

141. *Id.* (emphasis added) (citation omitted).

142. *Id.*; *see also* Singleton v. Cooper, 456 F. App’x 417, 418–19 (5th Cir. 2011) (per curiam) (employing “made” language, as well).

143. *Houser*, 395 F.3d at 562 (emphasis added).

constitutional rights.”¹⁴⁴ Again, note that while *Slack* suggested that the “stating” of the claims should be reasonably debatable, the Fifth Circuit’s construction shifts the debate from the invocation of the claims to the claims themselves. Other Fifth Circuit cases show this searching standard in action, often while facially invoking the “state a valid claim” requirement of *Slack*.¹⁴⁵

The Eighth Circuit has endorsed a similar reading of *Slack*. The court observed that no COA should be issued if “there is no merit to the substantive constitutional claims.”¹⁴⁶

Other courts effectively equate “stating a valid claim” of the denial of a constitutional right with making a “substantial showing” of one. For example, in *Bell v. Florida Attorney General*,¹⁴⁷ the Eleventh Circuit observed that the district court “erred in failing to specify whether jurists of reason would find it debatable that Bell’s petition states a valid claim of the denial of a constitutional right.”¹⁴⁸ It therefore vacated the COA as improvidently granted, and remanded for the district court to consider “what claims, if any, in Bell’s petition for habeas corpus make a ‘substantial showing of the denial of a constitutional right.’”¹⁴⁹ In an alternative articulation, the court read the *Slack* pronouncement to require a “show[ing] . . . that one or more of the claims [the petitioner] has raised presents a *substantial constitutional issue*.”¹⁵⁰

144. *Womack v. Thaler*, 591 F.3d 757, 758 (5th Cir. 2009) (per curiam).

145. See, e.g., *Morris v. Dretke*, 379 F.3d 199, 206 (5th Cir. 2004); *Graves v. Cockrell*, 351 F.3d 143, 154–55 (5th Cir. 2003). However, it is, as always, difficult to distinguish between the actual use of a stricter standard and descriptive richness.

146. *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002); see also *Langley v. Norris*, 465 F.3d 861, 863 (8th Cir. 2006) (utilizing the “no merit” language in the context of an ineffectiveness claim to resolve the prejudice prong at the COA stage).

147. 614 F.3d 1230 (11th Cir. 2010) (per curiam).

148. *Id.* at 1232.

149. *Id.* (quoting 28 U.S.C. § 2253(c)(2)).

150. *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007) (per curiam) (emphasis added). It is worth noting here that early post-*Slack* cases from the Eleventh Circuit could be interpreted as leaning more toward the “quick-look” end of the analytical spectrum. See, e.g., *Franklin v. Hightower*, 215 F.3d 1196, 1199–1200 (11th Cir. 2000) (per curiam) (quoting the “states a valid claim” language, while also noting that “the first claim’s merit is certainly debatable among jurists of reason”); *Roberts v. Sutton*, 217 F.3d 1337, 1340 n.4 (11th Cir. 2000) (“[A]s long as reasonable jurists would find *the merits of at least one procedurally barred claim to be debatable*, we may move on and weigh the merits of the petitioner’s procedural argument to determine if it satisfies the COA standard.”) (emphasis added). In retrospect, the circuit’s later decision that the merits—and not the actual cognizability—should be “debatable” finds its genesis in these opinions. See also *Gonzalez v. Sec’y for the Dep’t of Corr.*, 366 F.3d 1253, 1264 (11th Cir. 2004)

The upshot of the stricter standard is the denial of COAs in cases where a procedural question may exist, but the merits of the underlying petition are either undeveloped or appear to lack a chance of success. Even if a loosely cognizable constitutional claim may exist, a court can evaluate the facts presented by the record to deem it presumptively meritless and thus unworthy of a COA.¹⁵¹ Thus, a petitioner may successfully “assert[] a constitutionally cognizable right in his habeas petition,” but may still fail if he does not articulate a “reasonably debatable infringement of that right.”¹⁵² The sliding-scale approach implies an odd paradox for the petitioner: the more developed his claims are or the more complete the factual record is, the less forgiving the reviewing court will be, even when the district court’s disposition did not touch upon the merits. For example, if a bare-bones habeas petition were erroneously denied on timeliness grounds, a “sliding scale” approach might compel a COA grant and a remand to the district court for further development of the factual record. By contrast, the same bare-bones petition which included, as an attachment, a state court decision disposing of the claim might not be so lucky, as an appellate court would no longer be looking at the claim in a factual vacuum.

C. *The Pabon Problem: The Third Circuit’s Third Way*

Of all recent COA decisions, however, the Third Circuit’s opinion in *Pabon v. Superintendent SCI Mahanoy*¹⁵³ is one of the most puzzling. Despite its pre-*Slack* activity in the COA realm, the Third Circuit fell quiet soon after *Slack* was decided.¹⁵⁴ In *Pabon*, the Circuit reentered the field, but in so doing it committed, in my opinion, an interpretive mistake: it tangled the *Slack* and *Miller-El* standards. The court was asked, in part, to tackle the question of

(characterizing COA as “filter[ing] out from the appellate process cases in which the possibility of reversal is too unlikely to justify the cost to the system of a full appellate examination”). These Eleventh Circuit decisions were, in fact, relied on by some of the “quick-look” courts to support those outcomes. *See, e.g.,* *Mateo v. United States*, 310 F.3d 39, 41 (1st Cir. 2002) (citing *Roberts*, 217 F.3d at 1339–40.).

151. *See, e.g.,* *Houser v. Dretke*, 395 F.3d 560, 562–63 (5th Cir. 2004).

152. *Williams v. Martinez*, 586 F.3d 995, 1001 (D.C. Cir. 2009).

153. 654 F.3d 385 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2430 (2012).

154. Although, it did suggest sympathy to the “quick-look” approach in 2007, *see Goldblum v. Klem*, 510 F.3d 204, 214 (3d Cir. 2007), and it did articulate a “raises a substantial constitutional question” test shortly after *Slack* was decided, *see United States v. Brooks*, 230 F.3d 643, 646 (3d Cir. 2000). *But see Tomlin v. Britton*, 448 F. App’x 224, 228 (3d Cir. 2011) (declining to issue a COA when the petitioner “has made no showing whatsoever, and certainly not a substantial showing, that his constitutional right to the effective assistance of appellate counsel was denied”).

the *Slack* “state a valid claim” language, but appeared to instead embrace the more searching analysis of *Miller-El*, a case whose teachings were arguably inapposite. While the opinion suggests an attempt at imposing a kinder standard upon habeas petitioners, it may have accomplished precisely the opposite—an object lesson in the need to keep distinct the two separate *Slack* tests and to separate the language of *Miller-El* from the language of *Slack*.

Pabon, like *Slack*, is a bull’s eye case on procedural appeals, with an interesting procedural twist. *Pabon*’s petition raised *Bruton*¹⁵⁵ claims. The district court denied equitable tolling and dismissed the petition as untimely. *Pabon* appealed and sought a COA. The court of appeals issued a COA, but its order mentioned only the equitable tolling claim and did not “indicate” any constitutional claims.¹⁵⁶ Recognizing that its COA order was problematic, the court stayed oral argument and directed the parties to brief “whether *Pabon* had made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).”¹⁵⁷

In its opinion, then, the court had to solve two different inquiries: first, had *Pabon* satisfied the merits-based portion of the *Slack* procedural test to bring the COA order into compliance; and, second, should the district court’s order be affirmed or reversed? The first question appeared to be an excellent opportunity to finally settle the circuit’s approach to *Slack*. Quickly, however, the court veered from *Slack* to *Miller-El*, quoting the latter’s merits-based discussion of the showing required by the petitioner to succeed.¹⁵⁸ And while proceeding to make “a threshold inquiry regarding the application of *Bruton* and its progeny to *Pabon*’s trial and conviction,”¹⁵⁹ the court’s “cursory” consideration of the applicable facts of the case spanned numerous pages.¹⁶⁰ In the end, it concluded that “[u]nder the *Miller-El* standard, *Pabon*’s alleged *Bruton* violation need only be debatable” and “[f]or the reasons explained

155. *Bruton v. United States*, 391 U.S. 123 (1968). “*Bruton* and its progeny establish[] that in a joint criminal trial before a jury, a defendant’s Sixth Amendment right of confrontation is violated by admitting a confession of a non-testifying codefendant that implicates the defendant, regardless of any limiting instruction given to the jury.” *Johnson v. Tennis*, 549 F.3d 296, 298 (3d Cir. 2008).

156. See *Pabon v. Superintendent SCI Mahanoy*, C.A. No. 08-1536 (3d Cir. Nov. 19, 2008).

157. *Pabon*, 654 F.3d at 392. The actual order did mention *Slack*’s “state a valid claim” language, albeit in a parenthetical. See *Pabon v. Superintendent SCI Mahanoy*, C.A. No. 08-1536 (3d Cir. May 12, 2010).

158. *Pabon*, 654 F.3d at 392–93.

159. *Id.* at 393.

160. See *id.* at 387–91, 393–98.

above, we conclude that reasonable jurists could debate whether Pabon has a meritorious claim.”¹⁶¹ Thus bringing the COA order into compliance, the court proceeded to the merits of Pabon’s equitable tolling argument, reversing and remanding to the district court for an evidentiary hearing on Pabon’s claim.¹⁶²

Yet the first part of the court’s exercise was arguably unnecessary—a clear demonstration of the problems of mixing the substantive *Miller-El* and procedural *Slack* standards. The court was not evaluating the merits of Pabon’s petition; indeed, it had granted a COA on only the procedural question. Thus, the court’s extraordinarily in-depth discussion of both the facts of the case and Pabon’s strong merits showing, which would perhaps have been appropriate in a *Miller-El* analysis, was not necessary under the procedural prong of *Slack*. The court had jumbled the appropriate standards, and failed to recognize that, while procedural COA determinations should be guided by the spirit of *Miller-El*, applying that case’s merits analysis is dangerous folly.

Odder still, the decision in *Pabon* is written as one generous to the petitioner, stressing the “threshold inquiry” and explicitly disclaiming the Commonwealth’s efforts to impose a heightened standard of COA review.¹⁶³ Despite this, the court might possibly have made future success by procedural appellants more difficult. Subsequent panels might take *Pabon* to impose *Miller-El*’s merits standard as the equivalent of “stating a valid claim” in procedural appeals, requiring a searching inquiry that might even exceed the stricter standard imposed by other non-quick-look circuits. Of course, the opposite could be true as well; simply because the court arguably overshot the merits analysis in *Pabon* does not mean that the level of inquiry conducted therein is required. *Slack* does, after all, emphasize that a petitioner must show “at least” that he has stated a valid claim of the denial of a constitutional right.¹⁶⁴ Under this reading, *Pabon* can be safely characterized as illustrative rather than restrictive, showing a sufficient, but not necessary, proffer of merit, and at least one post-*Pabon* case has adopted that approach.¹⁶⁵ Taken liter-

161. *Id.* at 398.

162. *Id.* at 404.

163. *Id.* at 392–93 & n.9. I suspect that the extended merits analysis in *Pabon* might have been intended to signal to the district court—to which the matter was being remanded—that the Third Circuit found substantive worth in the underlying habeas corpus petition.

164. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

165. Specifically, in *Gerber v. Varano*, 512 F. App’x 131 (3d. Cir. 2013) (per curiam), the Third Circuit emphasized its commitment to a threshold standard while declining to engage in a lengthy merits analysis à la *Pabon*. See *id.* at 134 &

ally, however, *Pabon's* casual mixing of procedural and substantive merits standards could portend difficulty for future petitioners.

Indeed, the court's failure to explicitly distinguish between the procedural and the substantive modes of appellate COA review is further demonstrated in the Commonwealth's decision to seek certiorari. In footnote nine of the opinion, the court rejected the Commonwealth's argument that AEDPA deference should be used in evaluating the merits of the petition at the COA stage, observing that this was "precisely what the Supreme Court rejected in *Miller-El*."¹⁶⁶ The Commonwealth charged that, in so holding, the Third Circuit had functionally endorsed de novo review of state court decisions, in clear violation of AEDPA and in contradiction of other circuit decisions that had held that AEDPA deference inheres in the application of *Miller-El*.¹⁶⁷ In my reading, both the court and the Commonwealth had a point, but they were simply arguing at cross purposes. If one interprets footnote nine as applying only to procedural COA considerations, the court is probably correct. As no federal court has yet deferred to the state courts' analysis of the merits of the habeas petition, it is reasonable to suggest that, under *Slack*, the state courts' denial of the petitioner's constitutional claims should not be taken into account in determining whether jurists of reason could debate if the petitioner has stated a valid claim of the denial of a constitutional right.¹⁶⁸ The Commonwealth, by contrast, seized upon the court's overreliance on *Miller-El*, and there *it* had a point. In determining whether "jurists of reason could disagree with the district court's resolution of [the petitioner's] constitutional claims"¹⁶⁹—the relevant consideration in a merits COA analysis—incorporation of AEDPA deference is proper because it bears on the district court's actual analysis of the petitioner's constitutional claims. In sum, the court's use of *Miller-El* as

n.2. As an unpublished decision, *Gerber* does not bind the circuit, see *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 127 n.12 (3d Cir. 2012), and may not reliably signal the court's thinking about *Pabon*. A recent precedential case, *United States v. Thomas*, 713 F.3d 165 (3d Cir. 2013), granted a procedural COA (assuming, without deciding, that one was needed) without discussing the merits of the underlying matter at all. *Id.* at 166 n.1. Indeed, discussion of the merits in *Thomas* would have been complicated by the absence of an actual filed 28 U.S.C. § 2255 motion.

166. *Pabon*, 654 F.3d at 392 n.9.

167. Petition for Writ of Certiorari at 16–21, *Kerestes v. Pabon*, No. 11-958, 2012 WL 379762, at *16–21 (citing *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004); *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

168. Of course, this applies only to habeas petitions filed by state prisoners.

169. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484).

its primary standard instead of *Slack*, and its inconsistent distinction between the merits-based and procedure-based COA standards, prompted the Commonwealth to argue that the court had advocated something far more novel than it had intended. While it is perilous to read much into a denial of certiorari,¹⁷⁰ I would not be surprised to learn that the Supreme Court untangled this skein in declining to take the case.¹⁷¹

Pabon's impact is not yet known, both within the Third Circuit and without. It may yet be marshaled to impose a stricter standard on attempts to obtain COAs on procedural claims; or, on the other hand, it may have very little impact in that realm at all.¹⁷² But regardless of its ultimate effect, *Pabon* speaks to the continued uncertainty over the proper standard to use in evaluating the merits of procedural COA appeals, and the danger of mixing the *Slack* and *Miller-El* approaches to two very distinct questions.

VII.

THE BEST APPROACH IS THE MOST PERMISSIVE

In my view, those circuits that follow the permissive approach—taking only the briefest look at the merits of a petition before granting a COA on procedural grounds—are most accurately following the letter of *Slack* and the spirit of *Miller-El*. It is my contention that an approach that focuses on claim cognizability would be ideal.¹⁷³ It should function like this: when presented with a petition that was denied on either erroneous or questionable procedural grounds, a court of appeals should check to see whether the petition facially alleges the deprivation of a constitutional right. If the petition does so, the court should grant a COA, identifying the constitutional ground in its order or other decree to satisfy 28 U.S.C. § 2253(c)(3). Having allowed the appeal to proceed, a court now has several options. Summary action, either in favor of the government or the petitioner, can be employed if the procedural

170. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 65 n.32 (1998).

171. I note, too, that the Third Circuit, with the same judge authoring, later acknowledged the ambiguities contained in its earlier statement of certainty in footnote nine. See *Tomlin v. Britton*, 448 F. App'x 224, 227 n.3 (3d Cir. 2011).

172. Of course, *Pabon* also involved a lengthy discussion of equitable tolling, for which the case has been repeatedly cited. See, e.g., *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012).

173. A “quick-look” standard, which might serve to weed out certain petitions that advance cognizable but facially meritless claims, would be an acceptable alternative.

grounds upon which the petition was denied below are clearly erroneous *or* if the petition is clearly meritless. As I argue below, this approach would not consume significantly more resources than a “strict” COA standard. Otherwise, the case can, as always, proceed to briefing, appointment of counsel, and so on, which may be appropriate if the procedural ground is ambiguous.

There are several clear reasons, both legal and prudential, why this standard should be adopted by the circuit courts and affirmed (if need be) by the Supreme Court. First, and most importantly, Justice Kennedy’s opinion in *Slack* uses language that is indelibly associated with a minimal showing: stating a claim, which traditionally refers to articulating the elements, facts, and actors required to plead a cognizable allegation. True, Kennedy modified this language by inserting “valid,” into “stating a claim,” and “stating a claim” has itself become a tougher burden in recent years (*Ashcroft v. Iqbal*,¹⁷⁴ anyone?). But interpreting “valid claim” to mean “winning claim” is clearly not right, as language in both *Slack* and *Miller-El* demonstrates.¹⁷⁵ Furthermore, while Justice Kennedy does not anchor his “valid claim” construction on any prior precedent, the Supreme Court *has* discussed “valid claims” in the context of cognizability. In *Estelle v. Gamble*, a seminal case about Eighth Amendment medical-care claims by prisoners, the Court observed that “a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment.”¹⁷⁶ Having reemphasized this principle, the Court proceeded to “consider whether respondent’s complaint states a *cognizable* § 1983 claim.”¹⁷⁷ Although *Estelle* was decided by a different Court and a different Justice—and on a different (if tangentially related) subject—the case still shows that “valid” can be a

174. 556 U.S. 662 (2009).

175. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (“Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”); *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000) (articulating the “jurists of reason” standard, while emphasizing that the COA is a “threshold” test).

176. 429 U.S. 97, 106 (1976).

177. *Id.*; see also *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 253 n.7 (1981) (“Both the District Court and the Court of Appeals determined that respondent had stated valid claims for relief under federal and state law”); *Urie v. Thompson*, 337 U.S. 163, 196 (1949) (referring to a “valid claim” as one cognizable under the relevant statute). I do not mean to suggest that this is the only reasonable way of interpreting “valid claim,” but rather that doing so is not outlandish and has support in earlier Supreme Court case law.

part of a cognizable/noncognizable continuum rather than a successful/unsuccessful one.

None of the alternative approaches is universally sustainable across the wide variety of procedural postures that can give rise to an appeal. A stricter approach, like the “sliding scale” one favored by the Fifth Circuit, fails when the record has not been developed to a sufficient extent to allow for the evaluation of the merits of the petition at all. In the aforementioned Fifth Circuit test, a petition without much factual development is evaluated at a “quick look” level, whereas one with more factual development is evaluated at a stricter level. In effect, then, the Fifth Circuit is using two different tests, each of which can lead to a COA. Because a cognizability/quick-look approach is still used in these more demanding circuits when circumstances warrant, those circuits are, in effect, acknowledging that a minimal showing is all that is actually required by *Slack*, and that they are interposing a greater requirement upon the appellant.

Second, and following from the above, the fact that multiple tests are percolating throughout the circuits hides a starker reality: because most COA orders are not available to or indexed by legal publishers, courts can, in fact, do whatever they please on a case-by-case basis. After all, COA orders, like most summary dispositions, need not contain justification or reasoning. While the Introduction to this Article decried the possible petitioner-disfavoring ramifications of this state of affairs, unclear and inconsistent standards can also work against the government. Take, for example, a Fifth Circuit case, *Bailey v. Cain*.¹⁷⁸ As the appellate court’s opinion reveals, the district court raised the issue of timeliness sua sponte, and a COA was granted by the court of appeals “on the issues of whether the district court should have raised the limitations issue sua sponte and, if so, whether the dismissal was proper.”¹⁷⁹ The order that granted a COA, however, makes no mention of the Fifth Circuit’s balancing test; indeed, it fails to reference the “merits” of Bailey’s petition at all, in contravention of both the balancing test and 28 U.S.C. § 2253(c)(2).¹⁸⁰ Circuit appeals always contain a certain amount of variability, and an appellant’s fortunes can be determined by the particular panel he draws. Yet, as shown by *Bailey*, the differences between a precedential opinion articulating a COA standard and an interstitial order (that is, for all intents and purpose, unsearchable) can be striking.

178. 609 F.3d 763 (5th Cir. 2010).

179. *Id.* at 765.

180. *See Bailey v. Cain*, No. 08-31222 (5th Cir. Aug. 13, 2009).

Third, any test that relies on a searching merits analysis will fail on those occasions where the record is not developed to a point where real evaluation of a petitioner's claims is possible.¹⁸¹ In these circumstances, the kind of in-depth analysis that is seen in cases like *Pabon* would be difficult, although the appellate court could sit as an ersatz district court and conduct a detailed factual inquiry. Furthermore, in extreme cases, a "category 1" procedural dismissal—one unrelated to either habeas or AEDPA, such as failure to follow court rules, pay the filing fee, and so on—can present the appellate court with the absence of a final, filed habeas petition.¹⁸²

Fourth, at least in the context of actions brought by prisoners acting pro se, courts are obligated to construe liberally the filings of the unrepresented.¹⁸³ This requirement is constrained and expanded by competing impulses. On the one hand, a court does not assume the role of an advocate;¹⁸⁴ on the other, courts may sometimes decide to grant relief based on an entirely different legal theory than the one identified by the pro se petitioner.¹⁸⁵ A risk inherent in denying procedural COAs based on marginal showings by a petitioner is that, simply, there may be more in the record that could plausibly suggest an alternative outcome if the petition were

181. See, e.g., *United States v. Thomas*, 713 F.3d 165 (3d Cir. 2013).

182. See, e.g., *United States v. Saro*, 252 F.3d 449, 453 (D.C. Cir. 2001) (addressing a situation in which "the underlying § 2255 motion was never filed because the district court denied leave to file," but declining to reach the central question—the standard of review).

It may be the case that the most extreme situations under category 1 need not always require a COA. The subject could likely support an article by itself, but, in brief: In *Harbison v. Bell*, 556 U.S. 180 (2009), the Supreme Court distinguished between appeals of "final" orders, which require a COA, and appeals of orders that are nonfinal—in that case, an order "den[ying] a motion to enlarge the authority of appointed counsel"—which do not require a COA. *Id.* at 183. At least one court has tentatively applied *Harbison* to situations in which a petition is denied in such a way that prevents it from being "filed" in the first place—in other words, a nonfinal predisposition order that is so defective as to be immediately appealable. See, e.g., *Pero v. Duffy*, No. 11-4532 (3d Cir. Mar. 7, 2012); *Jones v. Pa. Bd. of Prob. & Parole*, No. 11-3461 (3d Cir. Dec. 5, 2011).

183. See, e.g., *Meador v. Branson*, 688 F.3d 433, 436 (8th Cir. 2012); *Figueredo-Sanchez v. United States*, 678 F.3d 1203, 1207 (11th Cir. 2012); *Koons v. United States*, 639 F.3d 348, 353 n.2 (7th Cir. 2011).

184. See *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013); *United States v. Viera*, 674 F.3d 1214, 1216 n.1 (10th Cir. 2012) (citing *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)); see also Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42 (2009).

185. See, e.g., *Mala*, 704 F.3d at 245; *Meador*, 688 F.3d at 436. But see *Castro v. United States*, 540 U.S. 375, 385 (2003) (Scalia, J., concurring) (warning against moving from liberal construction to recharacterization).

to be liberally construed. Whether an appellate court chooses to vacate or affirm, the act of having to justify its decision at the merits stage could lead to a fairer examination of the pro se petition, especially in contexts where the district court's interpretation was unnecessarily narrow.

Fifth, a lenient standard maximizes the value of adopting a single standard for this kind of COA determination. As discussed above, the various circuit courts have promulgated markedly different rules with regard to briefing, presentation of the issues, and release of their opinions and orders to legal publishers. Some of these approaches—most notably, the Tenth Circuit's—can seem, at times, like a combination COA/merits determination. Using a single standard for procedural COA applications would ensure that, regardless of the reviewing court's ultimate output, no COA denials—whether in lengthier opinion form or shorter order form—would be “stealth” analyses of the merits of a petition. This benefit would be in addition to the intrinsic value contained in a uniform implementation of the rule, such as easier cross-circuit applicability and streamlined procedures for petitioners.¹⁸⁶ In other words, even if a court issued a nondescript order declining to issue a COA because the petitioner had failed to meet the *Slack* standard, a reviewing court or an outside observer would be assured that: (a) the district court's procedural determination was not debatable among jurists of reason; or (b) the petitioner had failed to allege a cognizable denial of a constitutional right. All parties to the system would be better informed, issues surrounding successive petitions would be clarified, and counsel for the petitioner would be better able to tailor her arguments if attacking a COA denial at a rehearing or certiorari stage.

The above leads smoothly into a discussion of several prudential rationales for adopting a more lenient standard across the circuits, starting with the one that is most central to my thesis: as AEDPA aimed, in part, to give prisoners a single attempt to collaterally challenge their convictions and sentences in federal court, those petitioners who successfully navigate the labyrinth that AEDPA erects should be afforded a decision on the merits of their petitions.¹⁸⁷ By “decision on the merits,” I mean to suggest a *real*

186. Cf. Daniel S. Tomson, Note, *Rule 58's Dirty Little Secret: The Problematic Lack of Uniform Enforcement of Federal Rule of Civil Procedure 58 Within the Federal Court System*, 36 VAL. U. L. REV. 767, 816–17 (2002) (discussing the importance of uniformity of federal rules in connection with FED. R. CIV. P. 58).

187. See Uhrig, *supra* note 10, at 1222–23 (discussing the complex field that petitioners, often pro se, are expected to navigate).

decision on the merits, not one shrouded in the procedural uncertainty of a COA denial that suggests a failure to satisfy an ambiguous gatekeeping standard. Those prisoners who lose on the merits before the district court have been afforded one full look at the merits of their petition; thus, their arguments are subject to a higher standard of scrutiny before being granted a COA. Those petitioners who lose on a procedural ground, by contrast, have not been afforded an equal courtesy. Whether the appellate court acts via a summary affirmance on alternative grounds or remands to the district court for further consideration, a habeas petitioner whose filing is denied on procedural grounds that are erroneous or arguable has, under this model, a better chance of receiving a decision on the merits at some stage of the litigation. And while not true in all contexts, courts do, on occasion, indulge a “strong presumption in favor of deciding cases on the merits.”¹⁸⁸

I see many benefits and few clear pitfalls in taking the above approach. First and foremost, removing a stealth merits analysis from the COA stage renders the appellate court’s decision clearer to other courts and to the parties, especially in those circuits whose COA dispositions are traditionally neither detailed nor available to legal publishers. When a petition for certiorari is filed to the Supreme Court from a denial of a COA,¹⁸⁹ the Court does not possess insight into what motivated the lower court’s decision to deny a COA; all it has is the order. In procedural cases, shifting matters to the merits stage would give the high court a greater ability to determine what exactly motivated the appellate court’s disposition.

Further, the petitioner himself, especially in marginal cases, would understand the grounds upon which his petition was denied, which might have differed markedly from the grounds relied upon by the district court. A petitioner whose collateral attack on his conviction was denied on spurious procedural grounds, and whose COA application was nevertheless denied based on his “failure to state a valid claim” of the denial of a constitutional right, could reasonably take from these decisions a feeling that his petition was denied on grounds that were grossly unfair. This, in turn, could lead to exactly the sort of serial filing of petitions (both in good faith and bad) frowned upon by AEDPA, in an attempt to rear griev-

188. *Garcia-Perez v. Hosp. Metropolitan*, 597 F.3d 6, 7 (1st Cir. 2010) (quoting *Malot v. Dorado Beach Cottage Assocs.*, 478 F.3d 40, 43 (1st Cir. 2007)) (discussing dismissals under FED. R. CIV. P. 41(b)).

189. *See generally* *Hohn v. United States*, 524 U.S. 236 (1998).

ances that were not clearly addressed in earlier attempts.¹⁹⁰ And a court reviewing a subsequent application under the prefiling authorization provisions of 28 U.S.C. § 2244(b) might not have easy access to the reasoning that undergirded the previous decisions.

Take, for example, this simple scenario: a prisoner files a habeas petition of marginal worth that is denied as untimely by the district court based on a miscalculation of the periods of statutory tolling. Without this miscalculation, the petition is timely. In a circuit applying a stricter standard, an appeals court could deny a COA by simply stating that the petitioner failed to “state a valid claim” or make a “substantial showing of the denial of a constitutional right,” if the petition had little apparent merit after a cursory analysis. Indeed, boilerplate language citing *Slack* might be sufficient to deny permission to appeal. But the petitioner, who may or may not have a reasonable merits argument, has a *strong* argument that the district court’s procedural decision was wrong. He may think, understandably, that the circuit court simply missed the district court’s mathematical error, or, more darkly, might wonder whether the same forces that “railroaded [him] . . . to . . . conviction” were keeping him from his putative savior, the “federal habeas judge.”¹⁹¹ He probably knows that, if he wishes to file a second habeas petition, he confronts a daunting task in vaulting AEDPA’s restrictions on successive petitions.¹⁹² That bar contains numerous

190. Recall that habeas relief exists in obvious tension with the finality of a conviction and sentence; even before AEDPA, courts were required to balance the power of habeas corpus with its potential for abuse. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 490–91 (1991). AEDPA places tremendous restrictions on serial filings, requiring a prisoner to meet the demanding requirements of 28 U.S.C. § 2244(b) (for state prisoners) or 28 U.S.C. § 2255(h) (for federal prisoners) to proceed. But even the least meritorious application to pursue a second or successive petition requires judicial resources to process and deny, a feat that becomes more daunting when the actual disposition of the original petition is less than clear.

191. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2225 (2002).

192. State petitioners cannot pursue second or successive petitions unless they rely on new rules of constitutional law that have been made retroactively applicable or satisfy a “newly discovered facts” standard that requires them to show that “but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b) (2006). Federal prisoners must satisfy a similar standard. *See* 28 U.S.C. § 2255(h) (2006); *see also* Uhrig, *supra* note 10, at 1250. Moreover, both groups must receive prefiling authorization from the relevant court of appeals, after which (assuming the application is granted) the district court must undertake its own analysis of the § 2244(b) factors before proceeding to the merits. *See, e.g., Case v. Hatch*, 731 F.3d 1015, 1026–27 (10th Cir. 2013) (describing the screening process); FHCPP, *supra* note 3, § 28.3; *see also* *Burris v. Parke*, 116 F.3d 256, 257 (7th Cir. 1997) (referring to the

exceptions, though, some of which are open to creative (if frequently futile) interpretation by litigants and attorneys of both the jailhouse and licensed variety.¹⁹³ Federal prisoners might cast a keen eye upon 28 U.S.C. § 2255(e), for example, which allows for those prisoners who have used up their “one shot” at regular § 2255 relief to pursue a 28 U.S.C. § 2241 habeas corpus petition to “bring a second or successive attack on [their] conviction[s] or sentence[s] under 28 U.S.C. § 2241, without reference to § 2255(h)’s restrictions.”¹⁹⁴ Or a prisoner might delve into history, seeking solace in one of the residual writs that, in the modern age, are of limited general applicability.¹⁹⁵ This sort of serial filing of “disguised” habeas petitions (which are usually dismissed as unauthorized filings or as facially meritless¹⁹⁶) is hardly unique to prisoners who have been the subject of unfair procedural denials—far from it.¹⁹⁷ Yet it is certainly possible that a relaxed approach to granting procedural COAs would lead to a more satisfying resolution on the merits for a number of petitioners, and would indeed simplify

AEDPA successive requirements as “more restrictive” than the pre-AEDPA “abuse of the writ” standard).

193. See, e.g., D.G. Maxted, Panetti v. Quarterman: *Raising the Bar Against Executing the Incompetent*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 99, 104–05 (2009), available at http://scholarship.law.duke.edu/djclpp_sidebar/28/.

194. Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011), cert. denied, 132 S. Ct. 1001 (2012); see also Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 116–17 (2012) (discussing the scope of the “savings clause”). Legitimate petitions under § 2241 in this context can only be sought when § 2255 relief is inadequate or ineffective, an extraordinarily narrow category. See FHCPP, supra note 3, § 41.2(b) n.27. That the exception is narrowly drawn does not prevent petitioners from trying. See, e.g., Adderly v. Zickefoose, 459 F. App’x 73, 75 (3d Cir. 2012) (per curiam).

195. See, e.g., Massey v. United States, 581 F.3d 172, 174 (3d Cir. 2009) (per curiam) (discussing writ of audita querela), cert. denied, 130 S. Ct. 2426 (2010); see also FHCPP, supra note 3, § 41.2(b) (discussing residual remedies validly available to federal prisoners).

196. See, e.g., United States v. Ledesma-Cuesta, 443 F. App’x 685, 686 (3d Cir. 2011) (per curiam).

197. While I have no concrete evidence of this, I suspect that petitioners who do not receive adjudications on the merits are probably more likely to attempt to file serial petitions to relitigate claims that were never squarely addressed by the lower courts. During my time as a staff attorney, the majority of serial filers I encountered (at least, the ones who were not clearly vexatious or suffering from mental illness) fell into this category, raising claims that had been denied on procedural grounds either pre- or post-AEDPA. Undoubtedly, many of these procedural denials were correct, but some likely were arguable; an eventual decision on the merits might have stemmed the flow of serial petitions, or at the very least would have aided the court’s analysis of the petitioner’s claims when he complained of alleged injustices from trials occurring thirty or more years in the past.

things tremendously for those tribunals asked to rule upon those serial petitions. They would be able to proceed with the certainty and security that the petitioner had been afforded his day in court.

Taking this approach would also allow circuit courts to be more proactive in pointing out procedural errors made by the district courts while allowing for the more rapid development of the relevant jurisprudence. The procedural landscape of habeas after AEDPA is nothing if not wild and woolly, and district courts—especially those with crushing caseloads—can make the occasional, understandable mistake, in addition to touching on issues that, by dint of their complexity, might simply be “arguable” by jurists of reason. Even in this late hour, the basic components of AEDPA’s procedural toolkit are still being tweaked. To cite just one example, the Supreme Court recently ruled that a sentence-reduction motion under Rhode Island law is “an application for ‘collateral review’ that triggers AEDPA’s tolling provision.”¹⁹⁸ Certainly, this new rule probably affected some cases that were winding their way through the system, and will likely affect many more to come. Yet in applying the rule outside of Rhode Island, district and circuit courts will likely be confronted by more marginal than meritorious petitions. With a strict COA gatekeeping standard, those marginal petitions, even if denied on incorrect procedural grounds under the new rule, may yet be rejected at the COA stage. But with a more lenient standard, an appellate court might earlier be able to reach the relevant procedural question, even if its opinion was unpublished or otherwise lacked binding precedential value. This in turn would lead to a swifter growth of cases discussing the new rule.

The central argument against a lenient COA standard is clear: such a standard will require courts to expend more time, money, and energy on matters of uncertain merit. However, some of these concerns, while well intentioned, are not borne out by the reality on the ground. As a preliminary matter, the connection between granting COAs and additional resources is largely one of the courts’ own creation. If COAs are to only be granted in circumstances of likely merit, such that they imply the presumption of appointment of counsel, extended briefing schedules, and so on, then of course COAs will be associated with delay and other administrative or financial unpleasantness. Severing this connection, and recharacterizing COAs as modest gatekeepers instead of cruel ones, will do much to correct this misconception. Those same judiciary employ-

198. *Wall v. Kholi*, 131 S. Ct. 1278, 1287 (2011).

ees,¹⁹⁹ who now bear the responsibility of screening COA applications, will undoubtedly be able to spot those COA candidates that, despite being allowed to proceed to the merits stage, should not receive the full accoutrement of services that are granted petitions of potential merit.

Nor will shifting more appeals to the merits stage “frustrate[] the ‘E’ in AEDPA.”²⁰⁰ Courts will not have to invest more intellectual firepower in disposing of these cases. Behind each order denying a COA because a petitioner has failed to meet the merits prong of the *Slack* procedural standard must lie an analysis of the merits, one that could be easily transformed into an opinion. Moreover, courts already have mechanisms in place to expedite appeals of little to no merit, or those with clear errors that deserve quick remand to the district court. Summary affirmance, for example, can allow a court to dispose of an appeal *sua sponte* without requiring full briefing if no substantial question is presented.²⁰¹ Summary action can operate against the petitioner or in his favor. For example, if the appellate court wishes to summarily vacate and remand to the district court to reach the merits of a petition in the first instance, it can certainly do so.²⁰²

A case from the Third Circuit demonstrates a simple procedural approach to the summary action question in the habeas context. In *Buxton v. Pennsylvania*, after the district court had (potentially erroneously) dismissed a petition as unexhausted without reaching whether its claims may have been defaulted, the court of appeals issued an order to show cause requesting that the parties “address whether the claims raised in appellant’s petition for a writ of habeas corpus are either procedurally defaulted . . . or barred under the AEDPA statute of limitations.”²⁰³ After the response period had ex-

199. Staff attorneys, for example. See, e.g., Roxie Bacon, *Retain the Ninth Circuit: An Efficient and Excellent Bench*, ARIZ. ATT’Y, Sept. 2005, at 35, 44, available at http://www.myazbar.org/AZAttorney/PDF_Articles/0905Con3.pdf; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 335–39 (2011) (addressing case management among different circuits); David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 443 (2010).

200. Cutler, *supra* note 10, at 357.

201. See, e.g., *Murray v. Bledsoe*, 650 F.3d 246, 247–48 (3d Cir. 2011) (per curiam) (citing 3D CIR. R. 27.4; 3D CIR. I.O.P. 10.6 (2010)); *McKenna v. Powell*, 631 F.3d 581, 582 (1st Cir. 2011) (per curiam) (citing 1ST CIR. R. 27.0(c)).

202. See, e.g., *Wyatt v. Thaler*, 395 F. App’x 113, 114–15 (5th Cir. 2010) (per curiam) (vacating and remanding the district court’s dismissal of defendant’s habeas petition because he had been given insufficient procedural fairness).

203. No. 10-1203 (3d Cir. Mar. 31, 2010).

pired, the court granted a COA, vacated, and remanded in a single step.²⁰⁴

The filtering mechanism of the COA requirement does not complicate the process of taking summary action in those circumstances when an appellate court wishes to summarily affirm adverse to the interests of the petitioner—thus potentially reaching the merits in the first instance on appeal—rather than summarily vacating due to a problematic procedural outcome below. Ordinarily, when granting a COA on a procedural question, the merits of the case are not separately “certified” for appeal, although (as discussed further *infra*) a proper COA order should “indicate” at least one issue that passes the *Slack* test. Yet as explained by the Federal Rules of Appellate Procedure (if, curiously, not by the statutory text), “[a] certificate of appealability is not required when a state or its representative or the United States or its representative appeals.”²⁰⁵ Mindful of the rule that Congress generally does not mean to depart from standard federal procedure unless it states so explicitly,²⁰⁶ and embracing the axiom that an appellate court can “affirm a lower court’s ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court,”²⁰⁷ several courts have held that the scope of the COA does not limit the grounds that the state may argue to defend the judgment. These courts, therefore, have preserved the discretion of the appellate court to affirm on any basis supported by the record.²⁰⁸ Thus, appellate courts may easily deny a petition as meritless, notwithstanding that the district court had declined to reach those issues and the COA order declined to separately certify them for appeal.

In sum, there are several good reasons for adopting, in this context, the more lenient “quick-look” or “facially cognizable” COA standards for procedural habeas appeals. These positive legal and prudential considerations meet with few downsides. Allowing more procedural COAs to be granted, and therefore disposing of more petitions at the merits stage, will have little effect on a court’s use of

204. See generally *Buxton v. Pennsylvania*, 398 F. App’x 704, 706 n.2, 708 (3d Cir. 2010) (per curiam).

205. FED. R. APP. P. 22(b)(3).

206. See *Rhodes v. Robinson*, 621 F.3d 1002, 1007 (9th Cir. 2010) (quoting *Jones v. Bock*, 549 U.S. 199, 216 (2007)).

207. *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012); see also *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) (“Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.”).

208. See, e.g., *Woodward v. Williams*, 263 F.3d 1135, 1139 n.2 (10th Cir. 2001); *Garcia v. Lewis*, 188 F.3d 71, 75 n.2 (2d Cir. 1999).

resources. The manpower that has gone into deciding that a petition is marginal or meritless will already have been spent, no attorney need be appointed to represent a pro se petitioner, and a court's ability to take summary action in whatever way it pleases is unaffected by AEDPA. Further, courts will be hewing closer to the language of *Slack* and the spirit of *Miller-El*, while resolving a greater number of petitions on the merits and "out in the open." If made readily available, those opinions would hasten the further development and refinement of the procedural habeas landscape post-AEDPA.

VIII. WHAT DOES A "COMPLIANT" COA ORDER LOOK LIKE IN 2013?

One further question merits brief discussion: what does a compliant procedural COA order look like after fifteen years of AEDPA jurisprudence? Recently, in *Gonzalez v. Thaler*,²⁰⁹ the Supreme Court held that a failure to comply with the exact statutory language of AEDPA and "indicate" substantive constitutional issues does not deprive an appellate court of jurisdiction.²¹⁰ Nevertheless, following the language of § 2253(c) is still "mandatory,"²¹¹ although defects can be easily remedied when "a party timely raises the COA's failure to indicate a constitutional issue."²¹²

In order to satisfy the Court's *Gonzalez* ruling, then, all procedural COA orders should endeavor to identify *a* claim that passes the low-level scrutiny advocated for above. For example, a COA order might grant a certificate of appealability on a procedural default claim, while identifying an ineffective assistance of counsel argument as "stating a valid claim of the denial of a constitutional right." Citation to 28 U.S.C. § 2253(c)(2) is unnecessary, especially if the authoring panel is of the opinion that the relevant language of *Slack* was intended to supplant the literal statutory terms. The court need not take from its "indication" that it has separately certified the merits of the claim for appeal.

CONCLUSION: THE MODEST PROPOSAL

In 2007, District Judge James Robertson decried the "procedural obstacles that confront prisoners seeking review on the merits of

209. 132 S. Ct. 641 (2012).

210. *Id.* at 649.

211. *Id.* at 651.

212. *Id.*

their [habeas corpus] petitions.”²¹³ According to Judge Robertson, “virtually every habeas petition and § 2255 application on [his] docket has to be dismissed” for one of a number of sundry procedural reasons.²¹⁴ While conceding that “[m]ost post-conviction claims do lack merit,” he nevertheless “suspect[ed] that [judges] expend a lot more energy crafting careful opinions explaining why we cannot reach the merits than we would if we simply ruled on the issues that petitioners ask us to decide.”²¹⁵ Judge Reinhardt of the Ninth Circuit has also assailed the “impenetrable procedural rules designed to make habeas relief unavailable to all but the most fortunate.”²¹⁶ Sympathy for the plight of the convicted and the pro se is hardly universal, of course, and given the seventeen years since AEDPA’s enactment, prisoners should arguably be on notice regarding the statute’s procedural pitfalls.²¹⁷ Yet the statistics are striking. Even before AEDPA’s passage, a substantial percentage of federal habeas petitions were dismissed on procedural grounds.²¹⁸ A recent study suggests that a majority of noncapital petitions filed by state petitioners continues to be disposed of on procedural grounds without a discussion of the merits.²¹⁹ And, of course, “virtually all habeas

213. James Roberston, *2007 James McCormick Mitchell Lecture: Quo Vadis, Habeas Corpus?*, 55 *BUFF. L. REV.* 1063, 1083 (2008).

214. *Id.* at 1084.

215. *Id.*

216. *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012) (Reinhardt, J., concurring).

217. *See, e.g., Cutler, supra* note 10, at 357. Indeed, the habeas petition forms themselves contain warnings about potential procedural issues. *See, e.g.,* PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY, U.S. COURTS 6 (June 2013), *available at* <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO241.pdf> (“CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies . . .”). Of course, these warnings are of little use to those who do not glance at the form before errors have been committed in state court proceedings, or who do so after the time to file has lapsed.

218. *See* PAUL H. ROBINSON, *AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS* 4(b), 13 (1979) (noting that 55% of petitions challenging state court convictions and sentences were dismissed because of procedural defects; at the time, 60% of those dismissals were due to failure to exhaust, and 15.1% failed to state a cognizable claim). Fifteen years later, that number was substantially unchanged. *See* Jonah Wexler, Note, *Fair Presentation and Exhaustion: The Search for Identical Standards*, 31 *CARDOZO L. REV.* 581, 593 n.74 (2009) (citing ROGER A. HANSON & HENRY W.K. DALEY, *BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS* 17–18 (1995), *available at* <http://www.bjs.gov/content/pub/pdf/FHCRSCC.PDF>).

219. *See* NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF*

petitions are brought pro se by prisoners”²²⁰ who are poorly equipped to navigate arcane procedural requirements and for whom warnings at stage ten are of little help in preventing procedural mistakes, errors, and oversights at stage one.

In enacting AEDPA, Congress aimed to streamline a process long thought to be unnecessarily protracted—especially in the capital context—while emphasizing the values of finality and comity. Agree or not with Congress’s decision, the concerns it identified were real, and the historical circumstances that led to AEDPA’s swift passage were certainly galvanizing. Yet the procedural additions that AEDPA grafted on to an already complex field of jurisprudence may not have helped the goals of expediency and regularity, and, undoubtedly, the general poor quality of the law’s drafting meant that courts would have to expend more effort, not less, on navigating the hidden shoals of the new order. At the end of the first stage of this navigation, the courts are instructed to apply an additional, opaque standard—the COA requirement—to determine whether an appeal can proceed. As this Article has hopefully shown, the combination of these new procedural requirements and a strict procedural COA standard (or one, at the very least, applied inconsistently across circuits) serves to frustrate the goals of Congress, the courts, habeas practitioners, and litigants.

Short of eliminating the COA requirement entirely, which would contradict over a hundred years of gatekeeping habeas jurisprudence, the best solution to AEDPA’s procedural quagmire is to ensure fairness to pro se litigants, while simultaneously honoring the impulses of comity and finality. Adopting a lenient procedural COA standard accomplishes this goal, while imposing few additional demands on the resources of the federal judiciary. COA jurisprudence may not be as exciting as the big issues in habeas corpus jurisprudence, but it remains a daily component of the dimmer parts of the criminal justice system. My aim is to rescue some portion from the shadows.

1996 45 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>; see also Erwin Chemerinsky, *Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process*, 60 HASTINGS L.J. 1129, 1133 (2009).

220. Chemerinsky, *supra* note 218, at 1134.