RAISE IT OR WAIVE IT? ADDRESSING THE FEDERAL AND STATE SPLIT IN AUTHORITY ON WHETHER A CONVICTION UNDER AN UNCONSTITUTIONAL STATUTE IS A JURISDICTIONAL DEFECT

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I. INTRODUCTION

The appellate system serves as the linchpin of the judicial system.[1] Appellate courts[2] serve several important functions: (1) generating more uniform laws for lower courts to follow;[3] (2) providing a venue for thoughtful consideration of complex legal issues;[4] (3) safeguarding important rights of the parties before the court;[5] and (4) legitimizing the legal process in the eyes of the parties to a dispute and the general public.[6] For civil cases, the right to appeal a trial court[7] decision developed at

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[1] *See infra* notes 3–6 and accompanying text.

[2] An appellate court is "[a] court with jurisdiction to review decisions of lower courts or administrative agencies." BLACK'S LAW DICTIONARY 405 (9th ed. 2009). This term is often synonymous with the term reviewing court, but there is a technical difference; a reviewing court could be a body that is not a true appellate court, such as a district court reviewing a magistrate judge's decision or the board of an administrative agency reviewing an administrative law judge's decision. *See, e.g.*, Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-Science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT'L L.J. 251, 287–88 (1998). This Comment will use the term appellate court rather than reviewing court.

[3] *See* Lester B. Orfield, *The Right of Appeal in Criminal Cases*, 34 MICH. L. REV. 937, 938 (1936).

[4] *See id.* at 938–39.

[5] *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 514–20 (1992).

[6] *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 202 (1983); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 426 (1995).

[7] The term tribunal court is sometimes used instead of the term trial court; the term trial court typically refers to courts within the traditional court system, while the term tribunal court is a

English common law and came with the colonists to America.[8] However, criminal defendants in America had virtually no right to appeal their conviction until the turn of the twentieth century.[9] In 1889, Congress allowed federal criminal defendants who had been sentenced to death to bring direct appeals to the United States Supreme Court.[10] Congress did not authorize a general right to appeal a federal criminal conviction until 1911.[11] The development of the right of criminal defendants to appeal their convictions in state court developed somewhat more quickly but remained quite limited until the mid-1800s.[12] In modern times, a reverse trend has emerged given increasingly overloaded appellate court dockets.[13] The criminal appeals system has already seen a variety of reforms with many of these changes initiated by courts themselves rather than legislatures.[14]

more general term that refers to a wider range of adjudicatory bodies, including adjudicatory bodies within administrative agencies. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 1646; Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1034–36 (2007). This Comment will simply use the term trial court since this discussion deals primarily with appeals in the traditional court system.

[8] *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 15–19 (1994).

[9] *See* Arkin, *supra* note 5, at 521–24 (discussing the history of criminal appeals in the federal system).

[10] *Id.* at 523; *see* Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

[11] *See* Act of Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1087, 1133–34; Arkin, *supra* note 5, at 524.

[12] 7 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE, § 27.1(a) (3d ed. 2007 & Supp. 2009).

[13] *See, e.g.*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1155–56 (1995) (commenting that federal criminal appeals have increased roughly 135% between 1974 and 1990).

[14] *See* Arkin, *supra* note 5, at 507–12 (discussing methods that courts have used to reform the appellate process); Alex S. Ellerson, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 387 (1991) (giving examples of appellate procedural reform). Some argue that the response to this problem has created more problems than it has solved by endangering a defendant's right to challenge his conviction. *See, e.g.*, Arkin, *supra* note 5, at 507–512. Evidence from some studies that have found high reversal rates on appeal in criminal cases legitimizes this concern, particularly in capital cases. *See id.* at 515–16 (noting that reversal rates in criminal appeals range from about 5% to close to 14% in various state systems or federal circuits); Robert T. Roper & Albert P. Melone, *Does Procedural Due Process Make a Difference? A Study of Second Trials*, 65 JUDICATURE 136, 139 (1981) (determining that between 1975 and 1979, of 1159 federal criminal proceedings remanded on appeal, the second trial reached

The right to appeal a court's decision is a statutory[15] or state constitutional[16] right.[17] There is no federal constitutional right to appeal a civil case[18] or a criminal case.[19] Some judges and commentators question the continued validity of the holding that criminal defendants have no federal constitutional right to appeal their conviction given the fundamental role that appeals play in our legal system and the age of the Supreme Court case that decided this issue.[20] This debate is to some degree an academic one given the fact that the federal government[21] and all fifty states[22] authorize at least some form of appeal in felony criminal cases.[23] A similar debate exists with respect to a criminal defendant's access to the writ of

different outcome in 51.1% of cases).

[15] *See, e.g.*, 28 U.S.C. § 1291 (2006); TEX. CODE CRIM. PROC. ANN. art. 44.01–.02 (West 2006).

[16] *See, e.g.*, ARIZ. CONST. art. II, § 24; DEL. CONST. art. IV, § 24; NEB. CONST. art. I, § 23. *See also* Arkin, *supra* note 5, at 516 n.64 (listing fifteen states that provide for a right to appeal in their state constitution).

[17] *See* McKane v. Durston, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of [state] constitutional or statutory provisions allowing such appeal.").

[18] *See* Nat'l Union of Marine Cooks v. Arnold, 348 U.S. 37, 43 (1954); Cobbledick v. United States, 309 U.S. 323, 324–25 (1940).

[19] *See McKane*, 153 U.S. at 687. The nature of the charged offense, including capital offenses, does not change this rule. *See id.* Although continued reliance on *McKane* might seem questionable given its age, the Supreme Court has at least by way of dicta expressed its approval of *McKane* in recent years. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal . . . ."). *See also* Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

[20] *See, e.g.*, *Jones*, 463 U.S. at 756 n.1 (Brennan, J., dissenting); LAFAVE, ET AL., *supra* note 12, § 27.1(a) ("*McKane* was written at a time in which appellate review had only recently been introduced into the federal judicial structure."); Arkin, *supra* note 5, at 524–33; David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 519 (1990).

[21] *See* 28 U.S.C. § 1291 (2006). This same statute also governs civil appeals in the federal court system. *See id.* In many states, the same statutes that regulate civil appeals also govern criminal appeals. LAFAVE, ET AL., *supra* note 12, § 27.2(a).

[22] *See* LAFAVE, ET AL., *supra* note 12, § 27.1(a).

[23] *See id.* Notably, not all states provide criminal defendants with mandatory appeals for felony cases and instead only allow them an appeal at the discretion of the state's highest court. *See, e.g.*, W. VA. CODE ANN. §§ 58-5-1 to -2 (LexisNexis 2005). With respect to misdemeanor cases, criminal defendants typically have less broad rights to appeal their conviction than in felony cases. *See* LAFAVE, ET AL., *supra* note 12, § 27.1(a).

habeas corpus, a debate that has required Supreme Court intervention in recent years.[24]

An appeal may only take certain forms and may only proceed through certain venues.[25] Appeals in the civil system normally take the form of a direct appeal[26] or a collateral attack on a judgment.[27] Appeals in the criminal system normally take the form of a direct appeal,[28] a collateral attack,[29] or a unique form of collateral attack under a writ of habeas corpus.[30] In criminal cases, the federal court system and the vast majority of state courts authorize at least one mandatory appeal to an appellate court from a trial court decision, particularly in the case of felony offenses.[31] In the majority of states[32] and at the federal level,[33] a party may only petition the highest court in the jurisdiction for judicial review of a decision. The highest court[34] in that jurisdiction will then at its discretion decide which

[24] *See* Boumediene v. Bush, 553 U.S. 723, 771–82 (2008) (striking down a federal statute that deprived federal courts of jurisdiction to review habeas petitions from Guantanamo prisoners based on the Suspension Clause when no meaningful alternative was provided by Congress); LAFAVE, ET AL., *supra* note 12, § 28.2(a); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032–34 (2007).

[25] *See, e.g.*, 28 U.S.C. § 1291.

[26] *See id.*; *infra* Part II.

[27] *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 298 (defining a collateral attack as "[a]n attack on a judgment in a proceeding other than a direct appeal").

[28] *See* 28 U.S.C. § 1291; *infra* Part II.

[29] *See* LAFAVE, ET AL., *supra* note 12, § 28.1(a). In addition to a criminal defendant's ability to file a writ of habeas corpus to challenge his conviction, states also provide their own collateral attack procedures independent of the habeas corpus procedures. *See id.*

[30] *See* 28 U.S.C. §§ 2241, 2254; BLACK'S LAW DICTIONARY *supra* note 2, at 298 ("A petition for a writ of habeas corpus is one type of collateral attack."); *infra* Part III.

[31] *See* LAFAVE, ET AL., *supra* note 12, § 27.1(a).

[32] *See* Steve Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63, 84 (2010).

[33] *See* 28 U.S.C. § 1257(a). The Supreme Court can also review state court decisions from each state's highest court when those decisions implicate federal law. *See id.*

[34] Some states, such as Texas and Oklahoma, have bifurcated the highest court in the state into two separate courts that have separate judges, one court for civil cases and one for criminal cases. *See* S. Allen Alexander & Matthew Steffey, *Laying the Groundwork for Court Reform: A Report of the Mississippi Bar's Commission on Courts in the 21st Century*, 14 MISS. C. L. REV. 511, 530–31 (1994). Intermediate appellate courts normally hear both civil and criminal cases. *See id.* at 531 n.15.

cases and issues it will review.[35]

A variety of procedural rules also govern when (and which) party may appeal a particular decision. In both the civil and criminal systems, a party can generally only seek an appeal from a final judgment.[36] If a party seeks to appeal a court's decision, it must do so in a timely fashion or else risk forfeiting its right to appeal.[37] Generally, the prosecution in the criminal system has a more limited right to appeal a trial court's decision than a defendant.[38] The prosecution must normally have express statutory authorization to appeal an adverse decision.[39] Furthermore, the prosecution cannot constitutionally appeal a decision of acquittal rendered for a defendant because of limits imposed by the Double Jeopardy Clause.[40]

One specific rule of appellate procedure will be the focus of this Comment: the rule that a party must first raise an argument at the trial court level before it can assert that argument on appeal.[41] This rule is sometimes called the raise-or-waive rule.[42] As an exception to this raise-or-waive rule, a party can raise a jurisdictional defect for the first time on appeal.[43] Because a jurisdictional defect implicates the foundational question of "[a] court's power to decide a case or issue a decree," courts allow parties to raise jurisdictional defects for the first time on appeal.[44] However, the

[35] *See, e.g.*, 28 U.S.C. § 1257(a).

[36] *See infra* Part II.A.

[37] *See, e.g.*, 28 U.S.C. § 2107(a).

[38] *See* LAFAVE, ET AL., *supra* note 12, §§ 27.3, 27.4(c).

[39] *See* United States v. Sanges, 144 U.S. 310, 318 (1892). In 1907, Congress authorized federal prosecutors to appeal a limited number of adverse decisions with the Criminal Appeals Act. *See* Act of March 2, 1907, ch. 2564, 34 Stat. 1246, 1246 (codified as amended at 18 U.S.C. § 3731). Congress's most significant amendment of this statute occurred in the 1970's when Congress allowed the government to appeal all district court decisions except when a double jeopardy violation would occur. *See* Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1880, 1890 (1971) (codified as amended at 18 U.S.C. § 3731). Many states have adopted comparable provisions. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 44.01 (West 2006).

[40] *See* U.S. CONST. amend. V; United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Ball v. United States, 163 U.S. 662, 671 (1896).

[41] *See, e.g.*, Luce v. United States, 469 U.S. 38, 43 (1984) (deciding not to hear a criminal defendant's improper impeachment argument that was not raised at trial); *infra* Part II.B.

[42] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[43] *See id.*; Ashcroft v. Iqbal, 129 S. Ct. 1937, 1945 (2009); *infra* Part V.

[44] *See Iqbal*, 129 S. Ct. at 1945; BLACK'S LAW DICTIONARY, *supra* note 2, at 927; *infra* Part V.

question of when a defect qualifies as jurisdictional has not proved to be a simple one and has caused courts a great deal of headaches over the years.[45] When the term jurisdictional defect is used properly, it refers to a defect in a court's subject matter jurisdiction.[46]

While this raise-or-waive rule is less controversial in the civil system where parties do not face incarceration as a result of an adverse judgment against them, this rule has more significant implications in the criminal system.[47] For this and other reasons, the Supreme Court has recognized that the deprivation of a limited number of important constitutional rights in a criminal proceeding rises to the level of a jurisdictional defect, although the Court has sought to narrow the concept of jurisdictional defects.[48]

Notably, the federal and state courts have split as to whether a conviction secured under an unconstitutional statute constitutes a jurisdictional defect, thus allowing a defendant to raise a facial challenge to that statute's constitutionality for the first time on appeal.[49] The majority of federal and state courts do not allow a criminal defendant to raise a facial challenge to a statute's constitutionality for the first time on appeal.[50] A minority of federal and state courts do allow these challenges for the first time on appeal.[51] This split in authority has in part occurred because the Supreme Court's precedent on this issue does not point in a consistent direction.[52]

Resolving this split in authority will be the focus of this Comment. Part II of this Comment will focus on some of the nuts and bolts of the direct appeals system. Part III will discuss the primary differences between appeals under the writ of habeas corpus (habeas review) in criminal proceedings as opposed to the direct appeals process. Part IV will examine the differences between facial constitutional challenges and as-applied constitutional challenges to a statute. Part V will assess when a particular

[45] *See infra* Part V.

[46] *See infra* Part V.A.

[47] *See, e.g.*, Karenev v. State, 281 S.W.3d 428, 436 n.9 (Tex. Crim. App. 2009) (Cochran, J., concurring) ("We do not put people in prison for non-crimes or for violating an unconstitutional penal statute . . . .").

[48] *See infra* Part V.

[49] *See infra* Part VI.A.1, VI.B.1.

[50] *See infra* Part VI.A.1.

[51] *See infra* Part VI.B.1.

[52] *See infra* Part V, VI.A.2, VI.B.2.

defect in a court proceeding will rise to the level of a jurisdictional defect. Part VI will discuss the current split in authority regarding the raise-or-waive rule's application to facial constitutional challenges asserted on appeal for the first time in a criminal proceeding. Part VII will look at other ways criminal defendants can attempt to raise facial constitutional challenges for the first time on appeal.

II. DIRECT APPEALS IN THE CRIMINAL SYSTEM

A. The Final-Judgment Rule

The final-judgment rule requires that the trial court enter a final judgment before one of the parties may appeal the court's decision.[53] Black's Law Dictionary defines the final-judgment rule as "the principle that a party may appeal only from a district court's final decision that ends the litigation on the merits."[54] The final-judgment rule found its roots in the civil system because the right to appeal a civil case predates the right to appeal a criminal case.[55] This rule promotes judicial economy by avoiding piecemeal appellate review of cases.[56] It also encourages efficient decision making by appellate courts since many of the issues raised by the parties reach a resolution during the course of the litigation, prove non-prejudicial, or become moot due to the final outcome of the litigation.[57] In criminal law, the rule also provides prosecutors with an important tool to secure a conviction because "encouragement of delay is fatal to the vindication of the criminal law."[58] In the vast majority of jurisdictions, legislatures have codified the final-judgment rule.[59]

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[53] *See, e.g.*, 28 U.S.C. § 1291 (2006).

[54] BLACK'S LAW DICTIONARY, *supra* note 2, at 705–06.

[55] *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3906 (2d ed. 1991 & Supp. 2010); *supra* notes 9–12 and accompanying text.

[56] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

[57] *See* Lee I. Sherman, Note, *Immediate Appeal from Counsel Disqualification in Criminal Cases*, 25 WM. & MARY L. REV. 131, 134 n.20 (1983).

[58] *See* United States v. MacDonald, 435 U.S. 850, 853–54 (1978).

[59] *See, e.g.*, 28 U.S.C. § 1291 (2006); MINN. STAT. ANN. § 480A.06 (West 2002 & Supp. 2009); NEB. REV. STAT. § 25-1912(1) (2008); TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (West 2008 & Supp. 2009); LAFAVE, ET AL., *supra* note 12, § 27.2(a).

Determining whether an appealable final judgment exists depends on several factors.[60] For a judgment to be final, it must end the litigation on the merits and leave nothing for the court to do but execute the judgment.[61] The party seeking the appeal must also demonstrate that the order appealed from had a final and irreparable effect on his rights.[62] In criminal law, a final judgment exists when the defendant receives a sentence, not just a conviction.[63] This Comment will not address the exceptions to the final-judgment rule.

B. The Raise-or-Waive Rule and Its Exceptions

The raise-or-waive rule[64] dictates that an error not raised and preserved at the trial court level will not be considered on appeal.[65] The Supreme Court has recognized that even a constitutional right "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right."[66] Many jurisdictions codify the raise-or-waive rule.[67] The rationales for this rule include: (1) encouraging finality in the court system;[68] (2) promoting judicial economy; (3) preventing unfair surprise to the other

[60] *See infra* notes 61–62.

[61] Cunningham v. Hamilton Cnty., 527 U.S. 198, 204 (1999).

[62] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949).

[63] *See* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 54 (1989); Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment.").

[64] While many courts label the failure to raise an error at the trial court as a waiver, the term forfeiture more appropriately describes what occurs. *See* Freytag v. Comm'r, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring); LAFAVE, ET AL., *supra* note 12, § 27.5(c); While forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. United States v. Olano, 507 U.S. 725, 733 (1993).

[65] *See, e.g.*, FED. R. CRIM. P. 51(b). Merely raising an error, however, does not necessarily mean that a party has properly preserved that error for appeal; the party must typically brief and argue their claim in order to preserve it. *See* Beck v. Washington, 369 U.S. 541, 553 (1962) (stating Washington law).

[66] Yakus v. United States, 321 U.S. 414, 444 (1944). Normally, a failure to comply with the raise-or-waive rule also precludes a criminal defendant from raising those claims through a collateral attack proceeding, such as a habeas petition. *See* LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[67] *See, e.g.*, FED. R. CIV. P. 46; FED. R. CRIM. P. 51(b); TEX. CODE CRIM. PROC. ANN. art. 1.14 (West 2005).

[68] *See* Custis v. United States, 511 U.S. 485, 497 (1994).

parties who had no opportunity to address the argument in the lower court; (4) encouraging efficiency within the judicial system; (5) preserving the nature of our adversary system in which the litigants frame the issues and present them to the court; and (6) discouraging abuse of the appeals system by the parties.[69]

Like most other rules, the raise-or-waive rule is not absolute.[70] The most common exceptions[71] to this rule include (1) a jurisdictional defect,[72] (2) plain error,[73] (3) inadequate opportunity to preserve the issue for appeal,[74] and also in some cases (4) a claim for ineffective assistance of counsel.[75] Notably, the Supreme Court has announced that it will give appellate courts discretion with respect to the raise-or-waive rule to let parties raise arguments for the first time on appeal when it would be suitable to the individual case.[76] Of these exceptions, this Comment will primarily focus on jurisdictional defects and plain error, in Subpart V and II.C respectively.

C. The Plain-Error Rule

Under the plain-error rule, if a party fails to raise an argument at the trial court level, that party can still assert the argument on appeal under a limited standard of review: the plain-error standard of review.[77] In criminal

[69] *See* Greenlaw v. United States, 128 S. Ct. 2559, 2564 (2008); LAFAVE, ET AL., *supra* note 12, § 27.5(c) (quoting State v. Applegate, 591 P.2d 371, 373 (Or. 1979)).

[70] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[71] Another less-frequently discussed exception is a nonjurisdictional structural constitutional defect, such as an appointment of a federal judge in violation of the Appointments Clause. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 878–79 (1991).

[72] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(c) ("A lack of jurisdiction also is treated as a 'venerable exception' to the raise-or-waive rule."); *infra* Part V.

[73] *See infra* Part II.C.

[74] *See, e.g.*, United States v. Henry, 429 F.3d 603, 618–19 (6th Cir. 2005) (allowing defendant to raise a commerce-clause challenge for the first time on appeal because of the exceptional circumstance that the case on which defendant based his argument was decided after the district court entered judgment); LAFAVE, ET AL., *supra* note 12, § 27.5(c) ("It is a basic premise of the raise-or-waive rule that the defense will have adequate opportunity to present its objection . . . .").

[75] *See, e.g.*, Stoia v. United States, 22 F.3d 766, 768 (7th Cir. 1994); LAFAVE, ET AL., *supra* note 12, § 27.5(c) (stating that a defendant normally does not need to raise an ineffective-assistance-of-counsel claim until a post-conviction proceeding).

[76] *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976).

[77] *See, e.g.*, FED. R. CRIM. P. 52(b).

proceedings, virtually every jurisdiction has adopted some form of the plain-error rule.[78] When applying plain-error review, courts typically evaluate constitutional errors more favorably to the party raising the challenge than less serious errors.[79]

To determine whether an error qualifies as plain error, the Supreme Court has enumerated a four-step analysis: there must be (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.[80] An error is plain when it is "clear" or "obvious," and that error must at a minimum be "clear under current law" at the time the appellate court hears the case.[81] For an error to affect substantial rights, it must typically be "prejudicial" in that it must have "affected the outcome of the [trial court] proceedings."[82] The requirement that the error seriously affect the fairness, integrity or public reputation of the judicial proceedings makes the finding of plain error discretionary with appellate courts.[83]

D. The Standard of Review in Appellate Procedure

A standard of review is "[t]he criterion by which an appellate court . . . measures . . . the propriety of an order, finding, or judgment entered by the lower court."[84] The particular standard of review an appellate court applies determines the level of deference that the appellate court gives to a decision made by a trial court or lower appellate court.[85] Appellate courts use

[78] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(d). A few jurisdictions have expressly rejected the plain-error rule. *See, e.g.*, State v. Sexton, 886 P.2d 811, 823 (Kan. 1994); Lamphere v. State, 348 N.W.2d 212, 218 (Iowa 1984).

[79] *See, e.g.*, United States v. Knowles, 29 F.3d 947, 951 (5th Cir. 1994) ("[W]e have long held that, under the plain error inquiry, errors of constitutional dimension will be noticed more freely than less serious errors.").

[80] Johnson v. United States, 520 U.S. 461, 466–67 (1997).

[81] *See* United States v. Olano, 507 U.S. 725, 732–35 (1993).

[82] *See id.* at 734. A criminal defendant bears the burden of persuasion on this issue of prejudice. *Id.* In comparison, under harmless-error review when the defendant has timely asserted the issue, the government would bear the burden of persuasion that the error was harmless. *See id.*

[83] *See id.* at 735–36. This discretion should be employed "in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 736.

[84] *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 1535.

[85] *See* Kunsch, *supra* note 8, at 14.

different standards of review depending on the particular character of decision, such as a factual or legal finding.[86] In some cases, a statute will provide the appropriate standard of review.[87] The judiciary also has the inherent power to determine the appropriate standard of review for a particular type of decision.[88]

While some standards of review clearly provide less deference to a particular finding than others, such as the de novo standard of review,[89] there is no simple way to rank all the standards of review from more deferential to less deferential because each of these standards focuses on different components of the trial court's or lower appellate court's decision.[90] The Supreme Court has nicely summarized three of the most frequently applied standards of review: "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."[91]

First, an appellate court normally reviews a trial court's decision de novo in the context of a purely legal question[92] or mixed questions of law and fact.[93] De novo is the least deferential standard of review; the appellate

[86] *See id.* Courts generally apply a more deferential standard of review when the trial judge likely has more information or expertise than reviewing judges on the particular issue, or when that type of decision does not require uniform rules to guide trial courts. *See* LAFAVE, ET AL., *supra* note 12, § 27.5(e).

[87] *See, e.g.*, 5 U.S.C. § 706(2)(E) (2006) (stating that the appropriate scope of review is the "substantial evidence" standard).

[88] *See, e.g.*, State v. Thurman, 846 P.2d 1256, 1266 (Utah 1933). Sometimes, the appropriate scope of review is "provided by a long history of appellate practice." Pierce v. Underwood, 487 U.S. 552, 558 (1988). When the history of appellate practice does not provide a clear standard of review, courts can derive from the pattern of appellate review of other questions an analytical framework that will yield the correct standard of review. *See id.*

[89] *See* Kunsch, *supra* note 8, at 14. Under de novo review, the appellate court reviews the particular issue independently and gives no deference to the lower court's findings. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 697 (1996).

[90] *See* Kunsch, *supra* note 8, at 14.

[91] *Underwood*, 487 U.S. at 558.

[92] *See id.* Whenever a reviewing court has a purely legal question before it, the standard of review will always be de novo. Kunsch, *supra* note 8, at 27.

[93] *See* Kunsch, *supra* note 8, at 27–28. At the federal level, reviewing courts normally review mixed questions of law and fact under the de novo standard of review, although in some circumstances courts review these questions under the clearly erroneous standard of review. *See*

court completely substitutes its judgment for that of the trial court.[94]

Second, an appellate court reviews a trial judge's factual findings under the clearly-erroneous standard.[95] Unfortunately, there is no clear way to define the clearly-erroneous standard,[96] but it is unquestionably more deferential than the de novo standard.[97] While the historical development of this heightened deference to a trial court's factual findings has a convoluted history, heightened deference for factual findings has become the standard for appellate courts.[98]

Third, an appellate court reviews a variety of often context-specific findings made by a trial judge under the abuse-of-discretion standard.[99] Courts have given various definitions for this standard, but they uniformly recognize that the appellate court will largely defer to the trial judge's decision.[100] Generally speaking, it is difficult to neatly classify the types of

Pullman-Standard v. Swint, 456 U.S. 273, 288–90 (1982). The Supreme Court has not yet provided a clear answer to the question of when a court should review a mixed question of law and fact under the de novo standard or the clearly-erroneous standard or if the clearly-erroneous standard applies at all to mixed questions of law and fact. *See id.* at 289 n.19.

[94] *See supra* note 89 and accompanying text.

[95] LAFAVE, ET AL., *supra* note 12, § 27.5(e). For jury verdicts, on the other hand, the standard of review is somewhat different. *See* Hamling v. United States, 418 U.S. 87, 124 (1974). When the jury returns a favorable verdict for the government in a criminal case, the Supreme Court requires that the reviewing court must sustain that verdict if there is substantial evidence to support that verdict. *See id.* The same basic rule applies in federal civil jury trials based on the Seventh Amendment right to a civil jury trial. *See* Kunsch, *supra* note 8, at 19.

[96] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945). The term clearly erroneous does not lend itself to a straightforward definition; as Judge Learned Hand once stated, "It is idle to try to define the meaning of the phrase, 'clearly erroneous.'" *Id.* One Supreme Court decision stated that a finding of fact qualifies as clearly erroneous when a "court is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

[97] *See, e.g.*, Kunsch, *supra* note 8, at 14.

[98] *See id.* at 17–18; *See* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571 (3d ed. 2008 & Supp. 2010). Federal Rule of Civil Procedure 52(a)(6) expressly adopts the clearly erroneous standard for reviewing courts when a party challenges a district judge's fact-findings. *See* FED. R. CIV. P. 52(a)(6). Since the Federal Rules of Criminal Procedure have no provision similar to Rule 52(a)(6), the Supreme Court has expressly adopted the same standard for criminal cases. *See* Maine v. Taylor, 477 U.S. 131, 144–45 (1986).

[99] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(e).

[100] *See In re* Grand Jury Investigation, 974 F.2d 1068, 1072 (9th Cir. 1992) (defining an abuse of discretion as a decision that leaves the appellate court with a "definite and firm conviction that

questions that fall within the abuse of discretion standard,[101] although they do have some common characteristics.[102]

III. COLLATERAL REVIEW OF CRIMINAL CONVICTIONS THROUGH HABEAS RELIEF: KEY DIFFERENCES FROM DIRECT APPEALS

Since habeas relief is not the focus of this Comment, the discussion of habeas review of criminal convictions will focus primarily on the key differences between habeas review and direct appeals. Unlike a direct appeal in the criminal system, a habeas proceeding is actually a civil proceeding filed in federal court by an inmate.[103] However, there are many similarities between a direct appeal and a habeas proceeding.[104] Habeas review allows federal courts to review judgments rendered in both state and federal court, but only for constitutional violations or violations of federal law.[105] Many states also provide their own post-conviction procedure independent from habeas proceedings.[106] This Subpart will focus in particular on the restrictions the Supreme Court and Congress have imposed on habeas review.

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the district court committed a clear error of judgment"); United States v. Hughes, 970 F.2d 227, 232 (7th Cir. 1992) (quoting United States v. Tipton, 964 F.2d 650, 654 (7th Cir. 1992)) (defining an abuse of discretion as reaching a decision "no reasonable person" could reach); State v. Adams, 879 P.2d 513, 516 (Haw. 1994) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 839 P.2d 10, 26 (Haw. 1992)) (defining an abuse of discretion as "exceed[ing] the bounds of reason or disregard[ing] rules or principles of law or practice").

[101] *See* LAFAVE, ET AL., *supra* note 12, § 27.5(e). Procedural rules are subject to the abuse-of-discretion standard more often than substantive rules. *See* Kunsch, *supra* note 8, at 34.

[102] More specifically, these questions often (1) depend upon the trial judge's first-hand observations of the litigants and the evidence; (2) involve the trial judge's ability to control the trial proceedings; (3) include issues about which a trial judge would have a greater understanding than an appellate judge; and (4) require context-specific decisions resistant to general rules. LAFAVE, ET AL., *supra* note 12, § 27.5(e).

[103] *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 8 (1989).

[104] *See, e.g.*, James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999–2010 (1992).

[105] *See* 28 U.S.C. §§ 2241, 2254 (2006). Habeas petitions are not limited to addressing jurisdictional defects as they once were more than half a century ago. *See* LAFAVE, ET AL., *supra* note 12, § 28.3(b). However, the defendant must show cause and prejudice if he wishes to pursue a claim in a habeas petition that he did not originally raise in the original action. *See* Wainwright v. Sykes, 433 U.S. 72, 87–91 (1977).

[106] *See* Daniels v. United States, 532 U.S. 374, 381 (2001); *supra* note 29.

A. Judicial Limits on Habeas Review

To avoid potential abuse of the habeas review process and to encourage finality within the criminal justice system, the Supreme Court has imposed a variety of limits on habeas review.[107] For example, the Supreme Court recognizes that courts should not announce "new rules" when handling cases through habeas review and that they should instead limit relief to the constitutional claims which prevailed at the time the defendant's conviction became final.[108] Likewise, "new law"[109] announced by the Court generally does not apply retroactively to inmates who have already exhausted the appellate procedures available to them.[110] In comparison, "new law" announced by the Court does apply retroactively to all cases currently on direct review (direct appeal) within the appellate system.[111] Furthermore, an inmate in state custody bringing a habeas petition must have normally exhausted all direct appeal remedies available under state law before seeking federal habeas corpus relief.[112] A federal court will also not review a state court's decision through a habeas petition when a state inmate defaulted on his federal claims through a violation of an adequate state procedural rule.[113] Lastly, inmates in state custody cannot relitigate Fourth Amendment claims through a habeas petition if they had a full and fair opportunity to litigate those claims in state court.[114]

B. Statutory Limits on Habeas Review

Congress has also placed significant limits on habeas review. For instance, Congress requires that a person be in custody before he can bring

[107] *See infra* note 108–114.

[108] *See* Teague v. Lane, 489 U.S. 288, 315–16 (1989) (plurality opinion).

[109] Some commentators have argued that courts could apply this concept of "legal newness" in an overly restrictive manner that would unduly restrict habeas corpus review. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1748 (1991).

[110] *See Teague*, 489 U.S. at 308–10.

[111] Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

[112] *See Ex parte* Royall, 117 U.S. 241, 251–53 (1886). Congress has now codified this requirement with some modifications. *See* 28 U.S.C. § 2254(b) (2006); *infra* note 119 and accompanying text.

[113] Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[114] *See* Stone v. Powell, 428 U.S. 465, 490–94 (1976).

a habeas petition.[115] Congress has also expressly adopted some of the restrictions on habeas review announced by the Supreme Court.[116] Furthermore, in 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), an act that significantly restructured the process of reviewing habeas petitions from inmates convicted in a state court.[117] In particular, AEDPA limits the scope of review federal courts can apply when reviewing habeas petitions from state inmates and imposes additional procedural requirements that state inmates must meet to qualify for habeas review.[118]

This new standard of review under AEDPA requires that a federal court rule in favor of a state inmate on his habeas petition claims only if the adjudication of a claim resulted in a decision that (1) was contrary to, or that involved an unreasonable application of, clearly-established federal law as determined by the Supreme Court or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[119] By limiting this standard of review, Congress has created "a substantially higher threshold" for obtaining habeas relief than under pre-AEDPA law.[120]

AEDPA also imposes a variety of procedural requirements on criminal defendants to obtain habeas review.[121] This act codifies some of the habeas limitations the Supreme Court has already recognized, such as the certification of appealability requirement.[122] AEDPA also adopts a

[115] 28 U.S.C. §§ 2241, 2254.

[116] *See supra* note 112; *infra* note 122.

[117] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (1996) (codified as amended in scattered sections of U.S.C.).

[118] *See infra* notes 119–126. As the Supreme Court recently stated, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." Renico v. Lett, 130 S. Ct. 1855, 1866 (2010).

[119] *See* 28 U.S.C. § 2254(d).

[120] *Lett*, 130 S. Ct. at 1862 (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). For example, the Supreme Court has recognized that even an incorrect application of law will not necessarily meet this unreasonable application standard. *See id.* (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[121] *See infra* notes 122–126.

[122] *See* FED. R. APP. P. 22. The Supreme Court previously announced roughly the same rule in *Barefoot v. Estelle*. *See* Barefoot v. Estelle, 463 U.S. 880, 893 (1983), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–18, *as recognized in*, Slack v. McDaniel, 529 U.S. 473, 474–75 (2000).

modified form of the exhaustion doctrine previously adopted by the Supreme Court that now allows a federal court to dismiss a habeas petition on the merits before the exhaustion of all remedies available under state law.[123] AEDPA also requires a state inmate to pursue certain other state avenues before seeking federal habeas relief.[124] Furthermore, AEDPA imposes a one-year period of limitation on habeas corpus claims for state inmates[125] and also limits successive petitions from state inmates.[126]

IV. CONSTITUTIONALITY CHALLENGES TO STATUTES

A. Constitutional Challenges Generally

The doctrine of constitutional avoidance assumes that legislatures draft laws that will meet constitutional standards.[127] Because of this assumption, courts construe statutes whenever possible to avoid finding a statute constitutionally infirm.[128] A corollary rule to this one requires that a court only address constitutional issues raised by the parties.[129]

Nevertheless, the judiciary serves as an important check on legislatures.[130] Chief Justice Marshall once wrote that it is "the very essence of judicial duty" to resolve conflicts between a legislative act and the Constitution.[131] Since the elected representatives in a legislative body (1) generally receive direct feedback from their constituents, (2) often face a great deal of political pressure, and (3) frequently run for reelection, legislators sometimes behave in a more reactionary manner than do

[123] 28 U.S.C. § 2254(b)(2); *supra* note 112 and accompanying text.

[124] *See* 28 U.S.C. § 2254(b)(1)(B) (requiring that there be no available state corrective process or that there be circumstances that render such process ineffective to protect the defendant's rights to maintain a habeas petition).

[125] *See id.* § 2244(d)(1). The Supreme Court had previously stated that there was no time limit on a criminal defendant's ability to file a habeas petition. *See* United States v. Smith, 331 U.S. 469, 475 (1947).

[126] 28 U.S.C. § 2244(b).

[127] *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1961 (1997).

[128] *See id.*; Jones v. United States, 526 U.S. 227, 239 (1999).

[129] Mazer v. Stein, 347 U.S. 201, 206 n.5 (1954) ("We do not reach for constitutional questions not raised by the parties.").

[130] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803).

[131] *See Marbury*, 5 U.S. (1 Cranch) at 178.

government officials in the other branches of government.[132] Consequently, legislatures sometimes pass politically charged legislation that potentially infringes on some people's constitutionally protected rights.[133] Criminalizing conduct in particular can have serious repercussions on the lives of citizens subject to those laws.[134] As a result, individuals subject to these laws often challenge their constitutionality.[135]

B. As-Applied Versus Facial Constitutional Challenges to a Statute

Generally, a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances.[136] An as-applied challenge "is a claim that the operation of a statute is unconstitutional in a particular case."[137] On the other hand, "a facial challenge indicates that the statute may rarely or never be constitutionally applied."[138] The consequences of this distinction have dramatic consequences for those not a party to the litigation.[139] If a court finds a statute to be unconstitutional on its face, no one may enforce the statute under any circumstances, unless an appropriate court narrows its application.[140] In contrast, when a court finds a statute unconstitutional as

[132] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (acknowledging that a legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals"); Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 495–96 (2004).

[133] Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 563 (2009).

[134] *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). The ability to challenge a criminal statute as unconstitutionally vague or as overbroad and chilling to First Amendment rights reflects this principal. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3 (2d ed. 2003 & Supp. 2009).

[135] *See infra* Part IV.B.

[136] Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

[137] 16 C.J.S. *Constitutional Law* § 187 (2005 & Supp. 2010).

[138] *Id.*

[139] *See* Dorf, *supra* note 136, at 236.

[140] *Id.*

applied to particular facts, a person may still enforce the statute in different circumstances.[141]

Generally, a litigant has a higher burden to bring a successful facial constitutional challenge than he would if he brought an as-applied challenge.[142] This is because the litigant must show that no circumstances exist under which the statute would be valid.[143] While a facial challenge to a statute is a purely legal question, courts normally require the litigant bringing the challenge to show that the statute would cause the litigant at least potential harm.[144]

Although the distinction between as-applied and facial challenges may seem simple in theory, it becomes far more difficult in practice.[145] Some commentators complain that the Supreme Court's inconsistent treatment of this distinction has transformed an already challenging concept into something entirely unmanageable.[146] To some extent, one can explain these inconsistencies based on whether the litigant challenged the statute before it had been enforced against him or after enforcement had already occurred.[147] Courts do not look as favorably upon pre-enforcement challenges since courts hesitate to strike down a statute without a concrete set of facts before them or existing judicial interpretations of the statute in question to guide them.[148] Some have suggested that the Supreme Court has shown an increasingly hostile attitude towards pre-enforcement facial constitutional

[141] *Id.*

[142] United States v. Salerno, 481 U.S. 739, 745 (1987).

[143] *Id.*

[144] *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 457–58 (2008) (requiring that the challenging parties show a "severe burden on [their] associational rights"). Some complain that the Court appears to demand an inconsistent showing of harm even on the same types of challenges depending upon the majority's particular attitude towards the right at issue in the case. *See* Borgmann, *supra* note 133, at 590–92. There is no simple way to resolve these conflicting precedents. *See id.* Notably, First Amendment rights do receive special protection and do not require as high of a showing of harm. *See Wash. State Grange*, 552 U.S. at 449 n.6.

[145] *See* Dorf, *supra* note 136, at 294.

[146] *See, e.g.*, Borgmann, *supra* note 133, at 590–92; Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 879–80 (2005).

[147] *See, e.g.*, Borgmann, *supra* note 133, at 573–74 (stating that the Court has shown particular hostility to pre-enforcement challenges in recent years).

[148] *See Wash. State Grange*, 552 U.S. at 450.

challenge in recent years, as well as facial constitutional challenges in general.[149]

V. WHEN IS A DEFECT JURISDICTIONAL?

A. The Nature of Jurisdiction and Jurisdictional Defects

Jurisdiction is a notoriously broad and amorphous concept that courts have given a wide variety of meanings.[150] For this reason, a discussion of the terms jurisdiction and jurisdictional requires heightened attention to detail.[151] According to the Supreme Court, jurisdiction refers to "a court's adjudicatory authority" that emanates from a statute or the Constitution.[152] Thus, there is both statutory and constitutional jurisdiction.[153] The Supreme Court has also recently emphasized that, when used properly, the term jurisdictional only applies to subject matter jurisdiction[154] and personal jurisdiction.[155]

Recall that a jurisdictional defect cannot be waived and may be asserted on appeal for the first time.[156] The term jurisdictional defect is misleading, however, given how the Supreme Court defines the term jurisdictional and

[149] *See* Borgmann, *supra* note 133, at 573–90 (summarizing recent Supreme Court case law). At least before the Roberts Court era, commentators have recognized that the Supreme Court would actually allow more facial challenges than its own rules would suggest. *See* Dorf, *supra* note 136, at 236; Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1390 (2000).

[150] Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S. Ct. 584, 596 (2009) (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 90 (1998)) (noting that the term jurisdiction has been profligately used by courts to convey too many different meanings).

[151] *See, e.g.*, *id.* (noting that a different or incorrect use of "jurisdiction" may affect whether the elements of a cause of action are met).

[152] *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010) (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)).

[153] *See id.*

[154] Discretely defining the concept of subject matter jurisdiction, particularly in criminal law, is not a simple task given the amount of federal constitutional requirements that criminal proceedings must meet. *See* Peter Westen, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308, 1330–34 (1978).

[155] *See Reed Elsevier*, 130 S. Ct. at 1243 (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)).

[156] LAFAVE, ET AL., *supra* note 12, § 27.5(c).

how jurisdictional defects operate in practice.[157] On the one hand, a challenge to a court's subject matter jurisdiction cannot be waived since it is both a statutory and an Article III constitutional requirement.[158] On the other hand, a challenge to a court's personal jurisdiction can be waived since it is a Due Process liberty restriction on judicial power rather than a restriction regarding the enumerated powers of the federal sovereign.[159] Thus, when federal courts say that a jurisdictional defect cannot be waived, they are referring (or should be referring) to defects in a court's subject matter jurisdiction.[160]

Jurisdictional defects can be further divided into statutory jurisdictional defects[161] and constitutional jurisdictional defects.[162] This Comment will focus on constitutional jurisdictional defects. Unfortunately, synthesizing a discrete set of rules governing all types of jurisdictional defects is not a simple task in part because of the muddled nature of the case law on this issue.[163] However, the Supreme Court has attempted to clarify its position on jurisdictional defects in recent years.[164]

In the criminal system, the issue of jurisdictional defects commonly arises in the context of guilty pleas since the defendant often waives his right to appeal a wide variety of issues and thus often attempts to raise

[157] *See Reed Elsevier*, 130 S. Ct. at 1243–44; *infra* notes 158–160.

[158] Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). However, based on the Full Faith and Credit Clause, a party that has had an opportunity to litigate the question of subject matter jurisdiction may not relitigate that question in a collateral attack upon an adverse judgment. *Id.* at 702 n.9.

[159] *See Ins. Corp. of Ireland*, 456 U.S. at 702–03. However, some state courts recognize that a criminal defendant does not waive a challenge to personal jurisdiction and can raise it for the first time on appeal. *See* LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[160] *See* United States v. Cotton, 535 U.S. 625, 630 (2002); *Ins. Corp. of Ireland*, 456 U.S. at 702–03.

[161] Although the concept of statutory jurisdictional defects is beyond the scope of this Comment, the Court has taken a similar attitude in recent years of defining statutory jurisdictional defects narrowly. *See, e.g.*, *Reed Elsevier*, 130 S.Ct. at 1243–44.

[162] *See id.*; Custis v. United States, 511 U.S. 485, 494–97 (1994).

[163] *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 143–44 (1999); Westen, *supra* note 154, at 1330 ("The obvious difficulty with 'jurisdictional error' is that it is not self-defining; it is a label one attaches to those constitutional defenses that are already determined—by some anterior standard—to deserve to be heard."); *infra* Part V.B.

[164] *See infra* Part V.B.

jurisdictional challenges since they cannot be waived.[165] For similar reasons, litigation over jurisdictional defects often arises in collateral attack proceedings, such as a habeas review proceeding.[166]

B. The Supreme Court's Current Reluctance to Label a Defect Jurisdictional

The Supreme Court's jurisprudence on when an error rises to the level of a jurisdictional defect has not been a model of clarity, particularly in light of the number of times the Court has addressed the question.[167] Originally, the Supreme Court took a more expansive view of jurisdictional defects in criminal cases largely because Congress at one time allowed the Supreme Court to review only jurisdictional errors in criminal cases.[168] Since the Court felt compelled to correct obvious constitutional violations, it defined jurisdiction broadly.[169] However, a clear trend has emerged in the last few decades that demonstrates the Court's choice to define jurisdiction more narrowly than it has in the past, particularly in criminal cases.[170]

For constitutional issues, the Supreme Court has determined that the violation of some constitutional rights will rise to the level of a constitutional jurisdictional defect.[171] In the criminal system, the primary example is the failure to provide an indigent defendant with counsel,[172] although others may exist.[173] Based on the *Custis v. United States* and *Daniels v. United States* decisions, the Court has clearly taken a more restrictive approach in the criminal context by stating that only the constitutional right to counsel rises to the level of a constitutional

[165] *See* King, *supra* note 163, at 147–48; LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[166] *See* LAFAVE, ET AL., *supra* note 12, § 28.1(a). This does not mean that habeas petitions are limited to addressing jurisdictional defects, however. *See id*.

[167] *See* King, *supra* note 163, at 143–44.

[168] *See* United States v. Cotton, 535 U.S. 625, 629–30 (2002).

[169] *See id.* at 630.

[170] *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243–44 (2010); *Cotton*, 535 U.S. at 630; Daniels v. United States, 532 U.S. 374, 378 (2001); Custis v. United States, 511 U.S. 485, 493–97 (1994).

[171] *See Custis*, 511 U.S. at 493–97 (holding that the failure to provide an indigent defendant with counsel as required by the Sixth Amendment qualified as a jurisdictional defect).

[172] *See id.*

[173] *See infra* notes 234–240 and accompanying text.

jurisdictional defect.[174] These two decisions will be discussed in more detail in Subpart VI.A.2.

VI. MAJORITY AND MINORITY APPROACHES TO ALLOWING A CRIMINAL DEFENDANT TO RAISE A FACIAL CONSTITUTIONAL CHALLENGE FOR THE FIRST TIME ON APPEAL

A. Majority Approach: A Conviction Under an Unconstitutional Statute Is Not a Jurisdictional Defect

1. State Court and Circuit Court Precedent

The majority of the federal circuit courts[175] and state courts[176] that have addressed the issue do not recognize that a conviction secured under an unconstitutional statute constitutes a constitutional jurisdictional defect; instead these courts address facial constitutional challenges raised on appeal for the first time under the plain-error standard. However, at least five circuit courts have reached inconsistent conclusions on this question without overruling the conflicting case law.[177] Earlier, this Comment

[174] *See Daniels*, 532 U.S. at 378; *Custis*, 511 U.S. at 493–97.

[175] *See* United States v. Dedman, 527 F.3d 577, 591 (6th Cir. 2008); United States v. Jimenez, 323 F.3d 320, 322 (5th Cir. 2003); United States v. Letts, 264 F.3d 787, 789–90 (8th Cir. 2001); United States v. Feliciano, 223 F.3d 102, 125 (2d Cir. 2000); United States v. Gray, 177 F.3d 86, 93 (1st Cir. 1999); United States v. Lewis, 115 F.3d 1531, 1539 (11th Cir. 1997); United States v. Badru, 97 F.3d 1471, 1476 (D.C. Cir. 1996); United States v. Cole, 41 F.3d 303, 307 n.3 (7th Cir. 1994); United States v. Cupa-Guillen, 34 F.3d 860, 863 (9th Cir. 1994); United States v. Easter, 981 F.2d 1549, 1557 (10th Cir. 1992); United States v. Mebane, 839 F.2d 230, 232 (4th Cir. 1988). To this author's knowledge, the Third Circuit has not expressly addressed this specific question. However, based on the Third Circuit's Double Jeopardy jurisprudence, it appears it would follow the majority approach. *See* United States v. Miller, 527 F.3d 54, 60 (3d Cir. 2008).

[176] *See, e.g.*, Poe v. State, 389 So.2d 154, 156 (Ala. Crim. App. 1980); State v. Gerstner, 219 P.3d 866, 869 (Mont. 2009); Karenev v. State, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009); LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[177] *Compare* United States v. DiSanto, 86 F.3d 1238, 1244 (1st Cir. 1996) ("[A] claim that a statute is unconstitutional or that the court lacked jurisdiction may be raised for the first time on appeal."), *and* United States v. Walker, 59 F.3d 1196, 1198 (11th Cir. 1995) ("We can think of no plainer error than to allow a conviction to stand under a statute which Congress was without power to enact. In essence, the statute was void *ab initio*, and consequently, the district court below lacked subject matter jurisdiction with respect to that charge."), *and* United States v. Skinner, 25 F.3d 1314, 1317 (6th Cir. 1994) ("Although a guilty plea waives all non-jurisdictional

discussed the general arguments in support of requiring parties to raise issues at the trial court level before asserting them on appeal.[178]

In *United States v. Baucum*, the D.C. Circuit Court provides one of the most extensive defenses of the majority approach.[179] In *Baucum*, the court addressed the question of whether or not to allow a criminal defendant to raise a commerce-clause challenge to the statute under which he was convicted for the first time on appeal.[180] Concluding that a criminal defendant's conviction under an unconstitutional statute did not constitute a jurisdictional defect, the *Baucum* court declined to allow the defendant to raise this argument for the first time on appeal.[181] However, the court recognized that "there is no universally accepted answer to" this question and acknowledged that the defendant's argument did have some support in precedent from the Supreme Court and from other circuits.[182] The *Baucum* court nevertheless concluded that the applicable precedent and policy supported the finding that this type of claim was not jurisdictional in nature.[183]

The *Baucum* court recognized that once a statute has been declared unconstitutional, a court no longer has subject matter jurisdiction over any alleged violations of the statute since no valid law exists to enforce.[184] However, the court rejected the argument that such a statute would be void ab initio and concluded that federal courts still have subject matter jurisdiction over the presumptively valid statute until that statute is declared

defects and fact issues, a vagueness challenge is a jurisdictional defect."), *and* United States v. Tabacca, 924 F.2d 906, 912 (9th Cir. 1991) (holding that vagueness challenge could be raised for the first time on appeal), *and* Mercado v. Rockefeller, 502 F.2d 666, 672 (2d Cir. 1974) (allowing a facial challenge for the first time on appeal for jurisdictional reasons), *with Dedman* 527 F.3d at 591 (constitutional challenge cannot be raised for the first time on appeal), *and Feliciano*, 223 F.3d at 125 (same), *and Gray*, 177 F.3d at 93 (same), *and Lewis*, 115 F.3d at 1539 (same), *and Cupa-Guillen*, 34 F.3d at 863 (same).

[178] *See supra* note 68–69 and accompanying text.

[179] *See* 80 F.3d 539, 540–44 (D.C. Cir. 1996).

[180] *Id.*

[181] *Id.*

[182] *See id.* at 540, 542. In terms of circuit court opinions, the *Baucum* court specifically cited to an Eleventh Circuit opinion when citing precedent that did lend support to the defendant's argument. *See id.* at 542 (citing United States v. Walker, 59 F.3d 1196, 1198 (11th Cir. 1995)).

[183] *See id.* at 540–44.

[184] *See id.* at 540–41.

unconstitutional.[185] In defense of its conclusion, the *Baucum* court advocated that a contrary rule would conflict with the constitutional-avoidance doctrine that requires a court to not address constitutional issues unless they are raised by the parties.[186] Since federal courts must address jurisdictional questions *sua sponte*, the *Baucum* court did not feel that they should be burdened with assessing the constitutionality of any statutes involved in a given case as a threshold matter.[187] Weighing the applicable Supreme Court and circuit court precedent, the court concluded that the defendant's position lacked sufficient support.[188]

2. Supreme Court Precedent

The Supreme Court precedent on whether a conviction under an unconstitutional statute would qualify as a constitutional jurisdictional defect does not point in a consistent direction.[189] However, in a 1940 civil case, the Court demonstrated its aversion to the concept that courts should treat unconstitutional statutes as void ab initio because of all the uncertainty and logistical difficulties such a rule would create.[190] Furthermore, the

[185] *See id.* at 541 (quoting Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

[186] *See id.* (citing Mazer v. Stein, 347 U.S. 201, 206 n.5 (1954)); *supra* notes 129–131 and accompanying text.

[187] *See Baucum*, 80 F.3d at 541.

[188] *See id.* at 540–544. Notably, the *Baucum* court did not address the *Custis v. United States* decision issued two years before the *Baucum* decision, which would further strengthen the *Baucum* court's holding since the Supreme Court recognized that constitutional claims that rose to the level of a jurisdictional defect are particularly rare. *See id.*; Custis v. United States, 511 U.S. 485, 493–97 (1994); *infra* Part VI.A.2.

[189] *Compare Ex parte* Siebold, 100 U.S. 371, 376–77 (1879) ("An unconstitutional law is void and is not law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."), *with* Glasgow v. Moyer, 225 U.S. 420, 428–29 (1912) ("The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised . . . .").

[190] *See Chicot Cnty. Drainage Dist.*, 308 U.S. at 374 ("The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which

Court's most recent precedent makes clear that the Court has shifted towards narrowing the definition of jurisdictional defects, both statutory and constitutional.[191]

The recent line of decisions that most directly supports the majority approach begins with *Custis v. United States*.[192] In *Custis*, the defendant brought a collateral attack on some of his prior state convictions during a federal sentencing proceeding because the prosecution attempted to enhance his sentence with those prior convictions.[193] The defendant challenged these convictions on the basis that he was denied the effective assistance of counsel, had not entered into a guilty plea knowingly and intelligently, and had not been adequately advised of his rights in opting for a "stipulated facts" trial.[194] The defendant argued that he had both a statutory basis to bring these collateral attacks as well as a constitutional basis since these constitutional violations rose to the level of a constitutional jurisdictional defect.[195] The district court rejected these arguments, concluding that only a complete denial of counsel would allow the defendant to bring this challenge.[196] Affirming the decision of the lower courts, the Supreme Court rejected the defendant's argument that these constitutional violations rose to the level of a constitutional jurisdictional defect.[197]

The Supreme Court did distinguish one particular constitutional violation that does rise to the level of a constitutional jurisdictional defect, the failure to appoint counsel for an indigent defendant.[198] However, the Court recognized that this particular constitutional violation is unique in the context of constitutional jurisdictional defects and demonstrated its desire that it remain unique.[199] In support of its holding, the Court offered two rationales: (1) ease of administration within the appellate system and (2) the

cannot justly be ignored. The past cannot always be erased by a new judicial declaration." (citations omitted)).

[191] *See supra* Part V; *infra* notes 197–208.

[192] 511 U.S. at 493–97.

[193] *Id.* at 487–88.

[194] *See id.*

[195] *Id.* at 490, 493–94.

[196] *See id.* at 489.

[197] *See id.* at 493–96.

[198] *Id.* at 494–97.

[199] *See id.*

interest in promoting finality of judgments.[200] With respect to ease of administration, the Court noted that the determination of whether a court had appointed counsel for an indigent defendant would typically be a simple task no matter how poorly the record from the original case had been preserved.[201] The Court concluded that the same would not likely be true for other types of constitutional challenges, including ineffective-assistance-of-counsel claims.[202] With respect to the interest in promoting the finality of judgments, the Court stated that opening the door to too many challenges would undermine confidence in the integrity of the judicial system while also inevitably delaying and impairing the orderly administration of justice.[203] The Court found this rationale to ring particularly true in the case of guilty pleas.[204]

The Supreme Court subsequently clarified that the holding in *Custis* also applies to federal review under 28 U.S.C. § 2255 in *Daniels v. United States*.[205] It is important to point out that *Custis* and *Daniels* do not preclude a defendant in custody from challenging any prior convictions through state post-conviction procedures or federal habeas review when the defendant can otherwise satisfy the requirements to take advantage of these avenues.[206]

Custis and *Daniels*, in conjunction with a variety of other recent Supreme Court precedent, shed a great deal of light on the Supreme Court's current attitude towards what will qualify as a constitutional jurisdictional defect, especially in the context of criminal proceedings.[207] The Court has clearly expressed that it seeks to narrow the definition of what will qualify as a constitutional jurisdictional defect based on the extensive ability

[200] *Id.* at 496–97.

[201] *See id.* at 496.

[202] *See id.* ("But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.").

[203] *See id.* at 497 (quoting United States v. Addonizio, 442 U.S. 178, 184 & n.11 (1979)).

[204] *See id.* ("These principles bear extra weight in cases in which the prior convictions . . . are based on guilty pleas . . . .").

[205] *See* 532 U.S. 374, 379–82 (2001).

[206] *See id.* at 382; *Custis*, 511 U.S. at 497 (citing Maleng v. Cook, 490 U.S. 488, 492 (1989)). The defendant must still satisfy the applicable requirements for those procedures, most notably the custody requirement. *See Custis*, 511 U.S. at 497; *supra* note 115 and accompanying text.

[207] *See Daniels*, 532 U.S. at 379–82; *Custis*, 511 U.S. at 494–497; *supra* Part V.

criminal defendants now have to challenge their convictions compared to when Congress initially allowed criminal defendants to appeal their convictions.[208]

B. Minority Approach: A Conviction Under an Unconstitutional Statute Is a Jurisdictional Defect

1. State Court and Circuit Court Precedent

The minority approach that concludes that a conviction under an unconstitutional statute constitutes a constitutional jurisdictional defect has its roots in some older Supreme Court precedent.[209] Five of the federal circuit courts have either directly held or suggested that a defendant can raise a facial constitutional challenge for the first time on appeal for jurisdictional reasons.[210] However, these same circuits have also held in different opinions that a defendant may not raise these challenges on appeal for the first time and must instead raise them as plain error.[211] Under the "law of the circuit" rule,[212] the holding of an earlier panel decision within a particular circuit will control when it conflicts with the holding of a later panel decision within that same circuit.[213] Only a circuit court sitting en banc or the Supreme Court has the authority to overrule a prior panel decision.[214] Based on this law-of-the-circuit rule, there clearly is a split

[208] *See Daniels*, 532 U.S. at 379–82; *supra* Part V.

[209] *See infra* note 229.

[210] *See supra* note 177.

[211] *See supra* note 177.

[212] *See, e.g.*, United States v. Wogan, 938 F.2d 1446, 1449 (1st Cir. 1991) ("The 'law of the circuit' rule is a subset of stare decisis. It is one of the building blocks on which the federal judicial system rests. Under the rule, newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point.").

[213] *See, e.g.*, *id.*; Robbins v. Carey, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007); Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 274 (2d Cir. 2005); United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam); Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985).

[214] *See Sullivan*, 424 F.3d at 274. For a Supreme Court decision to overrule a prior circuit court decision in this context, the Supreme Court decision must have actually overruled or conflicted with the circuit court precedent. *See, e.g.*, United States v. Marte, 356 F.3d 1336, 1344 (11th Cir. 2004). Furthermore, the holding of the Supreme Court case, not just the reasoning, must actually be at odds with the prior circuit court decision to justify one panel departing from a prior panel decision. *See, e.g.*, Atlantic Sounding Co. v. Townsend, 496 F.3d 1282, 1284 (11th

among the circuits on whether facial constitutional challenges can be raised for the first time on appeal because in the circuits with conflicting panel decisions the earlier panel decision typically sided with the minority approach.[215] Some state courts have expressly rejected the majority approach and adopted the minority approach.[216]

One of the most persuasive arguments for this minority approach comes from a concurring opinion in a recent Texas Court of Criminal Appeals case, *Karenev v. State*.[217] In support of the minority approach, the opinion offers two primary rationales: (1) American law prohibits the conviction and punishment of a person under an unconstitutional penal statute and (2) appellate courts are in at least as good a position as trial courts to review the purely legal question of whether a particular penal statute is facially unconstitutional.[218]

First, the opinion emphasized that an unconstitutional statute "affects the foundation of the whole proceedings" and that a court can only convict a person under a valid penal statute since an unconstitutional statute would be void ab initio.[219] This concurring opinion stated that the Court had laid down this basic proposition over a hundred years ago[220] and that Justice Scalia had recently reiterated the same concept.[221] Along similar lines, the

Cir. 2007).

[215] *See supra* notes 177, 212–214.

[216] *See, e.g.*, Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992); State v. Shives, 601 S.W.2d 22, 29–30 (Mo. Ct. App. 1980); State v. Lucero, 163 P.3d 489, 492 (N.M. 2007); Herrera v. Commonwealth, 483 S.E.2d 492, 493–495 (Va. Ct. App. 1997); LAFAVE, ET AL., *supra* note 12, § 27.5(c).

[217] *See* 281 S.W.3d 428, 435–40 (Tex. Crim. App. 2009) (Cochran, J., concurring).

[218] *See id.* at 436–40.

[219] *Id.* at 436 n.9 (quoting *Ex parte* Yarbrough, 110 U.S. 651, 654 (1884)) (citing *Ex parte* Siebold, 100 U.S. 371, 376 (1879)).

[220] *See id.* (quoting *Yarbrough*, 110 U.S. at 654) (citing *Siebold*, 100 U.S. at 376).

[221] *See id.* (quoting Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 760 (1995) (Scalia, J., concurring)). In *Reynoldsville Casket Co.*, the majority grappled with the retroactive effect a Supreme Court ruling declaring a particular type of statute unconstitutional has on pending cases that involve that same type of statute when a party has relied on that now-unconstitutional statute. *See Reynoldsville Casket Co.*, 514 U.S. at 751–59 (majority opinion). On Supremacy Clause grounds, the majority rejected the plaintiff's argument that a state court could apply a federal court ruling in only a prospective manner since the plaintiff had relied on the unconstitutional statute. *See id.* at 752–56. Rather than grappling with this complex question of retroactivity and the proper remedy for relying on an unconstitutional statute, Justice Scalia advocated that the proper approach for handling an unconstitutional statute is to simply ignore it and decide the case

concurrence rebuked the idea that defendants should go to jail based on a conviction secured under an unconstitutional statute simply because they raised the issue for the first time on appeal; the opinion argued that such a rule is contrary to the entire American system of justice.[222]

Second, in support of its assertion that appellate courts are in at least as good of a position to review this purely legal question of the facial challenge to a penal statute, the opinion argued that the general principles underlying the raise-or-waive rule do not apply to this type of facial challenge.[223] The concurrence gave three rationales for the raise-or-waive rule: (1) to give the opposing party an opportunity to respond or cure the problem before it becomes error; (2) to provide the trial judge with an opportunity to prevent the error from occurring; and (3) to encourage judicial economy in order to spare the parties and the public the expense of a potentially unnecessary appeal.[224] The opinion stated that these first two rationales for the raise-or-waive rule do not apply to a facial challenge to a penal statute because the statute is wholly defective and cannot be repaired by the parties or the trial judge.[225] Likewise, the concurrence argued that a facial challenge to a statute is a purely legal question that an appellate court is actually in a better position to address than a trial court judge.[226] This opinion further supported these arguments by carefully distinguishing as-applied challenges, which are not purely legal questions because they involve the particular circumstances of an individual, from facial challenges, which are purely legal questions.[227] With respect to the third rationale for the raise-or-waive rule, the concurrence dismissed the idea that judicial resources would be saved by requiring a criminal defendant to raise this type of constitutional challenge at the trial court level; this opinion

disregarding the statute since it "is void, and is no law." *See id.* at 759–60 (Scalia, J., concurring) (quoting *Siebold*, 100 U.S. at 376).

[222] *See Karenev*, 281 S.W.3d at 438–39 (Cochran, J., concurring) ("The moral of that story would be: Because you were a slowpoke at noticing that you were not guilty of any valid criminal offense, we will punish you as if you really were guilty of some valid criminal offense. That is not the American way: every person has an absolute, fundamental, and unforfeitable right to be punished only for the violation of a valid criminal statute.").

[223] *Id.* at 438–40.

[224] *Id.* at 439.

[225] *Id.* at 440.

[226] *See id.* at 438 & n.11.

[227] *See id.* at 435, 438 & n.11.

argued that, realistically speaking, trial judges will rarely declare a statute unconstitutional and prosecutors will rarely concede to the defendant that a penal statute is unconstitutional.[228]

2. Supreme Court Precedent

In terms of Supreme Court precedent, the most direct support for the minority approach comes from two late nineteenth century opinions.[229] In short, those opinions advocate the concept that an unconstitutional statute is no law whatsoever, since it is void ab initio, and that a conviction under that statute would also be void.[230] However, since these decisions are over a century old, some courts have questioned their current precedential value.[231] Nevertheless, in a recent concurring opinion in *Reynoldsville Casket Co. v. Hyde*, Justices Scalia and Thomas cited this exact holding in one of these cases, *Ex Parte Siebold*, with approval,[232] although the context in that case involved a nonjurisdictional question.[233]

In the last several decades, the Supreme Court has recognized a concept that may lend additional support to the minority approach.[234] In a line of cases beginning with *Blackledge v. Perry*, the Supreme Court has recognized that a defendant who pleads guilty to an offense and waives his right to appeal does not in some cases waive his ability to bring certain challenges to the conviction secured under that guilty plea, including Double Jeopardy challenges.[235] Some courts have called this the

[228] *Id.* at 440.

[229] *See Ex parte* Yarbrough, 110 U.S. 651, 654 (1884) ("If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged."); *Ex parte* Siebold, 100 U.S. 371, 376–77 (1879) ("An unconstitutional law is void and is not law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.").

[230] *See supra* note 229.

[231] *See, e.g.*, United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996).

[232] *See* 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (quoting *Siebold*, 100 U.S. at 376).

[233] *See Reynoldsville Casket Co.*, 514 U.S. at 751–59; *supra* note 221.

[234] *See* United States v. Broce, 488 U.S. 563, 574–75 (1989); Menna v. New York, 423 U.S. 61, 62 & n.2 (1975) ("[A] plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute."); Blackledge v. Perry, 417 U.S. 21, 30–31 (1974).

[235] *See supra* note 234. Recall that litigation over jurisdictional defects often occurs in the context of guilty pleas and collateral attacks. *See supra* notes 165–166 and accompanying text.

Blackledge/Menna exception.[236] Whether this particular exception qualifies as jurisdictional in nature is not entirely clear.[237] Notably, the Court's language in these opinions could be read more broadly to include facial constitutional challenges.[238] The cases speak in terms of situations that trigger the defendant's "right not to be haled into court at all upon the . . . charge."[239] In fact, some circuit courts have recognized that this *Blackledge/Menna* exception extends to facial constitutional challenges.[240]

The validity of a conviction secured under an unconstitutional statute raises foundational questions about a court's ability to lawfully convict a defendant.[241] Presumably for this reason, courts have included facial constitutional challenges within this *Blackledge/Menna* exception.[242] However, more recent Supreme Court precedent suggests that the Court would be unwilling to expand the amount of constitutional jurisdictional defects a defendant can raise.[243] It is a difficult task to hypothesize how the Supreme Court might try to reconcile these seemingly conflicting precedents.

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[236] *See, e.g.*, United States v. Drew, 200 F.3d 871, 876 (D.C. Cir. 2000).

[237] *Compare id.* (holding that the *Blackledge/Menna* exception is not jurisdictional in nature), *and* Ellis v. Dyson, 421 U.S. 426, 441 n.7 (1975) (Powell, J., dissenting) (arguing the same), *and* Westen, *supra* note 154, at 133 (arguing the same), *with* United States v. Morgan, 230 F.3d 1067, 1071 (8th Cir. 2000) (holding that the *Blackledge/Menna* exception is jurisdictional in nature), *and* United States v. Johnston, 199 F.3d 1015, 1019 n. 3 (9th Cir. 1999) (same), *and* United States v. Skinner, 25 F.3d 1314, 1317 (6th Cir. 1994) (same).

[238] *See* United States v. Cortez, 973 F.2d 764, 767 (9th Cir. 1992) ("Those charges that the government constitutionally may not prosecute are not 'crystal-clear.'").

[239] *Blackledge*, 417 U.S. at 30.

[240] *See Morgan*, 230 F.3d at 1071; *Johnston*, 199 F.3d at 1019–20 n.3; *Skinner*, 25 F.3d at 1317. *But see Ellis*, 421 U.S. at 441 n.7 (Powell, J., dissenting); *Drew*, 200 F.3d at 876.

[241] *See, e.g.*, Karenev v. State, 281 S.W.3d 428, 436–39 (Tex. Crim. App. 2009) (Cochran, J., concurring); David Peeples, *Lawsuit Shaping and Legal Sufficiency: The Accelerator and the Brakes of Civil Litigation*, 62 BAYLOR L. REV. 339, 349 (2010); *supra* note 229. Furthermore, prior convictions have a variety of collateral consequences for defendants, such as affecting their right to vote and hold public office, and can be used against a defendant by the government to enhance sentences on later convictions. *See* United States v. Daniels, 532 U.S. 374, 388–90 (2001) (Souter, J., dissenting).

[242] *See supra* note 240.

[243] *See supra* Part V, VI.A.2.

C. The Majority Approach Has a Stronger Foundation in Supreme Court and Circuit Court Precedent

The Supreme Court's more recent decisions suggest that it would follow the majority approach.[244] The Supreme Court has significantly restricted its definition of what qualifies as a constitutional jurisdictional defect in recent years.[245] The Court has recognized that it at one time defined constitutional jurisdictional defects too broadly and has clearly moved towards a narrower definition, thus undercutting some of its older precedents, including those that support the minority approach.[246]

Likewise, the majority of circuits hold that a conviction secured under an unconstitutional statute is not a constitutional jurisdictional defect, although the circuit courts are clearly split on this issue.[247] The fact that more circuits have adopted the majority approach would also weigh in favor of the majority approach even if it would not be clearly determinative.[248] Furthermore, the Court has recently shown some hostility to facial constitutional challenges to statutes in general.[249] Nevertheless, the lack of clarity in the Supreme Court's case law makes this question a difficult one to answer.[250] There are certainly some strong arguments in favor of the minority approach as well.[251]

VII. OTHER METHODS OF HANDLING A FACIAL CONSTITUTIONAL CHALLENGE RAISED FOR THE FIRST TIME ON APPEAL

Notably, even when an appellate court applies the majority approach, there are other ways a criminal defendant can successfully bring a facial challenge to a statute for the first time on appeal. Every circuit court that follows the majority approach still allows the defendant to raise a facial

[244] *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243–44 (2010); United States v. Cotton, 535 U.S. 625, 630 (2002); *Daniels*, 532 U.S. at 379–82; United States v. Custis, 511 U.S. 484, 493–97 (1994); *supra* Part V, VI.A.2.

[245] *See supra* note 244.

[246] *See supra* Part V, VI.A.2.

[247] *See supra* Part VI.A.1, VI.B.1.

[248] *See id.*

[249] *See supra* note 149 and accompanying text.

[250] *See* King, *supra* note 163, at 143–44.

[251] *See supra* Part VI.B.

challenge as plain error under Federal Rule of Criminal Procedure 52(b).[252] Some circuit courts have even recognized that plain-error challenges of this nature have a relatively high degree of success, since "[a] conviction based upon an unconstitutional statute is both 'plain' and 'error.'"[253] If clear precedent exists that demonstrates that the challenged statute belongs to the same class of statutes that have been in the past held unconstitutional, the criminal defendant has a strong chance of bringing the plain-error challenge successfully.[254] If the issue of whether the challenged statute is unconstitutional is not clear under current law, then the plain-error challenge will fail.[255]

Second, a criminal defendant can simply ask the reviewing court in its discretion to allow him to raise the argument for the first time on appeal based on the circumstances in the individual case.[256] Particularly when circumstances beyond the defendant's control precluded him from raising the argument, such as misconduct by his own attorney[257] or the appointment of a new attorney to represent an indigent defendant on appeal,[258] appellate courts should be receptive to these arguments.[259]

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[252] *See, e.g.*, United States v. Dedman, 527 F.3d 577, 591 (6th Cir. 2008); *supra* note 175.

[253] United States v. Coil, 442 F.3d 912, 916 (5th Cir. 2006) (quoting United States v. Knowles, 29 F.3d 947, 951 (5th Cir. 1994)).

[254] *See, e.g.*, *Knowles*, 29 F.3d at 951 (holding that commerce-clause challenge easily satisfied plain-error test). Under plain-error review, courts typically evaluate constitutional challenges more favorably to the defendant than less serious errors. *See id.*; United States v. Easter, 981 F.2d 1549, 1557 (10th Cir. 1992); United States v. Torres, 901 F.2d 205, 228 (2d. Cir. 1990).

[255] *See* United States v. Olano, 507 U.S. 725, 735 (1993); United States v. Dedman, 527 F.3d 577, 591–92 (6th Cir. 2008) (denying facial-constitutionality challenge to an Arkansas marriage statute raised as plain error when the statute's unconstitutionality was not clear under current law).

[256] *See* Singleton v. Wulff, 428 U.S. 106, 121 (1976); United States v. Henry, 429 F.3d 603, 618–19 (6th Cir. 2005) (allowing a defendant to raise a commerce clause challenge for the first time on appeal because of the exceptional circumstance that the case on which the defendant based his argument was decided after the district court entered judgment). Recall that the abuse-of-discretion standard of review is quite deferential to lower court findings. *See supra* notes 99–102 and accompanying text.

[257] *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2555–60 (2010).

[258] *See* Winslow Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676, 689–691 (1971); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 251–52 (2005).

[259] *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (recognizing that "discretion is essential to the criminal justice process").

Third, in the context of guilty pleas, some circuit courts allow a criminal defendant to raise a facial constitutional challenge for the first time on appeal under the *Blackledge/Menna* exception.[260] Lastly, a criminal defendant can attempt to raise this type of challenge for the first time on appeal through an ineffective-assistance-of-counsel argument.[261]

VIII. CONCLUSION

Resolving a legal split in authority has particularly high stakes in the area of criminal law. When the constitutional rights of criminal defendants vary depending upon the particular circuit in which charges are brought against them, the criminal justice system appears somewhat arbitrary. For this and other reasons, the Supreme Court takes a disproportionate amount of criminal cases every year, especially capital cases.[262]

No matter which approach the federal and state courts ultimately adopt with respect to a criminal defendant's ability to raise a facial challenge for the first time on appeal, consistency within the criminal justice system benefits both defendants and prosecutors. This significant legal question has not received the attention it deserves, in part because of the difficulty of the question and the amount of conflicting precedents that influence the question. However, now that the Supreme Court has modernized its jurisprudence on what constitutes a jurisdictional defect, the foundation for a clearer answer is in place. The most likely result will be that the Supreme Court will eventually adopt the majority approach if it decides to address this question. Nevertheless, a significant amount of the Supreme Court's precedent would also support the minority approach. Regardless of the outcome, this particular issue remains an extremely intriguing question in criminal procedure.

[260] *See supra* note 240 and accompanying text.

[261] *See supra* note 75 and accompanying text.

[262] *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 448–49 (2004); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of the Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 156–57 (2008).