

## Justice Sotomayor and the Supreme Court's Certiorari Process

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*The Supreme Court's certiorari process is generally a black box. Occasionally, however, Justices issue statements explaining their dissent from or concurrence in the denial of certiorari. Since she joined the Court, Justice Sotomayor has produced more of these statements than any of her colleagues. In this Essay, Robert Yablon considers what Justice Sotomayor's certiorari-stage writings reveal about her substantive passions and her vision of the Supreme Court's institutional responsibilities. Nearly all of Justice Sotomayor's statements decry instances in which the criminal justice system failed to deliver on its promise of ethical and evenhanded justice, whether due to structural defects or individual transgressions on the part of prosecutors or courts. The author suggests that, were the Court to recalibrate its docket along the lines Justice Sotomayor's writings advocate, the Court could improve the functioning of the legal system as well as its own institutional standing.*

### INTRODUCTION

Before they can decide cases, Supreme Court Justices must decide what cases to decide.<sup>1</sup> This selection process is no small undertaking. Each year, the Court receives some 10,000 petitions for a writ of certiorari, and the Justices and their law clerks devote substantial energy to winnowing those petitions down to the eighty or so that receive plenary review.<sup>2</sup>

Most of this work takes place completely outside the view of the parties, their advocates, and the public. The Justices make their certiorari decisions in closed-door private conferences that they alone attend. In the overwhelming majority of cases, the Court offers neither an explanation for its decision to

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1. Cf. H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

2. *Frequently Asked Questions*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/faq.aspx> (last visited Mar. 13, 2014).

grant or deny certiorari, nor a tally of the votes for and against review. A one-line order is all that is released.<sup>3</sup>

For the most part, the outside world does not even know which petitions garner serious attention. At their conferences, the Justices actively consider only those petitions that at least one Justice specifically asks to have placed on the so-called “discuss” list.<sup>4</sup> That list, however, is not publicly released. Careful Court-watchers can sometimes infer from the issuance of certain obscure procedural orders that a petition has caught the attention of someone at the Court.<sup>5</sup> But even in these instances, it is usually impossible to discern whose interest has been piqued and why.

A handful of times each year, however, a Justice cracks open the black box of the certiorari process and issues an explanatory statement respecting the denial of certiorari. These statements, which run anywhere from one or two paragraphs to many pages, take two primary forms: a dissent from the denial of certiorari or a concurrence in the denial. In a dissent, the author explains why she believes certiorari should have been granted. In a concurrence, the author typically expresses interest in or concern about a lower court’s handling of a particular issue, but then identifies some obstacle to plenary review, such as the petitioner’s failure to have properly preserved the issue below.

These writings offer a fascinating glimpse into the Court’s certiorari discussions and into the thinking of individual Justices. Justices have

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3. A number of scholars have offered detailed descriptions of the mechanics of the certiorari process. 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, 397-406 (2004); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PENN. L. REV. 1, 14-18 (2011).
  4. See, e.g., Cordray & Cordray, *supra* note 3, at 398-99; Watts, *supra* note 3, at 15-16.
  5. For instance, when a respondent declines to file a brief in opposition to certiorari (a frequent occurrence), the Court may issue an order calling for a response. That order suggests that the petition caught the eye of at least one Justice. The Court occasionally takes the further step of calling for the views of the Solicitor General. That move—typically made when a petition raises an issue of potential interest to the federal government but the government is not itself a party to the proceedings—requires the assent of four Justices and signals that a petition is a serious candidate for plenary review. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009). Court-watchers also study whether petitions are disposed of according to the expected timetable. See, e.g., John Elwood, *Relist Watch*, SCOTUSBLOG (Jan. 23, 2014, 12:37 PM), <http://www.scotusblog.com/2014/01/relist-watch-31>. If a petition is held over, then a Justice may have requested more time to consider a petition or to seek to persuade his or her colleagues to grant it.

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unfettered discretion to choose whether and when to put pen to paper at the certiorari stage. And the wide range of petitions that comes in the door gives them a chance to focus on topics they otherwise might not have an opportunity to address in a formal judicial opinion. This is especially true for relatively junior Justices. Because writing assignments in merits cases are made by the senior-most member of the majority and the senior-most dissenter, new Justices often end up handling some of the more technical or mundane issues on the Court's merits docket. Of course, Justices have limited time for extra writing projects, so they must be selective. A Justice's willingness to take on the additional authorial work of a dissent from or concurrence in the denial of certiorari thus indicates that the views being expressed are strongly held.<sup>6</sup>

Dissents from and concurrences in the denial of certiorari provide an especially good window into Justice Sotomayor's early tenure on the Supreme Court. They reveal a Justice who is deeply engaged in the Court's agenda-setting function and willing to share her perspective with her colleagues, legal professionals, and the public. They also give a sense of her substantive passions and priorities and her views on the institutional role of the Supreme Court in overseeing lower courts and the legal profession.

### I. JUSTICE SOTOMAYOR'S CERTIORARI-STAGE WRITINGS BY THE NUMBERS

One striking aspect of Justice Sotomayor's statements respecting the denial of certiorari is their relative frequency. In her first four full Terms on the Court, Justice Sotomayor issued ten such statements—more than any of her colleagues.<sup>7</sup> Her closest competitors during that four-year stretch were Justice Scalia and Justice Alito, each of whom issued eight statements. Justice Thomas, with five, was the only other member of the Court to author even half as many. Justice Ginsburg and Justice Breyer each issued four, the Chief Justice three, and Justice Kennedy one. Now in the middle of her fourth Term on the Court, Justice Kagan has yet to issue any statement respecting the denial of certiorari.

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6. A similar observation can be made when a Justice decides to write a separate concurrence or an individual dissent in a case that the Court has decided on the merits. See Andrew Pincus, Remarks at the Institutional Supreme Court Panel at the Yale Law Journal Symposium on Justice Sotomayor's Early Jurisprudence (Feb. 3, 2014).

7. She issued an additional statement early in the Court's current Term. See *Woodward v. Alabama*, 134 S. Ct. 405 (2013) (Sotomayor, J., dissenting from the denial of certiorari); see *infra* notes 22-28 and accompanying text.

These numbers suggest that Justice Sotomayor has taken up the mantle of Justice Stevens, who, prior to his retirement, was the Court's most frequent author of certiorari-stage writings.<sup>8</sup> Justice Stevens was the only one of the Court's more liberal members to write with regularity, typically issuing more statements respecting the denial of certiorari than those Justices did combined. During his penultimate Term on the Court—a year before Justice Sotomayor's arrival—he issued five such statements, while Justices Souter, Ginsburg, and Breyer authored only two among them.<sup>9</sup> During his final Term—the only Term he and Justice Sotomayor overlapped—he released four statements, while Justice Sotomayor and Justice Ginsburg each issued one.<sup>10</sup> In the three Terms following Justice Stevens's departure, Justice Sotomayor authored nine, while Justices Ginsburg (three), Breyer (four), and Kagan (zero) combined for a total of seven.<sup>11</sup>

While Justices who refrain from issuing statements respecting the denial of certiorari still may be active participants in the certiorari process, an abundance of statements is an affirmative indication of engagement. Each time Justice Sotomayor felt strongly enough to issue a statement, she almost certainly played a central role in the Court's deliberations. And these are likely not the only occasions when Justice Sotomayor vigorously advocated for certiorari. Instances in which she may have successfully shepherded a case onto the Court's docket remain hidden from view, as do instances in which she may have strongly supported granting certiorari but was not sufficiently troubled by the Court's denial to issue a public statement.

The nature of the cases in which Justice Sotomayor has issued statements provides further evidence of her deep certiorari-stage engagement. All but one

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8. See Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 880 (2011) (making the Stevens-Sotomayor comparison). Interestingly, early in his tenure on the Court, Justice Stevens was skeptical of the practice of issuing statements respecting the denial of certiorari. See *Singleton v. Comm'r*, 439 U.S. 940, 944-46 (1978) (statement of Stevens, J., respecting the denial of certiorari).
  9. See *2008 Term Opinions Relating to Orders*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/relatingtoorders.aspx?Term=08> (last visited Feb. 14, 2014).
  10. See *2009 Term Opinions Relating to Orders*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/relatingtoorders.aspx?Term=09> (last visited Feb. 14, 2014).
  11. See *2010 Term Opinions Relating to Orders*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/relatingtoorders.aspx?Term=10> (last visited Feb. 14, 2014); *2011 Term Opinions Relating to Orders*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/relatingtoorders.aspx?Term=11> (last visited Feb. 14, 2014); *2012 Term Opinions Relating to Orders*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/relatingtoorders.aspx?Term=12> (last visited Feb. 14, 2014).

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of the cases came from the *in forma pauperis* portion of the Court's docket.<sup>12</sup> These are petitions for certiorari submitted by petitioners who, for reasons of economic hardship, are exempted from the Court's filing fee and excused from complying with the Court's usual requirements for the formatting of petitions.<sup>13</sup> Though there are exceptions (for instance, a number of the petitions are filed by skilled federal public defenders), the quality of the advocacy in these petitions often is not high. Many are submitted pro se. They are sometimes written out by hand. Even the counseled petitions sometimes show little regard for the norms of Supreme Court advocacy. Numerically speaking, *in forma pauperis* petitions account for the vast majority of the petitions the Court receives—some seventy-five to eighty percent.<sup>14</sup> Yet, in most years, they account for less than twenty percent of the Court's grants of certiorari.<sup>15</sup> Much of this disparity no doubt derives from the failure of most *in forma pauperis* petitions to present the sort of legal issue that would even arguably warrant Supreme Court review. But the widespread deficiencies of *in forma pauperis* petitions mean that they are also the petitions in which serious issues can most easily escape notice. It takes a good eye and keen attention to detail to repeatedly pluck needles from the *in forma pauperis* haystack.

### II. JUSTICE SOTOMAYOR'S SUBSTANTIVE AND INSTITUTIONAL COMMITMENTS

In terms of substance, Justice Sotomayor has focused her certiorari-stage writing on issues pertaining to the criminal justice system. Every one of her statements addresses a petition for certiorari that presents questions of criminal procedure,<sup>16</sup> habeas corpus,<sup>17</sup> or the rights of prisoners.<sup>18</sup> Other symposium

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12. The only case from the paid docket was *Cash v. Maxwell*, 132 S. Ct. 611 (2011), in which Justice Sotomayor filed a statement responding to Justice Alito's dissent from the denial of certiorari.

13. See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 548 (9th ed. 2007).

14. See *id.* at 549 n.4.

15. See *id.* at 550 n.6.

16. See *Woodward v. Alabama*, 134 S. Ct. 405 (2013) (whether a judge may sentence a defendant to death where the jury has recommended a life sentence); *Calhoun v. United States*, 133 S. Ct. 1136 (2013) (whether the defendant should have received a new trial in light of a prosecutor's racially charged remarks); *Gamache v. California*, 131 S. Ct. 591 (2010) (whether the California Supreme Court mistakenly placed on the defendant the burden of proving that an error was not harmless); *Wrotten v. New York*, 130 S. Ct. 2520 (2010) (whether the use of two-way video testimony violates the Confrontation Clause).

participants are offering perspectives on Justice Sotomayor's criminal procedure jurisprudence.<sup>19</sup> For present purposes, it suffices to observe that the attention Justice Sotomayor has devoted to criminal matters at the certiorari stage identifies this as an area of real substantive passion and one in which she plays an especially active part in shaping the Court's agenda. Her background as a former prosecutor—Justice Alito is the only one other one on the Court—and as the Court's only former district court judge makes her a natural for this role. She can speak with the authority of someone who has participated in the day-to-day, on-the-ground functioning of the criminal justice system.

It appears, however, that something more than an affinity for criminal-law issues animates Justice Sotomayor's certiorari-stage writings. Her statements reveal a Justice who has a distinctive vision of the Court's institutional responsibilities. The petitions that capture her attention and motivate her to break the Court's usual certiorari-stage silence are, by and large, ones in which the legal system failed to deliver on the promise of ethical and evenhanded justice, whether due to structural defects or individual transgressions. By directing attention to these cases, Justice Sotomayor's implicit message is that, when the legal system breaks down, the Supreme Court, as the nation's court of last resort, has a duty to step in.

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17. See *Haynes v. Thaler*, 133 S. Ct. 639 (2012) (whether a habeas petitioner was entitled to press his ineffective assistance of counsel claim); *Hodge v. Kentucky*, 133 S. Ct. 506 (2012) (whether a state court applied the wrong standard in deciding whether a habeas petitioner was prejudiced by his counsel's deficient performance); *Fairey v. Tucker*, 132 S. Ct. 2218 (2012) (whether a habeas petitioner who was convicted on felony charges in absentia and without counsel was entitled to relief); *Cash v. Maxwell*, 132 S. Ct. 611 (2012) (whether relief was properly granted to a habeas petitioner who had been convicted based on the testimony of an unreliable informant); *Buck v. Thaler*, 132 S. Ct. 32 (2011) (whether the decision to sentence a habeas petitioner to death was tainted by racially charged testimony); *Williams v. Hobbs*, 131 S. Ct. 558 (2010) (whether a state may withhold an objection to an evidentiary hearing until after the hearing is held and habeas relief is granted).
  18. See *Pitre v. Cain*, 131 S. Ct. 8 (2010) (whether a prisoner who had allegedly been required to do hard labor after refusing to take his HIV medication had stated an Eighth Amendment claim).
  19. See Miriam H. Baer, *Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in United States v. Jones*, 123 YALE L.J. F. 393 (2014), <http://yalelawjournal.org/forum/secrecy-intimacy-and-workable-rules>; Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. F. 409 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-criminal-justice-in-the-real-world>; I. Bennett Capers, *Reading Michigan v. Bryant*, "Reading" *Justice Sotomayor*, 123 YALE L.J. F. 427 (2014), <http://yalelawjournal.org/forum/reading-michigan-v-bryant-reading-justice-sotomayor>.

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Many of Justice Stevens's statements respecting the denial of certiorari addressed similar issues and themes, which bolsters the view that Justice Sotomayor may have stepped in to fill an institutional gap that opened when Justice Stevens departed. Several members of the Court—particularly Justices Scalia and Alito—regularly produce certiorari-stage writings that highlight instances in which they believe lower courts improperly granted relief to criminal defendants, habeas petitioners, or prisoners.<sup>20</sup> In the years leading up to his retirement, Justice Stevens was the only member of the Court who routinely used certiorari-stage writings to direct attention to cases in which relief may have been improperly denied, particularly in capital cases.<sup>21</sup> It is now Justice Sotomayor whose statements provide a counterweight to those of her more conservative colleagues.

Justice Sotomayor's most recent certiorari-stage writing, her dissent from the denial of certiorari in *Woodward v. Alabama*,<sup>22</sup> vividly illustrates her desire for the Court to scrutinize the workings of the justice system and respond to potential structural flaws. The petitioner in *Woodward* challenged the constitutionality of Alabama's capital-sentencing scheme. Alabama is one of only a handful of states in which judges may impose a death sentence even when the jury recommends against it, and it is the only state in which judges routinely exercise their override prerogative.<sup>23</sup> Justice Sotomayor expressed "deep concerns about whether this practice offends the Sixth and Eighth Amendments."<sup>24</sup> She cited "empirical evidence" that "Alabama judges, who are elected in partisan proceedings," had "succumbed to electoral pressures" in

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20. See, e.g., *Unger v. Young*, 134 S. Ct. 20 (2013) (Alito, J., dissenting from the denial of certiorari) (arguing that the Court should have reversed the Second Circuit's grant of habeas relief); *Cash v. Maxwell*, 132 S. Ct. 611, 613 (2012) (Scalia, J., dissenting from the denial of certiorari) (arguing that the Court should have reversed the Ninth Circuit's grant of habeas relief).
  21. See, e.g., *Johnson v. Bredesen*, 130 S. Ct. 541 (2009) (statement of Stevens, J., respecting the denial of certiorari) (asserting that lengthy stays on death row constitute cruel and unusual punishment); *Kelly v. California*, 129 S. Ct. 564 (2008) (statement of Stevens, J., respecting the denial of certiorari) (expressing concern about the use of certain victim impact evidence during capital sentencing proceedings); *Walker v. Georgia*, 129 S. Ct. 453 (2008) (statement of Stevens, J., respecting the denial of certiorari) (questioning the seeming disproportionality of a defendant's capital sentence).
  22. 134 S. Ct. 405 (2013).
  23. *Id.* at 405.
  24. *Id.*

making their capital sentencing decisions.<sup>25</sup> This possibility, she wrote, “casts a cloud of illegitimacy over the criminal justice system” and raises the specter of “potentially arbitrary outcomes.”<sup>26</sup> Judges often failed even to offer “a meaningful explanation for the decision to disregard the jury’s verdict.”<sup>27</sup> Justice Sotomayor recognized that the Court had previously upheld Alabama’s sentencing scheme, but she believed that, in light of intervening doctrinal and factual developments, “we owe the validity of Alabama’s system a fresh look.”<sup>28</sup>

In other statements, Justice Sotomayor has highlighted instances of apparent impropriety on the part of government officials and courts. Justice Sotomayor’s statement respecting the denial of certiorari in *Calhoun v. United States*<sup>29</sup> is perhaps the most prominent of these writings. The petitioner in that case was convicted of participating in a drug conspiracy following a trial at which a federal prosecutor made racially charged remarks.<sup>30</sup> Unfortunately for

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25. *Id.* at 408. Some Alabama judges had, in fact, acknowledged that electoral considerations affected their sentencing practices. *Id.* at 409.

26. *Id.* at 408-09.

27. *Id.* at 409.

28. *Id.* at 411-12. Justice Sotomayor’s dissent from the denial of certiorari in *Hodge v. Kentucky*, 133 S. Ct. 506 (2012), and statement respecting the denial of certiorari in *Gamache v. California*, 131 S. Ct. 591 (2010), likewise focus on the functioning of state judicial systems. The petitioner in *Hodge* sought review of a decision from the Kentucky Supreme Court rejecting his claim that his trial counsel provided ineffective assistance during his capital sentencing proceeding by failing to present mitigating evidence. Justice Sotomayor expressed concern that the Kentucky Supreme Court’s understanding of mitigation evidence was “plainly contrary” to U.S. Supreme Court precedent and improperly discounted the potential of such evidence to affect sentencing outcomes. *Hodge*, 133 S. Ct. at 510 (Sotomayor, J., dissenting from the denial of certiorari). The petitioner in *Gamache* sought review of the California Supreme Court’s conclusion that a constitutional error at his trial was harmless. Justice Sotomayor took exception to the California Supreme Court’s articulation of the harmless-error standard. Contrary to U.S. Supreme Court precedent, the California Supreme Court appeared to place the burden on the defendant to show harm instead of placing the burden on the government to prove harmlessness. *Gamache*, 131 S. Ct. at 592 (statement of Sotomayor, J., respecting the denial of certiorari). Because this apparent error was not outcome determinative in the petitioner’s case, Justice Sotomayor did not dissent from the Court’s decision to deny review. But she cautioned the California courts to take care in future cases “to ensure that their burden allocation conforms to the commands of *Chapman* [*v. California*, 386 U.S. 18 (1967)].” *Id.* at 593.

29. 133 S. Ct. 1136 (2013).

30. While cross-examining the petitioner about his professed ignorance of a drug transaction, the prosecutor asked, “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This



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the petitioner, his attorney failed to object to the prosecutor's comments and, on appeal, failed to press the argument he advanced in his petition for certiorari.<sup>31</sup> In light of those significant procedural roadblocks, Justice Sotomayor "d[id] not disagree with the Court's decision to deny the petition."<sup>32</sup> She wrote, however, "to dispel any doubt whether the Court's denial of certiorari should be understood to signal our tolerance of a federal prosecutor's racially charged remark. It should not."<sup>33</sup> The prosecutor, she lamented, had "tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation."<sup>34</sup> Justice Sotomayor found it "deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century."<sup>35</sup> Such conduct, she observed, "diminishes the dignity of our criminal justice system and undermines respect for the rule of law."<sup>36</sup> Justice Sotomayor was also "troubl[ed]" by the government's belated acknowledgement of the prosecutor's error. On appeal, the government was reluctant to concede that the prosecutor had "crossed the line."<sup>37</sup> And while the Solicitor General ultimately confessed error and admitted that "that the 'prosecutor's racial remark was unquestionably improper,'" he did so only after first declining to file a response to the petition for certiorari.<sup>38</sup> Justice Sotomayor concluded that she "hope[d] never to see a case like this again."<sup>39</sup>

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is a drug deal." *Id.* at 1136. The prosecutor later revisited this line of questioning during closing argument. *See id.* at 1137 n.\*.

31. *Id.* at 1136-37.

32. *Id.* at 1137.

33. *Id.* at 1136.

34. *Id.* at 1137.

35. *Id.* at 1138.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* Justice Sotomayor also addressed a criminal prosecution "marred by racial overtones" in her dissent from the denial of certiorari in *Buck v. Thaler*, 132 S. Ct. 32, 35 (2011) (Sotomayor, J., dissenting from the denial of certiorari). The petitioner in *Buck* had been sentenced to death following a penalty-phase hearing at which a state prosecutor, while cross-examining a psychologist called by the petitioner, elicited testimony linking race and future dangerousness. *Id.* at 35-36 ("You have determined . . . that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?"). The same psychologist had offered testimony in several other capital cases, and the State of Texas confessed error in those cases. *Id.* at 36. But it refused to do so in *Buck*, and according to Justice Sotomayor's dissent, gave the federal habeas court an incomplete and

Along similar lines is Justice Sotomayor's dissent from the denial of certiorari in *Pitre v. Cain*.<sup>40</sup> The petitioner in that case was a Louisiana prisoner who alleged that, after he refused to take his HIV medication, prison officials forced him to do hard labor in 100-degree heat. His repeated requests for lighter duty were denied, even after he was twice rushed to the emergency room.<sup>41</sup> He claimed that this treatment constituted cruel and unusual punishment. What drew Justice Sotomayor's attention was not just the substance of the petitioner's allegations, but also the cursory and dismissive way the lower courts had handled them. A federal magistrate judge had "*sua sponte* recommended dismissing [petitioner's] complaint as 'frivolous.'"<sup>42</sup> The district court adopted the recommendation, and the court of appeals summarily affirmed, stating that "[e]vidence of conscious indifference [to petitioner's plight] is not presented."<sup>43</sup> Justice Sotomayor found it problematic that these courts had seemingly ignored the requirement that they construe pro se filings liberally and had faulted the petitioner for failing to include supporting evidence even though the case was only at the pleadings stage.<sup>44</sup> Justice Sotomayor believed that the petitioner's allegations sufficed to state an Eighth Amendment claim, and she could not "comprehend how a court could deem such allegations 'frivolous.'"<sup>45</sup>

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"misleading" explanation for its about-face. *Id.* at 37. The possibility of a death sentence tainted by racially charged testimony, combined with a lack of candor by government attorneys after the fact, led Justice Sotomayor to conclude that the case warranted review.

40. 131 S. Ct. 8 (2010).

41. *Id.* at 8.

42. *Id.*

43. *Id.*

44. *Id.* at 9.

45. *Id.* at 10. Justice Sotomayor's dissents from the denial of certiorari in *Williams v. Hobbs*, 131 S. Ct. 558 (2010) (Sotomayor, J., dissenting from the denial of certiorari), and *Fairey v. Tucker*, 132 S. Ct. 2218 (2012) (Sotomayor, J., dissenting from the denial of certiorari), likewise took issue with judicial acquiescence to questionable government conduct. The petitioner in *Hobbs*, a death row prisoner, sought federal habeas relief on the basis of ineffective assistance of counsel. After conducting an evidentiary hearing to determine whether the petitioner had been prejudiced by his trial counsel's poor performance at sentencing, the district court granted relief. Despite consenting to the evidentiary hearing in the district court and attempting to use the hearing to its strategic advantage, the government turned around on appeal and argued that the hearing never should have been held. The court of appeals accepted the government's arguments and reinstated the petitioner's death sentence. Criticizing the court of appeals, Justice Sotomayor wrote that, "the interests of justice are poorly served by a rule that allows a State to object to an evidentiary hearing only after the hearing has been completed and the State has lost." *Hobbs*,

### III. ASSESSING JUSTICE SOTOMAYOR'S DISTINCTIVE CERTIORARI PRIORITIES

Justice Sotomayor's pattern of advocating certiorari in cases such as these suggests that she balances the Court's usual certiorari factors a bit differently than some of her colleagues. A non-exclusive list of reasons for granting certiorari appears in Supreme Court Rule 10. In practice, most cases that end up on the Supreme Court's merits docket are ones in which a federal court of appeals or state high court has decided a question of federal law "in a way that conflicts with a decision" from another such court.<sup>46</sup> Most of the rest are cases that involve no conflict among lower courts but present contentious legal issues of great national significance. Justice Sotomayor no doubt considers the resolution of such cases to be a vital part of the Supreme Court's work. But she appears more willing than some of her colleagues to invoke Rule 10's less frequently cited justifications for certiorari. Rule 10 provides that plenary review may be appropriate not only when a case implicates a split of authority or raises one of the major issues of the day, but also when a federal appellate court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power,"<sup>47</sup> or when a state or federal court "has decided an important federal question in a way that conflicts with relevant

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131 S. Ct. at 561. In *Fairey*, the petitioner was tried on state felony charges in absentia and without counsel after the state failed to give him actual notice of his trial date. After the state courts rejected his appeals, he sought federal habeas relief, which the district court denied. The district court and court of appeals refused even to issue a "certificate of appealability" to allow petitioner to file an appeal. *Fairey*, 132 S. Ct. at 2218; see also 28 U.S.C. § 2253(c)(2) (2014) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."). Justice Sotomayor found both aspects of petitioner's treatment—the in-absentia trial and the denial of the certificate—unacceptable. In her words, "[a] trial conducted without actual notice to a defendant and in his absence makes a mockery of fair process and the constitutional right to be present at trial." *Fairey*, 132 S. Ct. at 2221. She "would [have] grant[ed] the petition [for certiorari] and summarily reverse[d] the judgment below" denying the certificate. *Id.*

46. SUP. CT. R. 10(a) & (b); see, e.g., Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) ("[S]eventy percent of Court's plenary docket is devoted to addressing legal issues on which lower courts have differed, and law clerks and Justices alike have acknowledged that ensuring uniformity is a driving force in case selection."); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981-82 (2007) (same).

47. SUP. CT. R. 10(a).

decisions of [the Supreme] Court.”<sup>48</sup> In recent years, the Court has tended to rely on these grounds mainly when summarily reversing decisions favorable to criminal defendants and habeas petitioners.<sup>49</sup> Based on her writings, it seems fair to say that Justice Sotomayor would like to see the Court focus attention not just on cases prosecutors should not have lost, but also on cases they should not have won, at least when it appears that failing to intervene would allow a serious injustice to go uncorrected.

Would the Court do well to recalibrate its docket along the lines Justice Sotomayor seems to favor? Skeptics might trot out the oft-repeated mantra that the Supreme Court “is not a court of error correction” and argue that, given its limited bandwidth, it is more important for the Court to focus on resolving splits of authority and to intervene in only the most high-profile national legal debates.<sup>50</sup> But, as just noted, the current Court’s disdain for error correction is selective. In a steady trickle of cases, the Court has been granting certiorari and summarily reversing decisions favorable to criminal defendants and habeas petitioners.<sup>51</sup> These rulings send a message to lower courts—sometimes implicitly and sometimes overtly—that relief to criminal

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48. SUP. CT. R. 10(c).

49. During the 2012 Term, for instance, the Court granted certiorari and summarily reversed without argument in five cases. Three of these decisions wiped out rulings in favor of prisoners seeking habeas corpus. See *Ryan v. Schad*, 133 S. Ct. 2548 (2013); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013). None of them granted relief to a criminal defendant or prisoner. Likewise, six of the Court’s eleven summary reversals during the 2011 Term nullified rulings in favor of habeas petitioners and a seventh went against a family that sought damages for alleged police misconduct. See *Parker v. Matthews*, 132 S. Ct. 2148 (2012); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012); *Ryburn v. Huff*, 132 S. Ct. 987 (2012); *Hardy v. Cross*, 132 S. Ct. 490 (2011); *Bobby v. Dixon*, 132 S. Ct. 26 (2011); *Cavazos v. Smith*, 132 S. Ct. 2 (2011). Again, none granted relief to a criminal defendant or prisoner. See also *Merits Opinions*, SCOTUSBLOG (June 27, 2013), [http://scotusblog.com/wp-content/uploads/2013/06/merits-opinions\\_OT12.pdf](http://scotusblog.com/wp-content/uploads/2013/06/merits-opinions_OT12.pdf) (charting summary reversals by Term).

50. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) (citation omitted); see also GRESSMAN ET AL., *supra* note 13, at 276 (“It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.” (citation omitted)). *But cf.* Frost, *supra* note 46, at 1569-71 (contending that the Supreme Court places too much emphasis on attempting to ensure uniformity in federal law); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1447 (2009) (advocating institutional reforms that would increase the Supreme Court’s capacity “to correct more errors committed by lower courts”).

51. See *supra* note 49.

defendants, and especially to habeas petitioners, should be granted sparingly.<sup>52</sup> Deciding more cases of the sort that Justice Sotomayor has chosen to highlight in her certiorari-stage writings might help to restore a sense of balance. Such review would impress upon lower courts that errors in criminal cases can run in both directions and that relief should not be reflexively denied.

Shifting the Court's docket along the lines Justice Sotomayor's writings propose not only would allow the Court to remedy individual injustices and send more balanced signals to lower courts; it also would enable the Court to offer guidance to lawyers and the broader public about how the criminal justice system ought to function and how the individuals at the heart of the system ought to conduct themselves. Over time, such guidance might help to curb instances in which legal institutions and legal professionals fall short of expectations and might boost public confidence in the legal process as well as the Court's own institutional standing.<sup>53</sup> If the Court too often allows structural flaws and individual malfeasance to go uncorrected, such problems may fester and multiply, undermining the public's faith in the Court and in the justice system as a whole.<sup>54</sup>

Whether or not Justice Sotomayor ends up persuading her colleagues to take up cases like the ones her certiorari-stage writings address, those writings may themselves produce at least some of the benefits of plenary review. They serve to remind courts and government officials of their professional obligations. They inform attorneys and policymakers about issues that may warrant attention.<sup>55</sup> And they assure litigants and the public that one of the

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52. See, e.g., *Coleman v. Johnson*, 132 S. Ct. 2060, (2012) (reversing a federal appellate court's grant of habeas relief and criticizing the court for "fail[ing] to afford due respect to the role of the jury and the state courts").
53. Justice Sotomayor herself has written about improving "public confidence" in the legal profession by "weeding out fraudulent and wrongful conduct." See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 46 (1996).
54. Cf. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 58 WM. & MARY L. REV. 1219, 1260 (2012) ("When the Court fails to hear a case, it may change how Americans view the judiciary. In other words, what cases the Court decides to hear—and not hear—is important in terms of perception and, ultimately, legitimacy."); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 483 (1973) ("The choice of issues for decision largely determines the image that the American people have of their Supreme Court.").
55. See, e.g., Timothy R. Johnson et al., *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1568 (2009) (observing that dissents from the denial of certiorari "provide an avenue through which a Justice may communicate with

country's most prominent jurists is carefully scrutinizing the petitions that cross her desk in an effort to ensure that justice is done.

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external actors" and "relay information to litigants regarding strategies for getting similar cases accepted in the future").