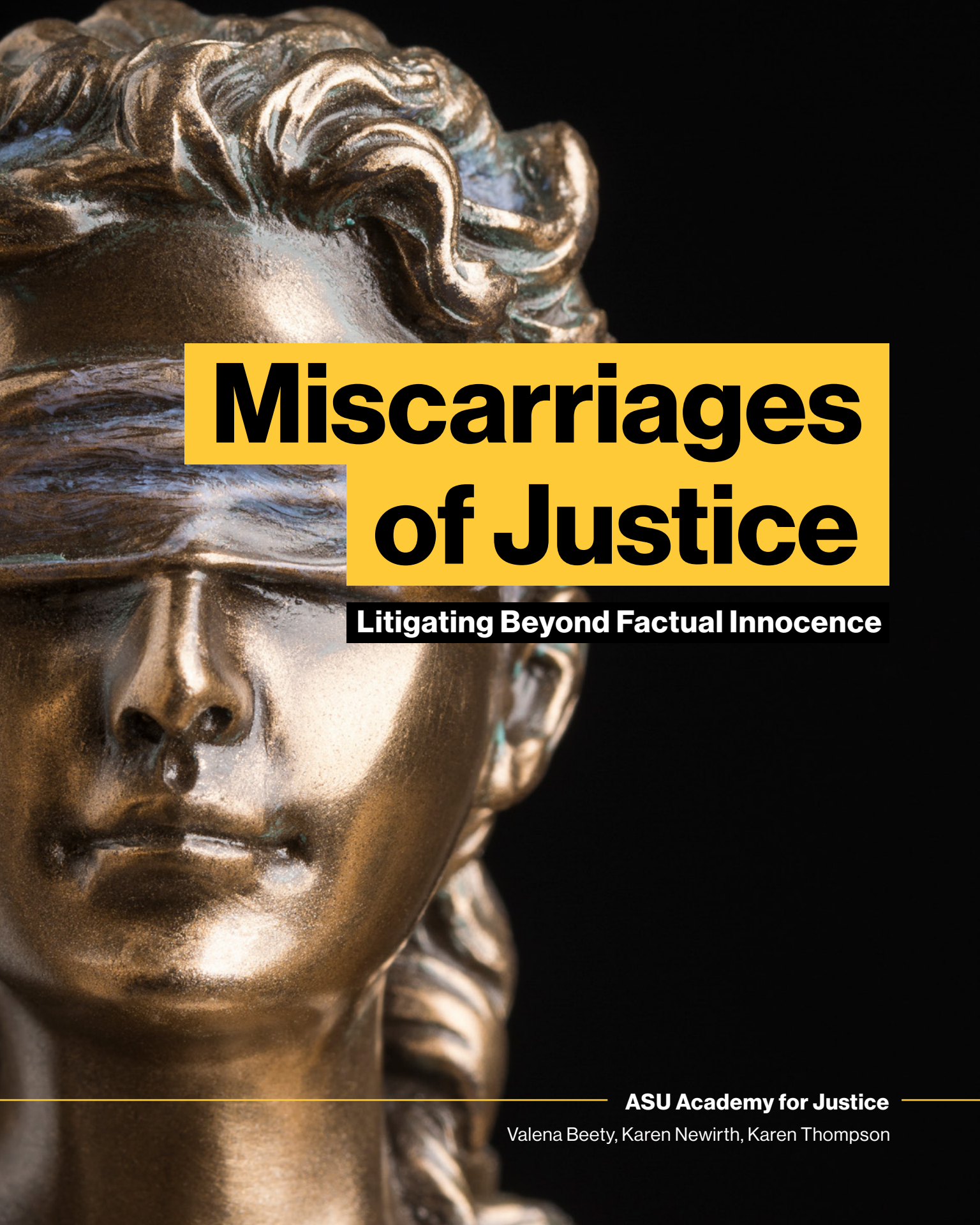

Miscarriages of Justice

Litigating Beyond Factual Innocence

ASU Academy for Justice

Valena Beety, Karen Newirth, Karen Thompson

Sandra Day O'Connor College of Law
Arizona State University
Academy for Justice

Miscarriages of Justice:

Litigating Beyond Factual Innocence

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A Guide from the Academy for Justice's Miscarriage of Justice Initiative

About the Academy for Justice

The Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State University is dedicated to bridging the gap between academia and on-the-ground criminal justice reform by making scholarly research and ideas accessible to policymakers, stakeholders, journalists, and the public. Our primary objectives include identifying the major challenges confronting our criminal justice system; developing and promoting fact-based, non-partisan scholarship that identifies potential reforms; and facilitating the sharing of information between academics and those responsible for making and implementing criminal justice policy.

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About This Guide

This Guide is intended to provide post-conviction litigators, conviction integrity prosecutors, judges, legislators, and wrongly convicted individuals themselves with innovative and creative approaches to addressing miscarriages of justice. The creation of this Guide was spurred on by three related trends: 1) Supreme Court decisions limiting federal habeas corpus and the increased focus on post-conviction relief in state courts; 2) Conviction Integrity Units in prosecutors' offices increasingly reviewing and vacating convictions based on miscarriages of justice rather than solely based on proof of innocence; and 3) post-conviction litigators successfully bringing claims based on a holistic review of the evidence, interest of justice, and expanded applications of state constitutional and statutory provisions. Additionally, in recent years, legislatures have passed statutes allowing for the review of convictions based on the presence of racial bias, the age of the convicted person at the time of the crime or sentence, or excessive or otherwise unfair sentences. Given the increasing focus on state post-conviction proceedings as a primary source of relief, this Guide seeks, collects, and analyzes cases gathered from across the country to highlight the ways in which stakeholders are finding relief for miscarriages of justice.

This Guide was created through a collaborative working group of legal scholars, Conviction Integrity Unit directors, public defenders, civil rights attorneys, and innocence litigators, including Lara Bazelon, Cynthia Garza, Stephanie Hartung, Lisa Kavanaugh, Carrie Sperling, and Cheryl Wattley. It was authored by the leaders and organizers of the working group: Valena Beety, Karen Newirth, and Karen Thompson. The Guide was reviewed and improved upon by leaders in litigating wrongful convictions: Sharon Beckman, Patricia Cummings, Lindsay Herf, and Imran Syed. The working group was sponsored by the Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State University, and supported by Academy for Justice research assistants Courtney Fleager, Tihanne Mar-Shall, Alyssa Padilla, Haille Saal-Khalili, and Priyal Thakkar, with particular thanks to research assistant Erin Romano. Any errors are the authors' only.

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Photo by Carles Rabada

I. Introduction

This Guide builds on the work of the innocence movement to share novel approaches to lawyering wrongful conviction cases.

The innocence movement,[1] placed within the long history of reform movements, is still in a relatively nascent phase. The Innocence Project, the seminal non-profit founded by Barry Scheck and Peter Neufeld in 1992, brought disparate prongs of innocence work into structured, legal coherence. The 1998 National Conference on Wrongful Convictions and the Death Penalty was the birthplace of multiple legal innocence organizations across the United States. Today, thirty years out, the innocence movement once described as "...changing assumptions about some central issues of criminal law and procedure... born of science and fact, as opposed to choices among a competing set of controversial values," has landed.[2]

However, one deeply concerning fact – and a catalyst for this guide – is that while the innocence movement has certainly changed many hearts and minds across the political spectrum and has led to important reforms, it has been slower to change the rules (procedural and substantive) that the legal system applies to claims of wrongful conviction[3] or to miscarriages of justice more broadly.[4] The legal system's intransigence means that the tools for seeking relief for wrongful convictions are limited, and often inadequate, despite the thousands of people who have been exonerated over the past 30+ years. **They are frequently defensive tools that inevitably confirm and entrench the legitimacy of convictions, rather than offensive tools that challenge the entrenched biases and harms**

1 For the purposes of this guide, the term "innocence movement" encompasses those miscarriages of justice resulting in wrongful convictions of the innocent and the organized campaign—scientific, legal, and cultural—leading to the widespread understanding that technology and investigative diligence could free the innocent and correct the legal blind spots that allow those miscarriages of justice to occur.

2 Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573-74 (2004).

3 With Oklahoma Governor Mary Fallin signing a bill into law on May 24, 2013, providing a right to seek DNA testing to all those who pursue innocence claims, every state in the United States now provides a statutory right to DNA testing should a defendant meet particular criteria. However, that provided right is not a guarantee, and those statutes do not impact wrongful convictions that cannot be proven without DNA evidence.

4 The legislative/policy gains secured by the innocence movement have been significant. *See* INNOCENCE PROJECT, Policy Reform (https://perma.cc/ZM96-PFLZ).

built into the criminal legal system, even as they restore freedoms wrongfully taken from individual defendants. This guide attempts to gather in one place new and creative offensive tools from around the country.[5]

The legal system's failings are not the only problem facing the innocence movement today, however. While the innocence movement began as a revolutionary reform movement – highlighting to many for the first time the fallibility of the criminal legal system – it has been slow to address other miscarriages of justice that may or may not involve actual innocence, including those in which actual innocence cannot be established to the satisfaction of courts or prosecutors.[6] **Factually innocent people, that is, those individuals who did not commit the crime for which they have been charged, remain incarcerated because they cannot meet the current standards for actual innocence and reversal of a conviction.** For example, women are more likely to be convicted where no crime occurred – "no crime wrongful convictions." DNA evidence, arguably the most conclusive proof of factual innocence, was unavailable to nearly three-fourths of exonerated women, unable to identify "true perpetrators" because there was no crime.[7] In such cases, statutes for DNA testing and standards that expect DNA exculpatory evidence as proof of factual innocence are either unhelpful or act as affirmative barriers to relief.

Legal innocence, by contrast, involves convictions based on procedural or legal errors, including constitutional rights violations, reduced culpability (**e.g.**, a non-participant convicted of felony murder), or other factors that undermine the validity of the conviction. Treating one form of innocence (factual) as a "quintessential" form of innocence over other wrongful convictions obscures the reality of how civil rights and constitutional infractions permeate almost every wrongful conviction.[8]

The working group for this guide wrestled with the complications of parsing out "legal innocence" from the broader umbrella of wrongful convictions. Wasn't that frame jarring and confusing? Would its mere articulation offend the stakeholders we seek to engage in this conversation? Are these distinctions useful in litigating innocence cases? Is legal versus factual innocence a distinction without a difference? Wouldn't this best be seen as a call for

5 Additionally, for a comprehensive discussion of the foundational contributions made by people in prison and the centrality of their intellectual, legal, and conceptual experiences in ending mass incarceration, see Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53 (2022) (https://perma.cc/Q5VM-YXPK).

6 *See, e.g.*, Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010) (https://perma.cc/LDD8-GW4U); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779 (2018) (https://perma.cc/9RFS-G3AZ)

7 *See* VALENA BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS (2022); JESSICA S. HENRY, SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED (2021).

8 As Stephanie Roberts Hartung and Lynne Weathered argue:

> There is a natural tension between the commonly held notions of "innocence" (which are also usually utilized by the media) and the concept of "innocence" or "wrongful conviction" as it applies in the legal system. Whilst the public and the media's perception of terms such as "wrongful conviction" and "miscarriage of justice" may appear to relate more to actual innocence than to cases in which procedural errors have been made, the legal system has adopted much broader definitions that include both.

Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission, 29 O.J.L. STUD. 43, 49 (2009) (https://perma.cc/V8XA-TB5Y) Finally, as discussed in greater detail *infra*, miscarriages of justice (or cases involving manifest injustice) represent a broad category that may include claims of actual/factual innocence, legal innocence, fundamental unfairness, excessive sentencing, or other wrongs singly or in combination.

greater reliance on wrongful convictions rather than an innocence frame? All of these concerns inform greater struggles in litigating innocence cases and are underscored by the realities illuminated in this guide, struggles that innocence organizations have deeply engaged with when naming themselves and the work they do.[9]

However, the suffering of a wrongfully convicted innocent person should not be the only means by which constitutional and civil rights can be justified or advocated for. We can underscore that every criminal defendant is entitled to constitutional protections as an initial and elementary matter, and demand its applicability in all circumstances, not just the ones where a narrative can be created around a perfect defendant. If we only create room for the factually innocent, "blameless" defendant, the innocence movement is not so much a revolution, but a willing participant in a system that allows for and accepts the legitimacy of legal violations being justified and justifiable in **some** cases.

Many people view the wrongful conviction of a factually innocent person as the worst miscarriage of justice that can occur. That feeling of horror is tied to the concept of a blameless person being forced to bear a punishment they did not deserve. However, a similar sense of horror occurs when government actors violate the legal rules of substantive criminal law. The latter offense exposes the lie of equal protection of law upon which our entire criminal system is based. It thus stands to reason that the system does even worse by defendants with non-innocence claims where a miscarriage of justice led to their conviction – whether as the result of corruption in

9 Wrongful conviction work falls under various names, including miscarriage of justice, manifest injustice, unsafe conviction (UK), wrongful conviction, legal innocence, and more.

the proceeding, a violation of their constitutional rights, the use of flawed or false evidence, racial or other prohibited bias in their proceedings, or some other reason. Treating factual innocence as the quintessential miscarriage of justice has obscured the ways in which other kinds of "wrongful convictions" – including those that do not necessarily involve claims of actual innocence – are also miscarriages of justice that must be remedied.

While some innocence organizations are formally or informally addressing claims that do not turn on assertions of factual innocence, most innocence organizations still limit their work to those whose factual innocence can be firmly established.[10] We urge members of the innocence movement to fully expand their purview to address these other miscarriages of justice, following the lead of those organizations that already have.

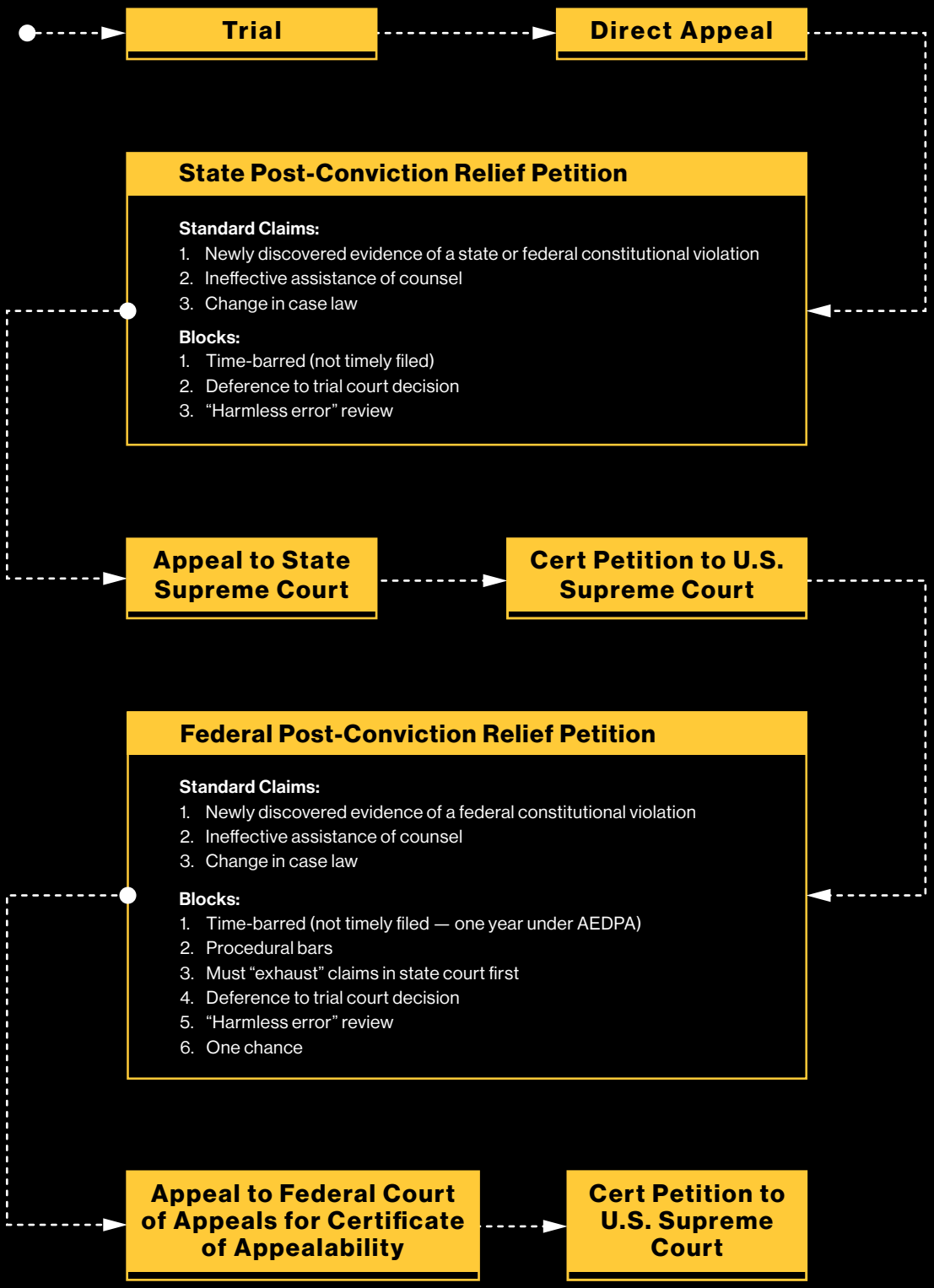
We believe that finding ways to successfully remedy these harms will expand the available avenues for relief for the factually innocent and reinvigorate constitutional protections for all who have been charged with crimes.

In this guide, we address our self-criticism by identifying common categories where miscarriages of justice occur and some mechanisms by which they have been or could be remedied. Yet this guide is not meant to exhaustively identify new approaches, nor does it tread this ground for the first time. Rather, it is meant to be a source of ideas from brilliant litigators around the country that can serve as a starting point for thinking, discussing, and acting at the beginning of the fourth decade of innocence work.[11]

10 Three members of the United States' Innocence Network formally take on cases that do not assert a claim of actual innocence: the Arizona Justice Project, the Montana Innocence Project, and the Innocence Project of New Orleans. Other projects, including the Los Angeles Innocence Project, the Innocence Project Clinic at the University of Baltimore School of Law, and the Midwest Innocence Project take on these cases on a more limited, informal basis.

11 We are not, in any way, confused about the lack of funding, people power, and political and legal will to change the many things we describe in this guide, issues that stand as constant roadblocks in innocence work as well as to any expansion of the work. We do not blithely expect innocence projects to add to their overloaded dockets, but we hope that the issues we raise here provide additional means by which to address the fundamental causes of these miscarriages of justice and to crack other windows that can expand the innocence movement.

Post-Conviction Process



II. #AllTogetherNow:

Why We Must Expand Our Vision to Miscarriages of Justice

Innocence practitioners recognize that the thousands of known successful exonerations to date are merely the tip of the iceberg. These practitioners regularly unveil the broader underlying causes for miscarriages of justice, which is important for several reasons:

Challenging wrongful convictions more broadly strengthens the constitutional protections in place for all criminal defendants; these protections are already in a state of erosion.

By viewing all wrongfully convicted defendants as occupying the same space, and not dismissing constitutional violations as mere argument around burdens of proof or "technicalities," practitioners can engage in litigation strategies that actualize promises of equity and benefit all criminal defendants. As we continue to test our criminal legal system with new methods of proof, we can demonstrate evidence of harm alongside new technology in order to create new methodologies for addressing the persistence of wrongful convictions.

Privileging factual innocence claims over other miscarriages of justice reinforces the system's individualized treatment of cases, limits review to traditional avenues, and stunts the development of tools for mass relief.

The vast majority of factual innocence claims are individual in nature and must be adjudicated as such. Even in factual innocence cases involving groups of

defendants[12], these cases are classically individual: they depend on the unique facts of the case, the unique evidence of guilt and innocence, and the unique procedural posture.

In contrast, as recent cases involving mass relief show (discussed in greater detail **infra**), we must propose standards of relief that can be applied to cases en masse. The individual facts, evidence, and procedure don't always matter – it is the shared injustice that drives this remedy. Mass incarceration requires mass remedies in order to repair the harms of race-based policing, overcriminalization, and excessive sentencing.

Because the traditional criminal legal system is designed for individual cases and not mass reviews, continuing to only litigate cases of actual innocence means that innocence lawyers lose the opportunity to push for novel forms of mass, precedent-setting relief which will necessarily benefit the factually innocent as well as the legally innocent.

If litigating claims of both factual and legal innocence expands and creates new avenues for relief, those new opportunities will be available to factually innocent clients whose avenues for traditional legal relief have been procedurally barred or exhausted.

12 The case of the Central Park Five was only reconsidered because the actual perpetrator came forward regarding the rape of the jogger in the park. His DNA was the only DNA recovered from the scene. The Manhattan District Attorney moved to vacate the verdict of the wrongly convicted teenage boys, all of whom were of color. *See* Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019) (https://perma.cc/RWP6-E7F9). A Texas Court of Criminal Appeals judge vacated the convictions of the San Antonio Four, four lesbian women wrongfully convicted, after a main witness recanted and the Texas Innocence Project showed the scientific testimony used at trial to be inaccurate. A *See* Innocence Staff, *Justice at Last: San Antonio Four are Declared Innocent*, INNOCENCE PROJECT, (Nov. 30, 2016) (https://perma.cc/CES7-E3BR). Even after the actual perpetrator's DNA evidence was found to match the DNA found at the crime scene and he pleaded guilty to the rape and murder, prosecutors did not drop their charges against the Norfolk Four. One man served his entire sentence and three were granted conditional pardons by the then Governor of Virginia. See Priyanka Boghani, "*Norfolk Four" pardoned 20 Years After False Confessions*, PBS (Mar. 22, 2017)(https://perma.cc/ZU3F-Z5PM).

As innocence lawyers join the fight for novel approaches to remedy past harms, the traditional client base will reap the benefits. In a particularly timely example, the recent vacatur of Adnan Syed's conviction was the result of his attorney, Erica Suter, the Director of the University of Baltimore School of Law's Innocence Project Clinic, filing a petition under the Juvenile Restoration Act. In so doing, Mr. Syed's case was assigned to the Baltimore District Attorney's Resentencing Unit, led by Becky Feldman, a former Deputy Public Defender, who began the process of reinvestigating Mr. Syed's case.[13]

Thirty years ago, innocence organizations had good reason to limit their work to the representation of the factually innocent. Indeed, even this was a radical proposition. But thirty years on, the claim that innocent people are convicted of crimes they did not commit is neither shocking nor radical, and it is time to engage with the work of innocence pioneers, civil rights organizations, and other community partners who offer broader critiques of the legal and procedural mechanisms for exonerating the factually innocent. One striking criticism of the innocence movement is made clear by Professor Emily Hughes in her article *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011):

> *Because the innocence movement has focused on defendants who did not commit the actions underlying their convictions, courts, lawyers, and the larger society have come to believe that a person is wrongly convicted of a crime only if he is actually innocent. This perception overlooks the fact that a person can be wrongly convicted if his constitutional rights were violated in the process. As such, the innocence movement devalues legal innocence and the constitutional values that underlie a broader conception of innocence.*[14]

This interpretation also includes incidences of official misconduct and police violence. Hughes makes the important point that the goal of the law should be to treat a person who committed the crime but did not get a constitutionally sound trial in the same manner as a person who did receive a fair trial but did not commit the crime.[15]

We recognize the ways in which limited resources mean that innocence organizations must draw bright lines around whom they will represent.[16] But drawing those lines to exclude people who do not have foolproof claims of factual innocence can be detrimental to the core mission of innocence organizations – exonerating the innocent, preventing future wrongful convictions, and improving the fairness of the criminal legal system while eradicating racial bias.[17] Additionally, it risks further weakening legal protections for criminal defendants and convicted individuals by reinforcing the traditional individualized approach to adjudicating miscarriag-

13 *See generally* The Daily: Why Adnan Syed Was Released From Prison, N.Y. TIMES (Sept. 20, 2022) (https://perma.cc/X8MD-PXHL).

14 Professor Hughes maintains that the Supreme Court should not prioritize innocence over other types of constitutional error, and, it follows, "innocence" should not be modified by terms such as "factual" or "actual." By making these distinctions, she argues, the Court dilutes the concept of innocence by valuing "actual innocence over other constitutional rights, such as the effective assistance of counsel to explore exculpatory evidence, weaknesses in the government's case, or other legal defenses that comprise an innocence unmodified. Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1119-20 (2011) (https://perma.cc/TN5N-AKKN).

15 *Id.* at 1083.

16 Ellen Yankiver Suni, *Ethical Issues for Innocent Projects: An Initial Primer*, 70 UMKC L. REV. 921 (2002) (https://perma.cc/W8LC-9929).

17 For example, the Innocence Project's mission is "...to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone . . . Our work is guided by science and grounded in antiracism." About the Innocence Project, : *About*, INNOCENCE PROJECT (https://perma.cc/WQ8U-GKCZ).

es of justice and preventing new opportunities for relief for all.[18]

Engaging with miscarriages of justice can begin to create a jurisprudence of repair and address the discriminatory applications of criminal law.

For the purposes of this guide, we limit our inquiry to small questions simply expressed: **what legal challenges can be posed to wrongful convictions based on non-factual innocence? How can these cases begin to create a jurisprudence of repair and address the discriminatory applications of criminal law?**

Engaging with these questions – wherever they lead – has the potential to reinvigorate the innocence movement's work and to resolve the divisions and hierarchies created by the movement's traditional approach. We submit that these hierarchies have inured us to the plight of all wrongly convicted people at each stage of the criminal legal system (investigatory, pre-trial, trial/plea, direct appeal, and post-conviction) and have resulted in weakened constitutional and other protections for people charged with criminal offenses.

Innocence lawyers, regardless of whether they expand their work to include clients with claims of legal innocence, can deploy the following novel remedies to address common types of miscarriages of justice.

18 *See* Margaret Raymond, *The Problem with Innocence*, 49 CLEV. STATE L. REV. 449, 450 (2001) (https://perma.cc/9BYH-NH2P). *See also* Smith, *In Praise of the Guilty Project*; Daniel S. Medwed, *Innocentrism*. 2008 U. ILL. L. REV. 1549 (2008) (https://perma.cc/2PTR-FZ7V).

III. Mass Group Claims Based on Official Misconduct

"[Official] misconduct . . . distorts the evidence used to determine guilt or innocence [and] . . . produces unreliable, misleading or false evidence of guilt . . ."

—Samuel R. Gross, et al.,
Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement, NAT'L REGISTRY EXONERATIONS, i, ii (2020).

Creative group claims, and Conviction Integrity Units, can act to legally reconsider convictions obtained through the work of tainted government actors – a key cause of wrongful convictions.

The innocence movement has an important role to play in addressing official misconduct, whether by prosecutors, police officers, lab analysts, "experts," judges, or other government representatives. By subjecting official misconduct to the same level of scrutiny as eyewitness identification, junk science, and false confessions, the actions of the individual bad actor do not remain invisible, and the pervasive nature of the harm is exposed, forcing legal and social repair.

By pursuing legal reconsideration of convictions obtained through the work of tainted government actors, the innocence movement can create mechanisms to address the harms on a wide legal scale (whether through Conviction Integrity Units,[19] statutory reforms, or creative group actions). In some rare

19 For an example, see the report *Overturning Convictions - And an Era*, the Philadelphia District Attorney's Conviction Integrity Unit Report (January 2018 - June 2021), (https://perma.cc/W9UE-NNNR).

cases, they may attain monetary and community compensation for the people harmed.[20]

Scrutiny also allows for relief not just on an individual basis, but for falsely or improperly accused people as a class.[21] In other words, the information gained through the exoneration of a factually innocent person could benefit similarly situated people – whether proven to be factually innocent or not – who suffered the same violations of rights. The resources poured into the single exoneration can be spread wide.

The pervasive nature of official misconduct taints not only the conviction but also the entire process in ways that warp the legitimacy of the whole criminal legal system, destroying the public trust in all stakeholders from police to prosecutors, analysts to judges. The National Registry of Exonerations ("NRE") 2020 Annual Report reveals important facts about official misconduct in the context of factual innocence:[22]

- Official misconduct contributed to the false convictions of 54% of defendants who were later exonerated. In general, the rate of misconduct was higher in more severe crimes.
- **Concealing exculpatory evidence**—the most common type of misconduct—occurred in 44% of exonerations.
- Police officers committed misconduct in 35% of cases. They were responsible for most of the **witness tampering, misconduct in interrogation, and fabrications of evidence**—and a great deal of concealing exculpatory evidence and perjury at trial.
- Prosecutors committed misconduct in 30% of the cases. Prosecutors were responsible for most of the concealing of exculpatory evidence and misconduct at trial, and a substantial amount of **witness tampering**.
- In state court cases, prosecutors and police committed misconduct at about the same rates, but in federal exonerations, prosecutors committed misconduct more than twice as often as police.
- In federal exonerations for white-collar crimes, prosecutors committed misconduct seven times as often as police.[23]

The report also reveals some fundamentals that should inform investigations of innocence claims and miscarriages of justice equally; specifically, that **exonerations for murder, particularly those**

20 A particularly powerful example of how this might function, particularly within the context of non-factual exonerations, is found in the story of Jon Burge, a former Chicago police commander who led a team of police who tortured over 100 mostly Black men throughout the 1980s in order to force false confessions from them. The violence perpetrated against these men prompted Governor George Ryan to pardon four death row inmates and halt the use of capital punishment in Illinois. In 2009, after years of organizing by Black People Against Police Torture and state legislators Kwame Raoul and Art Turner, the state of Illinois passed the Torture Inquiry and Relief Commission Act, which provided for administrative review of Burge-era police torture cases and empowered the commission to send meritorious claims of torture back to the Cook County criminal courts for new hearings. *See* Flint Taylor, Burge Torture Taxpayer Tab Eclipses $210M –and counting, INJUSTICE WATCH, (June 14, 2022) (https://perma.cc/FA4Z-445R). The commission, whose scope has subsequently expanded, has sent numerous cases back to the courts, and many survivors have been afforded new trials. *See* TIRC Decisions (https://tirc.illinois.gov/tirc-decisions.html). In May 2015, Chicago approved the United States' first reparations package for victims of police brutality, a $5.5 million package which included, among other things, a formal apology from former Chicago Mayor Rahm Emanuel, financial compensation to survivors and their families, waived tuition to City Colleges, a mandatory Chicago Public Schools curriculum to educate students about police torture under Burge, and the creation of a permanent, public memorial. It should be noted that although Burge was fired from the police force in 1993, he was never prosecuted for torture, but was convicted on federal charges of perjury and obstruction of justice in 2010.

21 Mass overturning of convictions as a consequence of police corruption and misconduct is nothing new; two of the most famous examples—the Rampart (involving corrupt police in Los Angeles found to have stolen funds from a Los Angeles bank as well as beating handcuffed prisoners) and Tulia Texas scandals (involving a corrupt undercover officer who lied about purchases of powder cocaine resulting in draconian sentences for large swaths of the Black community) are now over twenty years old.

22 Samuel R. Gross, et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, NAT'L REGISTRY EXONERATIONS, i, ii, (2020) (https://perma.cc/V7AR-5HAU).

23 *See id.*

Police Misconduct Cases and Relief in Illinois

People v. Mahaffey, 166 Ill. 2d. 607 (1995)
New post-conviction relief petition sought based on new evidence to support claim that defendant's statement was the result of physical coercion by the arresting Chicago police officers.

Hobley v. Burge, 225 F.R.D. 221 (N.D. Ill. 2004)
42 U.S.C. § 1983 charges of excessive force, failure to intervene in torture, deprivation of right to a fair trial under the Due Process Clause, conspiracy to deem citizen complaints of wrongdoing lodged against Chicago Police Department officers as unfounded even when meritorious, improperly seizing and arresting people without probable cause.

Wrice v. Burge, 187 F. Supp. 3d 939 (N.D. Ill. 2015)
42 U.S.C. § 1983 charges that Burge's brutality coerced defendant into making an incriminating statement that was later used against him at his trial in violation of his Fifth Amendment privilege against self-incrimination and his Fourteenth Amendment right to due process; Burge also violated his due process rights by fabricating evidence used to convict him.

People v. Tyler, 2015 IL App (1st) 123470
Evidence of systemic police misconduct, and which could have resulted in a coerced confession and supported actual innocence, required an evidentiary hearing.

People v. Harris, 2021 IL App (1st) 182172
Defendant's new evidence that detective who interrogated him also worked in Area 2 and engaged in abusive practices would have likely changed the outcome of the suppression hearing, had the detective's testimony been subject to impeachment.

People v. Martinez, 2021 IL App (1st) 190490
Conviction reversed for defendant framed by disgraced former Chicago Police Detective Reynaldo Guevara. *(35 cases have now been reversed due to misconduct by former Detective Guevara, including* People v. Thomas Sierra *(Cir. Ct. of Cook County, IL)*).

People v. Plummer, 2021 IL App (1st) 200299
Dismissal of habeas petition reversed and remanded for evidentiary hearing on newly discovered evidence that CPD Detectives Michael Kill and Kenneth Boudreau used torture and abuse to elicit incriminating evidence.

People v. Smith, 2022 IL App (1st) 201256-U
Defendant should have been granted suppression hearing related to his confession after newly discovered evidence of his torture by officers under Jon Burge and referral of case from Illinois Torture Inquiry and Relief Commission.

People v. Munoz, (Cir. Ct. of Cook County, IL, 2022)
Conviction reversed based in part on due process violation where Detective Halvorsen engaged in a pattern or practice of misconduct in police investigations.

In re **Corruption of Former Chicago Police Sergeant Ronald Watts** (Cir. Ct. of Cook County, IL, ongoing)
Cook County's first ever mass exoneration, over 230 convictions have been overturned as a result of a decade of misconduct by disgraced former CPD Sergeant Ronald Watts and his tactical team.

that are death penalty eligible, reveal the highest rates of misconduct, at 79%.[24]

Another study by the NRE points to the widespread role of official misconduct in legal innocence cases and noted striking patterns of racial stratification. That study, "Mass Exonerations and Group Exonerations Since 1989" (Apr. 9, 2018), focused on "the exoneration of a group of innocent defendants who were deliberately framed and convicted of crimes as a result of a large-scale pattern of police perjury and corruption."[25] As the authors noted, these group exonerations are "highly important cases, but they are fundamentally different" from individual exonerations.[26] Unlike the individual case in which "painstaking investigations . . . produce a great deal of information about each case, and much of that information is publicly available" to be studied and learned from,

"[t]he defining feature of a group exoneration is the corrupt officer or the police conspiracy."[27]

The authors explain:

> Once this pattern of corruption and perjury comes to light, specific exonerations may be handled summarily and receive little or no separate attention. As a result, many group exonerations involve comparatively minor false convictions that would never be reinvestigated on their own—cases in which defendants were sentenced to probation, or to several months or one or two years in custody. It is usually prohibitively expensive to establish the innocence of the defendants in such cases. It almost never happens—**except in a context like these group exonerations in which investigation of individual cases is considered unnecessary.**
>
> Because of this summary process, we know little about many of the individual cases that were dismissed in some of these groups: not the dates of arrest, conviction, and exoneration; not the facts of the alleged crimes; not the mode of conviction or the sentence; not the evidence of innocence that led to the exonerations—indeed, sometimes not even the names of the exonerated defendants. In short, **we have too little information on most group exonerations to include them in our database of individual exonerations**; and in any event, the two categories should be studied separately rather than mixed together.[28]

As of the writing of the NRE report in 2018 – which predates the additional exoneration of hundreds of people whose convictions were vacated in Chicago and in New York City – at least 2500 people had been exonerated in groups following the discovery of patterns of police misconduct.[29]

A. Official Misconduct and Race

Exonerations based on official misconduct and group exonerations are overwhelmingly of Black and Latino defendants.

24 Gross, et al., *Government Misconduct and Convicting the Innocent*, at 15.

25 *Mass Exonerations and Group Exonerations Since 1989*, NAT'L REGISTRY EXONERATIONS 1, 2 (2018) (https://perma.cc/N7Q5-FWNA).

26 *Id.*

27 The NRE even commented that many in the police misconduct group exonerations were likely factually guilty. *Id.* at 2.

28 *Id.*

29 *Id.*

The statistics for the presence of misconduct is high among all racial and ethnic groups, with 72% of all exonerations for murder involving official misconduct.[30] However, the NRE's 2020 report documented that 57% of Black exonerees overall experienced misconduct in their cases versus 52% of white exonerees, a racial disparity that grows much larger in exonerations for murder (78% to 64%)—especially those with death sentences (87% to 68%)—and for drug crimes (47% to 22%).[31] These statistics remained roughly the same for the NRE's 2022 report.

The 2018 NRE report reveals that in each of these group exonerations where the race of exonerees was known, the exonerated were either overwhelmingly or primarily Black or Latino.[32] The 2022 NRE report on Race and Wrongful Convictions states that in 2,975 group exonerations, the exonerated were primarily Black. The 2022 report provides the following group exoneration case studies as examples:

- Harris County, Texas Group Exonerations: 20% of the population is Black, 62% of the exonerees were Black
- Los Angeles - Rampart Scandal Group Exonerations: most exonerees were Hispanic males
- Tulia, Texas Group Pardons: almost all of the 35 defendants were Black

Both NRE reports strongly suggest, and are supported by the overwhelming evidence, that policing in this country is directly connected to the United States' particular history of racial oppression and is a deliberate tool of modern racial control.[33]

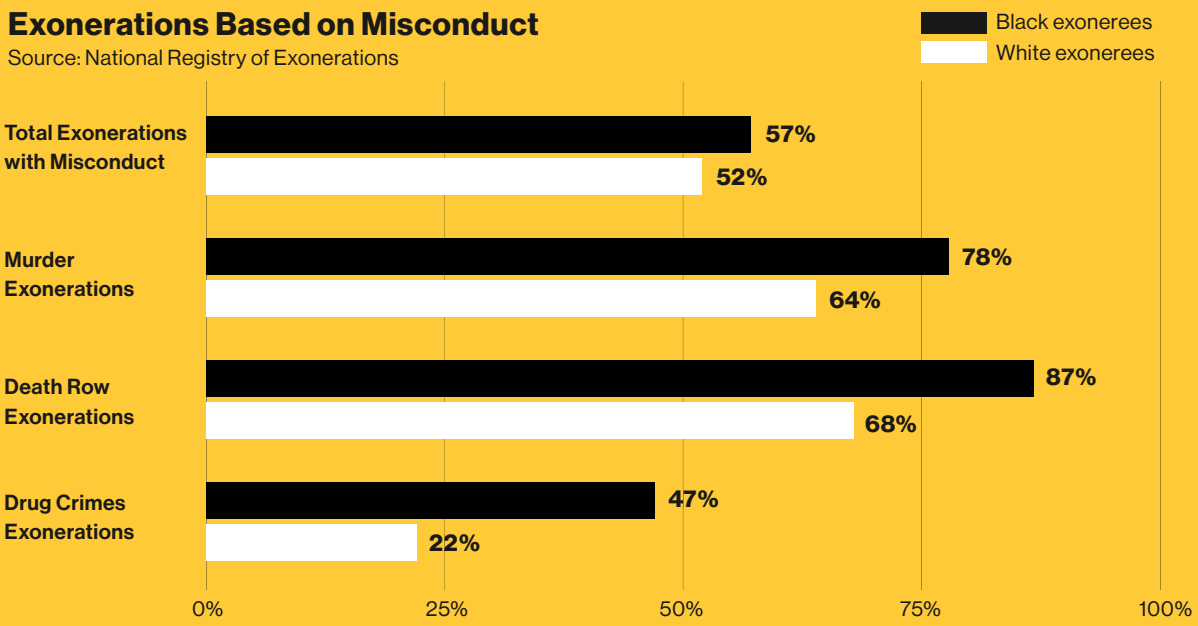
Reality dictates that racial bias is the thread that connects instances of official misconduct within the wrongful conviction space, but also within the larger

30 Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States 2022*, NAT'L REGISTRY OF EXONERATIONS (Sept. 2022) (https://perma.cc/AG7Z-GXPM).

31 Gross et al., *Government Misconduct and Convicting the Innocent*, at iii.

32 *Mass Exonerations and Group Exonerations Since 1989*, at 3. The study identified 17 separate mass exonerations and had information about the racial makeup of the group in all but two cases.

33 See Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN L. REV. ONLINE, 162 (2021) (https://perma.cc/W63N-GJJG).



criminal legal system. Indeed, racial bias forms the backbone of America's criminal legal system, and is, to a great degree, the operating design of the system itself. Official misconduct is merely one of the main implementing forces of that bias.[34]

1. California Racial Justice Act – Bringing Racial Bias Data Back into Litigation

The California Racial Justice Act (2020) prohibits defendants from being charged, convicted, or sentenced based on race, ethnicity, or national origin.

The Supreme Court's 1987 **McCleskey** decision protected laws and sentences from being challenged by data, like the NRE Reports, which show a racially disparate impact. In 2020, California became the first state legislature to counter the legacy of **McCleskey v. Kemp**, by passing the California Racial Justice Act. The California Racial Justice Act, instead, prohibits defendants from being charged, convicted or sentenced based on race, ethnicity, or national origin.[35]

Whether the evidence of racial bias is brought pre-trial or post-conviction, judges can respond in a number of ways: dismissing the charge, bringing in a new jury, declaring a mistrial, or vacating the conviction or sentence. If the defendant can show that they were convicted of a more serious offense than a similarly situated defendant of another race, or given a longer sentence, that can be sufficient to reverse a conviction – at any point in time. **This is one way, whether on an individual or mass basis, to bring data back into the conversation, with the Act explicitly allowing defendants to present "statistical evidence, aggregate data, [and] expert testi-**

34 See Edwin Grimsley, *African American Wrongful Convictions Throughout History*, INNOCENCE PROJECT (Feb. 28, 2013) (https://perma.cc/MLN6-SF6D).

35 *California Legislature Confronts Racial Discrimination in New Criminal Justice Reform Package*, ABA (Oct. 28, 2020) (https://perma.cc/B9D7-57N8).

mony."[36] The defendant does **not** need to prove intentional discrimination.

The California Racial Justice Act also allows a defendant to file a writ of habeas petition even after they've served their sentence and returned to the community. The Act acknowledges the tremendous hardship of living in the world with a conviction, and particularly a wrongful one.

As of 2022, when it was amended, the Act applies retroactively "to ensure equal access to justice for all."[37] The Act previously allowed defendants to file habeas writs for disclosure of "all evidence relevant to a potential violation of that prohibition," as long as the defendant shows good cause to believe the evidence exists.[38]

In the words of the bill's sponsor, California Assembly member Ash Kalra, "[i]t is time to establish a statewide policy that makes it unlawful to discriminate against people of color in the state's criminal justice system."[39]

B. Official Misconduct and Forensic Evidence

Some courts have accepted mass claims and granted mass relief, whether the claims were brought as a class or individually with a known remedy, in response to forensic analyst misconduct.

Mass and group exonerations provide inspiration for new and innovative approaches to exonerating large numbers of individuals in ways different from the traditional, individualized approach that characterizes most of the work of innocence organizations. In addition to the police misconduct examples above and further below, practitioners can consider the work deployed by the ACLU of Massachusetts and the Committee for Public Counsel Services (CPCS) in addressing two separate scandals involving corrupt lab analysts in Massachusetts. Those cases involved the creative use of affirmative litigation before a court with some of the broadest, if not the broadest, authority and jurisdiction of any state supreme court in the country.[40]

The plaintiffs in Massachusetts repeatedly sought mass vacatur of all convictions involving the disgraced lab analysts. Although they may have lost along the way, they gained smaller victories – orders requiring prosecutors to identify those affected; favorable presumptions; the creation of dedicated courts and special masters to hear the claims. Ultimately, in the face of a second lab scandal compounded by extreme prosecutorial misconduct, litigators won the mass dismissal they sought. While the cases may not be replicable due to the unique powers of the Supreme Judicial Court of Massachu-

36 CAL. RACIAL JUSTICE ACT OF 2020, AB-256 § 2(4)(C)(1) (2021-2022).

37 Id. at § 1.

38 CAL. RACIAL JUSTICE ACT OF 2020, AB-2542 (2019-2020).

39 Taryn Luna, California Lawmakers Approve Bill to Address Racism in Criminal Charges and Jury Selection, L.A. TIMES (Aug. 31, 2020)(https://perma.cc/RP3Z-ZJ9D).

40 MASS. GEN. LAWS. ch. 211, § 3 provides:

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.
In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration.

Corrupt Lab Analyst Cases in Massachusetts

Bridgeman v. Dist. Att'y for Suffolk Dist., 476 Mass. 298 (2017)
Under due process and common law principles, defendants who seek post-conviction relief should not be subject to more severe punishment.

Commonwealth v. Cotto, 471 Mass. 97 (2015)
Allegations of prosecutorial withholding of exculpatory evidence.

setts, understanding the victories along the way that led to the mass dismissal is inspiring and educational for anyone confronting official misconduct while also providing at least a rough model for future litigation, even if the jurisdictional frameworks differ.[41]

In West Virginia in the 1990s, the state high court ordered a path for mass relief when an exoneration uncovered vast misconduct at the West Virginia Police Crime Laboratory. Initially, the county prosecutor began a criminal investigation of the crime lab. Then the highest court in West Virginia appointed a judge and panel of lawyers and scientists to aid the investigation.[42] They discovered a staggering series of fraudulent testimony and falsified evidence. Compelled by the wide-spread forensic fraud, the Supreme Court of Appeals of West Virginia ruled that hundreds of defendants could petition for their convictions to be reversed, or guilty pleas vacated, under a manifest injustice standard.[43]

Finally, faulty scientific evidence also comes in the form of medical testimony. Dr. Fowler, a former chief medical examiner in Baltimore, became a household name when he testified at the trial of Derek Chauvin, the officer ultimately convicted of murdering George Floyd. Fowler testified, without evidence, that the nine-plus minutes of Chauvin's knee on Floyd's neck did not cause his death and argued that the manner of death should be classified as "undetermined," as carbon monoxide fumes from the police vehicle could have been a factor in Mr. Floyd's death as well as Floyd's heart condition and use of drugs.

More than 500 medical and public health professionals from around the country signed a letter in 2021 calling for Maryland Attorney General Brian Frosh to review Fowler's findings related to any in-custody deaths that occurred during his tenure, arguing that Fowler's involvement in a separate case involving an in-custody death raised the concern of a potential "pattern of bias in practice."[44] That review is currently ongoing.

41 Another example of a Massachusetts global solution is the exclusion of a certain type of breathalyzer test due to unreliability and an agency's failure to produce documents demonstrating its reliability. *See Com. v. Ananias,* https://www.mass.gov/doc/comm-v-ananias-memorandum-of-decision-on-commonwealths-motion-to-admit-breath-test-results-july/download and *Com. v. Lindsay Hallinan*, now pending in the state high court. As with the drug lab cases, the defense attorneys and CPCS as amicus are asking the high court to use its superintendence power to provide a global solution to a forensic agency's misconduct because the problem is too great to obtain meaningful relief on a case-by-case basis. *See* https://commonwealthmagazine.org/courts/breathalyzer-scandal-could-reopen-27000-drunk-driving-cases/

42 Crucial to this investigation was the assistance and effort of George Castelle, Public Defender for Kanawha County.

43 In re Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 506-07 (W. Va. 1993).

44 Open Letter to Political Leadership, (Apr. 20, 2021) (https://perma.cc/ULR9-H8QX).

C. Official Misconduct and Sexual Assault

Sex-based crimes by law enforcement may constitute another significant area of consideration for mass exoneration claims.

A trend that has not been discussed with the same frequency and urgency as racial and scientific misconduct involves sexual assault and abuse by police officers. Sex-based crimes may constitute another significant area of consideration for mass exoneration claims. Officer-involved sexual misconduct describes an entire subset of police misconduct that runs the spectrum from non-criminal complaints such as consensual sexual activity that occurs while an officer is on-duty, to sexual harassment, up to felony acts of sexual assault or child molestation.[45]

Sexual misconduct was the second most common form of police misconduct reported in 2010, with 618 officers involved in sexual misconduct complaints during that period, 354 of which involved forcible nonconsensual sexual activity such as sexual assault or sexual battery.[46]

Indeed, sexual assault rates were significantly higher for police when compared to the general population.[47]

While alarms about these abuses have been raised for decades, the killings, assaults, and rapes committed by the police against Black women and other women of color, as well as members of the transgender community, have long been either put to the side or ignored in favor of strictly race-based claims.[48] While misogyny drives a large portion of police sexual abuses, this does not mean that men do not experience sexual assault with distressing frequency. **Where female survivors are often not believed, male survivors frequently remain silent about sexual abuses they endure at the hands of law enforcement.[49]**

Sadly, 2021-2022 was a watershed moment for facing the particularly ugly realities of these types of police abuses. Former Kansas police detective Roger Golubski was charged in September 2022 with sexually assaulting two women while on duty more than two decades ago. He now faces additional federal charges from the Department of Justice that he helped three other men run a violent sex trafficking operation that preyed on underage girls in the 1990s.[50] Specifically, Golubski and the other men were each charged with one count of conspiring to run a sex trafficking operation and two counts of holding young women in involuntary servitude, forcing them to provide sexual services to adult men, including themselves. For years, accusations that Golubski was intentionally violating the constitutional and human rights of women and girls in

45 *See* Cato Institute, *National Police Misconduct Reporting Project Annual Report*, at 1-2 (2010) (https://perma.cc/VYM9-YAA3).

46 *Id. See also, generally*, ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017).

47 *Id.* at 3.

48 See Black Women's Blueprint & Yolande M.S. Tomlinson, *Invisible Betrayal: Police Violence and the Rapes of Black Women in the United States*, (Sept. 22, 2014) (https://perma.cc/PNU8-44H5); Andrea J. Ritchie, *#SAYHERNAME: Racial Profiling and Police Violence Against Black Women*, 41 N.Y.U. REV. L & SOC. CHANGE 187, 187 (2016).

49 Paul Butler, *Sexual Torture: American Policing and the Harassment of Black Men*, THE GUARDIAN, (Aug. 14, 2017) (https://perma.cc/P9YP-9US7).

50 Eduardo Medina and April Rubin, *Ex-Detective in Kansas Helped Men Run Sex Trafficking Operation,* U.S. Says, N.Y. TIMES (Nov. 14, 2022) (https://perma.cc/8EGX-RGFD).

Wyandotte County were ignored or labeled fabrications. This aligns with sexual assault cases in other venues, and particularly sexual assaults of Black women. Indeed, abusers may be emboldened by the awareness that such assertions will be ignored.

The case of Lamonte McIntyre shows how a refusal to acknowledge police sexual abuse leads directly to widespread wrongful convictions. McIntyre was exonerated in 2017 after spending more than half of his life in prison, convicted of a double murder that he did not commit.[51] A federal civil rights case alleged that years before the 1994 double homicide, Golubski stopped McIntyre's mother, Rosie McIntyre, and her boyfriend, asking Rosie to get out of the car. Golubski allegedly told her to meet him at the police station the next day, or he would arrest her boyfriend. When she went to the station, McIntyre alleged that Golubski forced a sex act. After that, Golubski wanted a long-term sexual arrangement, but Rosie McIntyre dodged him by moving and changing her phone number. The lawsuit alleged that the false double murder charges were revenge for Rosie's rejection of Golubski's sexual coercion.

In a joint statement with co-counsel Morgan Pilate LLC, the Midwest Innocence Project stated:

> While the Unified Government appears to have finally acknowledged that a systemic review of all cases involving Roger Golubski is necessary, the proposed plan offers no hope for accountability. A meaningful review must include individuals who are independent of the criminal legal system in Wyandotte County. Ideally, such a review should be done by the Department of Justice as part of a pattern-or-practice investigation...
>
> For more than three decades, Golubski relentlessly and intentionally violated the constitutional rights of community residents. And he was not alone in his wrongdoing. Supervisors protected, promoted and rewarded Golubski, though it was well known in the Department that Golubski preyed on, threatened, and violated the most vulnerable members of the community, including his so-called 'informants.' As a direct result of Golubski's actions, numerous individuals were wrongly convicted of crimes they had nothing to do with, grieving families who lost loved ones suffered without justice, and violent criminals were left free to prey on others. The decades of wrongdoing not only have a continued impact on the present; the wrongdoing itself continues.[52]

D. Organizing Public Pressure by a Coalition of Invested Institutions: Corrupt Police Case Dismissals (NYC 2021-2022)

A coalition of prosecutors, public defenders, and innocence organizations compelled more than 700 vacated convictions across New York City because the convictions were tainted by the work of 13 corrupt police officers.

Many cases involving officials who have been proven to commit misconduct remain unexamined.[53] **Some departments, such as the Civil Rights Division of the Orleans Parish District Attorney's Office, directed by Emily Maw, are working to create**

51 Peggy Lowe, *An Innocent Kansas Man Spent 23 Years in Prison. His Release Exposed Decades of Police Corruption*, IOWA PUB. RADIO, (Oct. 19, 2022) (https://perma.cc/P8ZN-7SVG).

52 Statement from the Midwest Innocence Project and Morgan Pilate LLC (Nov. 21, 2022) (https://perma.cc/4QGA-2LN7).

53 Jonathan Abel, *Cop Tracing*, 107 CORNELL L. REV. 926 (2022) (https://perma.cc/RC8V-MRNV).

protocols and procedures to audit the cases of "problematic officers." As Maw candidly states, "We have police officers who have been convicted of killing people and covering it up and no government institution has felt that it was their responsibility to go back and assess the damage on the officer's previous cases."[54]

What follows are examples of two group exonerations stemming from police misconduct that were secured in different ways. Both may provide useful approaches to addressing wrongful convictions caused by police misconduct from other jurisdictions. Additionally, official misconduct necessarily implicates both state and federal constitutional violations, which may also open a window to relief.[55]

Between April 2021 and September 2022 (with additional exonerations expected), prosecutors from offices throughout the five boroughs of New York City vacated more than 700 convictions arising from the work of at least 13 corrupt police officers over a period of decades. How this happened is an interesting lesson in independent prosecutorial initiative, the work of coalitions of public defenders and innocence organizations, and public pressure.

Joseph E. Franco made thousands of arrests for drug possession and sales between 2004 and 2018, when he was an N.Y.P.D. officer. In 2019, after video surfaced showing that Franco manufactured drug sales that never happened, the Manhattan District Attorney charged Franco with perjury. In April 2021, while the perjury case was pending – i.e., before Franco had been convicted – the Brooklyn District Attorney's office announced that it would be vacating as many as 90 convictions in which Franco was

54 *Id.* at 931. Emily Maw is also the former director of the Innocence Project New Orleans.

55 In light of the new global understandings of misconduct that have developed in the ten years that have passed since George Zimmerman killed Trayvon Martin, instigating what became the first days of the Black Lives Matter movement, it is important to note that excessive force still is very often not, and should not be, the only basis of constitutional relief defendants are able to seek with regard to police misconduct.

an "essential witness."[56] The mechanism for vacatur was a writ of error coram nobis.[57] The Brooklyn Defenders were notified of the Brooklyn District Attorney's plan to vacate convictions shortly before the court date.

At the time the Brooklyn District Attorney decided to vacate these convictions, one of the authors of this guide, Karen Newirth, working with the Exoneration Project, was investigating corrupt New York City police officers who had demonstrable histories of misconduct. This work involved defining "corrupt police officers"; identifying them through media searches, public records requests, community and defender outreach, and court records; and trying to identify all cases in which they had been involved (a step that involved a yearlong public records-related lawsuit against the N.Y.P.D. to obtain this information).[58]

Parties defined corrupt police officers as:

1. those who had been charged with[59] or **convicted of crimes** committed **in the course of their official duties or by abusing their authority;**
2. those who appeared on **district attorney's** so-called **"do not call lists"** – lists of police officers whose conduct had rendered them so untrust-

56 Brooklyn DA Eric Gonzalez to Dismiss 90 Convictions that Relied on Former Narcotics Detective Later Charged with Multiple Perjuries, BROOKLYN DIST. ATT'Y OFF. (Apr. 7, 2021) (https://perma.cc/FMH4-GDHG).

57 The common law writ of coram nobis is applicable for reversing convictions based on an error. Coram nobis can also be available when a person is no longer in custody – usually after the person has served their sentence. The most well-known modern-day instance of the writ of coram nobis is likely that of Fred Korematsu and Gordon Hirabayashi, who were convicted during World War II of refusing the California state-wide military order demanding all free Japanese Americans be incarcerated or excluded from the state. Their convictions were upheld in the now-disgraced Supreme Court decision of *Korematsu v. United States*, 323 U.S. 214 (1944). In 1984, their convictions were vacated through the writ of coram nobis, a mechanism "appropriate where the procedure by which guilt is ascertained is under attack." The federal court declared the reversal was in the public interest and to do otherwise would result in a manifest injustice. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). On the state level, West Virginia revived the writ of coram nobis in *State v. Hutton*, 235 W. Va. 724 (2015), a case litigated by the West Virginia Innocence Project, and thereafter used it to provide relief for wrongly convicted clients.

58 As with the Massachusetts drug lab scandals, identifying those harmed by a corrupt official is often the most difficult task, followed by actually locating those individuals, because many defendants victimized by corrupt officials also experience varying levels of financial depravations that make them less likely to maintain stable housing or contact information.

59 Respecting the presumption of innocence, we collected this information in order to watch the case and the evidence that emerged.

worthy that they would not be called as witnesses in court;

3. those who had substantially above-average **numbers of civil rights cases filed against them** alleging serious rights violations, or who had substantially above average **adverse Civilian Complaint Review Board findings**, or who were known in the community or by defenders or otherwise reported in the media as being bad actors; and
4. those who **participated in known wrongful convictions** that **involved manufactured police evidence** (false confessions or directed misidentifications or misuse of confidential informants).

This project was ongoing in April 2021 when the Brooklyn District Attorney suddenly dismissed ~90 cases in which Franco was an "essential witness."

What followed was less traditional legal work and more of a **public pressure campaign** bringing together a coalition of public defenders (including appellate defenders) and innocence organizations to demand that each of the City's other district attorneys, and the special narcotics prosecutor, likewise dismiss all cases in which Franco had played a key role. The Coalition sent and published a demand letter, after which the Bronx and Manhattan District Attorneys agreed to vacate at least 100 cases, then another 256 cases. They expect the total number of cases to ultimately reach close to 500.

Next, the coalition expanded its demands to include dismissal and/or a reexamination of cases involving "20 NYPD officers whom we have identified as having been convicted of crimes and two who engaged in serious misconduct relating to their duties (the 'Officers')," and any other law enforcement officers who had been convicted of crimes relating to their duties.[60] Prosecutors were urged to "vacate all convictions in which an 'essential role' was played by any of the Officers, or other, similarly situated officers, including those identified on so-called 'Brady/Giglio Lists' or 'Do Not Call Lists' maintained by your offices."[61] The coalition asked that "[t]o the extent your review identifies convictions in which the Officer's participation was not 'essential' we ask that a full, transparent review be conducted" and that the review include the convicted person and counsel.[62] Finally, following the lessons of the Massachusetts drug scandal, **the coalition requested that the prosecutors take on the burden of notifying all individuals in whose case a corrupt officer had been involved and the nature and extent of their involvement.**

Following this, the Queens District Attorney moved jointly with defense counsel to vacate 60 convictions involving three disgraced officers. Soon after, the Brooklyn District Attorney vacated another 378 criminal convictions dating back to 1999 involving 13 former N.Y.P.D. officers convicted of crimes relating to their work.[63]

Interestingly, about half of the vacated convictions in Brooklyn stemmed from a 2008 drugs-for-information corruption scandal that resulted in the conviction of four officers and – **at the time** – the dismissal of 80 cases. It was not possible to determine from public records whether those cases were pending (presumably so because they were "dismissed," not "vacated") and so the current vacatur made

60 Letter from Karen A. Newirth et al., (May 3, 2021)(https://perma.cc/T66U-PZXK).

61 Id.

62 Id.

63 Brooklyn DA Eric Gonzalez to Dismiss 378 Convictions that Relied on 13 Officers Who Were Later Convicted of Misconduct While on Duty, BROOKLYN DIST. ATT'Y OFF. (Sept. 7, 2022)(https://perma.cc/H6XU-HP4J).

clear that **the prior action taken by the Brooklyn District Attorney concerned only pending cases and involved no look backs or audit** of the damage those corrupt officers had done.[64]

When innocence attorneys and public defenders become aware of corrupt police officers, they can demand the dismissal of pending cases and the vacatur of past cases involving corrupt officers as those cases arise (e.g., when an officer is deemed untrustworthy or convicted of a crime in the course of their duties or a conviction that otherwise goes to their credibility). **Wrongful conviction practitioners can go further and craft protocols for handling the inevitable discovery of a bad actor, so that one part of the automatic response to such revelations is a full case review**, as the Massachusetts Supreme Judicial Court did in its ultimate resolution of the drug lab scandal cases.

E. Expanding "New Evidence" to Include Patterns of Misconduct in Other Cases: Detective Scarcella

Petitioner's "newly discovered evidence" can include a pattern of police misconduct – even when there is no direct evidence of misconduct in Petitioner's individual case.

One problem litigators often face is shoehorning new evidence and information into a rigorous, post-conviction "newly discovered evidence" standard. The litigation of claims relating to a notorious, corrupt Brooklyn detective has shown how the new evidence standard can be expanded to include a pattern of police misconduct – even when there is no evidence of misconduct in a given individual case.

In the 1980s and 1990s, Louis Scarcella was a leading detective in Brooklyn. In 2013, after one of his most celebrated cases was overturned, inquiries began into the more than 70 murders that Scarcella had worked. It was soon revealed that Mr. Scarcella engaged in a pattern of misconduct designed to secure convictions at all costs, including **reusing unreliable confidential informants** who could not have witnessed the events they claimed to have seen, **coercing false confessions**, **manufacturing purported eyewitness identifications**, and more. In the past nine years, nearly 20 murder and other convictions have been overturned after defendants accused Scarcella of coercing or inducing false confessions and bogus witness identifications; those convictions have now generally been repudiated by the same district attorneys who won them.[65]

For the most part, these cases followed the traditional trajectory of a joint investigation between the wrongly convicted person and counsel (including both **innocence organizations and independent innocence attorneys) and** the Brooklyn District Attorney's **Conviction Integrity Unit**. This work and the lessons learned are available in a report, "426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTION CASES IN BROOKLYN, NEW YORK."[66]

Where the Brooklyn DA's conviction integrity unit was not willing to join in a motion to vacate or motion for a new trial, a contested motion for a new trial generally followed.

64 *See* Al Baker, Drugs-for-Information Scandal Shakes up New York Police Narcotics Force, N.Y. TIMES (Jan. 23, 2008)(https://perma.cc/3U9A-SFWR).

65 On August 31, 2022, the first defendant to have a conviction overturned due to misconduct by Scarcella was found guilty after retrial.

66 INNOCENCE PROJECT, 426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTION CASES IN BROOKLYN, NEW YORK (July 2020) (https://perma.cc/33LJ-NZS2).

Many of these cases proceeded on a theory that knowledge of Scarcella's misconduct patterns was "new evidence" to the individual, even if it could not be directly shown to have occurred in his case.

This is an expansion of the traditional understanding of "new evidence" sufficient to warrant a new trial in New York.

1. People v. Hargrove, 26 N.Y.S.3d 726 (N.Y. Sup. 2015)

- Conviction vacated due to Officer's pattern of misconduct and witness tampering - even when witness did not recant identification in this case.
- Vacatur affirmed, although "[t]hrough it all, we cannot say whether the defendant is guilty or whether justice has ultimately been done in this case. But that is precisely why the defendant is entitled to a new trial."
- Common law "newly discovered evidence" requirements, which are not statutory, may derive from Georgia Supreme Court case, Berry v. State, a racist relic from 1851.

People v. Hargrove is an instructive case.[67] It involved a 1991 shooting that resulted in the death of one corrections officer and the wounding of another. The only evidence connecting Hargrove to the crime was the eyewitness identification by the wounded corrections officer, who identified him in a lineup created and administered by Det. Scarcella and his partner, Detective Chmil. Hargrove's motion for a new trial relied on the new evidence of Scarcella (and Chmil)'s pattern of misconduct, which had been revealed post-trial and which included the coercion of eyewitness identifications. Hargrove also brought a state claim of actual innocence.

The court granted Hargrove an evidentiary hearing at which various witnesses testified, including Scarcella and the wounded corrections officer/eyewitness. Importantly, **the eyewitness did not recant his identification** of Hargrove, and **neither he nor Scarcella testified to any coercive tactics** used to secure the identification. There were, however, material inconsistencies between how the eyewitness described his assailant and the actual appearance of Hargrove and his co-defendant, and the court found it noteworthy that although the eyewitness testified at the post-conviction hearing that he had known Hargrove and his family for two decades, he had not described his assailant as someone he knew (or as Hargrove).

The Brooklyn District Attorney's Office asserted that Hargrove had not demonstrated "that there is new evidence concerning the reliability of the identification made by the one witness in this case" – i.e., that whatever evidence exists of misconduct by Scarcella in other cases, that evidence was not sufficiently tied to this case where the eyewitness did not recant.

The court, however, found these inconsistencies significant, and repeatedly asserted **the importance of the context of Scarcella's known wrongdoing**. The decision vacating Mr. Hargrove's conviction recites the facts of the five cases involving Scarcella that were dismissed on joint motions with the Brooklyn District Attorney and noted the pattern of single-witness identifications involving

67 *People v. Hargrove*, 26 N.Y.S.3d 726, *1 (Sup. 2015).

Scarcella, including witness testimony about Scarcella's coercion or fabrication of the identifications.[68] The court also found it significant that Scarcella provided, at the post-conviction hearing, testimony that was "false, misleading and non-cooperative" and that he violated court orders during the hearing, including by bringing a handgun into the courtroom after being told not to.[69] Finally, the court found it significant that forensic evidence either did not match Hargrove or had never been tested and some forensic testing/evidence may have been destroyed. The court vacated Mr. Hargrove's conviction.[70] The Brooklyn District Attorney subsequently appealed the vacatur.

In affirming the vacatur, the intermediate appellate court began with inspiring words and a focus on doing justice in the broadest sense:

> While the issues implicated by this case represent some of the most pressing and contentious matters facing the criminal justice system today, the People have chosen to focus their appeal on an array of procedural and evidentiary arguments, largely ignoring the major underlying issues at stake.
>
> But these rules of procedure and evidence are not to be invoked for their own sake. They do not exist solely as an arsenal to be ranged against the accused or the imprisoned. They exist so that truth may emerge from their considered application. Indeed, it requires no earth-shattering pronouncement to state simply what centuries of jurisprudence make clear: that justice is the whole of the law.

People v. Hargrove, 162 A.D.3d 25, 29 (2d Dep't 2018).

The reviewing court endorsed the lower court's determination **"that evidence of prior police misconduct, if known to the court and the jury, would have created a probability of a more favorable verdict to the defendant"** and so vacatur was warranted. Notably, this was despite the fact that "[t]hrough it all, we cannot say whether the defendant is guilty or whether justice has ultimately been done in this case. But that is precisely why the defendant is entitled to a new trial."[71]

In responding to the prosecution's claim that "remote" evidence of police misconduct in other cases was not "newly discovered" evidence within the meaning of the statute, the court turned its attention to the requirement that evidence be "newly discovered." The appellate court reviewed the case law but noted that **decisional law had added requirements for evidence to be "newly discovered" that were not included in the statutory language.** These added requirements included the requirement that the **evidence be material** to the issue; **not be cumulative** to the former evidence; and **not be merely impeaching or contradicting** the former evidence.[72] In seeking to understand how New York courts had effectively grafted non-statutory requirements onto the new evidence rule, the appellate court explained that **New York courts appeared to have imported the common law standard from a Georgia Supreme Court case, *Berry v. State*, a racist relic from 1851.** In that case, a white man was accused of conspiring with two African-Amer-

68 *Id.* at *6.

69 *Id.*

70 *Id. at *9.*

71 *Hargrove*, 162 A.D.3d at 29.

72 *Id.* at 55.

ican enslaved people and much of the evidence used against Berry was obtained from one of the African-Americans "in a confession drawn from him by whipping." The court further noted that the case relied on the common law rule that "a negro has never been permitted to give evidence in any case, where the rights of a white person were concerned," and only accepted the evidence with the affirmation of a white witness.[73] After reciting the **"reprehensible" origins of the common law requirements for new evidence,** the court noted that notwithstanding the common law "requirements," courts had always left room for the trial court to exercise discretion in deciding whether to grant a new trial.

The court went on to hold that **only those factors articulated in the statute were legal prerequisites**, freeing lower courts – and litigants – to seek and receive new trials based on evidence that "merely impeaches" or otherwise calls into question the validity of the verdict. The decision thereby expanded the rights of those who, like Mr. Hargrove, were victims of Det. Scarcella[74] as well as those others who have been wrongly convicted (whether factually innocent or not) as a result of official misconduct.[75] **See, e.g., People v. Edmonson**, 76 Misc.3d 463 (Sup. Ct., Kings Co. 2022) (applying a "totality of the circumstances" analysis).

2. People v. DeLeon, 190 A.D.3d 764, 765 (N.Y. App.Div. 2021)

In a recent case, **People v. DeLeon**, affirming another vacatur of a conviction based on newly discovered evidence of Scarcella's misconduct, the same appellate court found that "newly discovered

73 *Berry v. State*, 10 Ga. 511, 515-16 (1851).

74 The Court stopped short of mandating vacatur of any case in which Det. Scarcella played a role: "In reaching this determination, we nevertheless find it appropriate to stress that the vacatur of the defendant's judgment of conviction is specifically confined to the particular facts of this case, and the result here does not mandate any particular result in future cases involving Detective Scarcella. Each case must be reviewed on its own facts." *Hargrove*, 162 A.D.3d at 74.

75 Three months before *Hargrove* was decided by the Appellate Court, a different trial court vacated another conviction obtained by Det. Scarcella on the basis of new recantation evidence and new evidence of Scarcella's misconduct. The Kings County District Attorney again objected to the characterization of Scarcella's misconduct in other cases as new evidence in that case, an argument rejected again by the court. *People v. Moses*, 58 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2018). Interestingly, in that case the court noted "At the outset, no one piece of evidence at this hearing, standing alone, would have been sufficient for this Court to grant this CPL § 440 motion. Rather, it is the cumulative effect of all of the new evidence which convinces this Court that there is a reasonable probability that had the evidence been known to the jury the result would have been more favorable to the defendant." *Id.* at *7.

evidence of [the police] misconduct would have furnished the jury with a different context in which to view all of the evidence in this case, including the defendant's purported inculpatory statement made to these detectives which the defendant has denied making, and further, that evidence of their misconduct was of such a character to create a probability that, had such evidence been received at trial, the verdict would have been more favorable to the defendant."[76]

F. Pattern or Practice of Behavior: DOJ Review to Encourage Office-Wide Review of Past Cases

The Biden Administration is renewing "Pattern or Practice" investigations of both police departments and prosecutors' offices for depriving defendants of constitutional rights.

A final possibility is encouraging reviews of cases linked to official misconduct through a Pattern and Practice investigation by the Department of Justice. On October 13, 2022, the Department of Justice Civil Rights Division released their INVESTIGATION OF THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE AND THE ORANGE COUNTY SHERIFF'S DEPARTMENT.[77] The report elucidates the DOJ's determination that the DA's office and the Sheriff's Department engaged in a pattern or practice of conduct that deprived defendants housed at the Orange County Jail of their Sixth and Fourteenth Amendment Rights.

The pattern or practice stemmed from the Sheriff's Department's organized placing of informants near represented defendants while housed at the Orange County Jail. Informants were cultivated and rewarded, and their placement in the jail was "systematized and managed by the Special Handling Unit" of the Sheriff's Office.[78] The District Attorney's Office failed to disclose information about these informants, and indeed,

> OCDA **prosecutors often failed to investigate the backgrounds of custodial informants** in their cases, missing key discovery that was in the hands of law enforcement, and even missing information from their own tracking system… when faced with overwhelming evidence of OCSD's informant program, OCDA continued to resist making disclosures… **simply dropping informants from their witness lists** to avoid surfacing **Massiah** and **Brady** problems.[79]

Among the **23 recommendations** made by the Department of Justice, one of them was a systemic review of past prosecutions, and another was an **audit of the DA's case files**. The DOJ recommended that both the Orange County DA's Office and Sheriff's Department undertake a "comprehensive, coordinated review of past investigations and prosecutions that involved custodial informants… [with a goal to] identify all information that must be disclosed to criminal defendants." The Orange County DA's Office should also "develop, train on, and implement a policy requiring OCDA to audit case files to determine compliance with the case file

76 *People v. DeLeon*, 190 A.D.3d 764, 765 (N.Y. App.Div. 2021).

77 U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE AND THE ORANGE COUNTY SHERIFF'S DEPARTMENT (Oct. 13, 2022) (https://perma.cc/RBS9-YUL8).

78 *Id.* at 60.

79 *Id.*

policy … [and] any errors revealed by audits must be corrected immediately."[80]

These reforms, and the investigation, stemmed from one case – the tenacious litigation of **People v. Dekraai**, a capital case. When the unconstitutional use of confidential informants was revealed, the **District Attorney's Office created the Orange County District Attorney Informant Policies and Practices Evaluation Committee**. The DA Committee made several recommendations, including an investigation by the DOJ, which the DOJ began on December 15, 2016.[81]

80 *Id.* at 57-58.

81 Relatedly, the DOJ also issued a 2020 report finding misconduct by the Springfield MA police department. In April 2020, the ACLUM, ACLU, CPCS, and Goulston & Storrs filed a petition asking the SJC to require an investigation into the SPD's violence and misconduct and to take action to require the Hampden County DA to disclose the misconduct. BCIP, IP, and NEIP filed an amicus letter in support, as did the Springfield NAACP branch, the Pioneer Valley Project, and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. The Single Justice referred the case for an evidentiary hearing before a special master, and the special master reported her findings and recommendations to the Single Justice. The matter is pending but the filings are available: https://www.aclum.org/en/cases/graham-et-al-v-district-attorney-hampden-county

IV. Individual Faulty Forensic Evidence Claims: Changed Science Writs and Due Process

A legal Catch-22 exists for faulty forensic evidence in post-conviction: if *any* studies challenging the evidence's reliability were available at the time of trial, the court may find that proof of unreliability is not "newly discovered evidence"; however, if defense counsel failed to rely on those less-known studies at trial, the court may find this does not rise to the level of "ineffective assistance of counsel." Petitioners have proof of faulty evidence but no viable legal claim.

The outsized role of unvalidated scientific and quasi-scientific theories in contributing to wrongful convictions is well-known. According to the National Registry of Exonerations, over the past thirty years our criminal legal system convicted and incarcerated hundreds of innocent individuals due in part to faulty forensic evidence.[82] Despite this, changes in scientific knowledge in the areas known to have caused wrongful convictions (e.g., fire science, eyewitness identification, confessions/interrogations, hair comparison, blood spatter, etc.) often fail to be sufficient to reverse a conviction – or even state a claim – because they may not fall squarely into either of the two standard post-conviction claims: ineffective assistance of counsel and newly discovered evidence.[83]

A petitioner may claim that the scientific research undermining the state's evidence at trial is newly discovered evidence, not available at the time of trial. **Claims of newly discovered forensic evidence** can either be that there is **new scientific evidence that discredits the old evidence, or** that the physical evidence is the same, however **new scientific conclusions can be drawn about the same evidence.** In the words of the U.S. Court of Appeals for the Sixth Circuit, "it is [the expert's] opinion itself, rather than the underlying basis for it, which is the evidence presented. Therefore, if [the expert's opinion has changed], the evidence itself has changed, and can most certainly be characterized as new."[84]

However, some state courts deny petitions when they find that **any** discrediting evidence existed at the time of trial to disprove the science behind the conviction. Their reasoning is that if any scientific evidence existed, even if it was not widely known or adopted, then the scientific evidence cannot be raised in the present because it is not so-called "new evidence," or was not newly discovered.[85] Some petitioners have also creatively argued—often compellingly but with mixed results—that the **change in science itself** is newly discovered evidence to be reviewed.[86]

A petitioner may alternatively claim that counsel failed to challenge the state's evidence by using said "known" scientific literature that **was** available at the time of trial. Necessarily, the petitioner would argue that counsel's behavior was ineffective, and that the failure to appropriately challenge the state's faulty scientific evidence prejudiced the petitioner.[87] However, the defendant must establish that counsel's performance fell below objective reasonableness and prejudiced the defendant, such that there is a "reasonable probability" that the defendant would have been acquitted but for the representation.[88] In changed science cases, defense counsel is only required to perform with reasonable diligence, which

82 *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("'[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.'" (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006) (https://perma.cc/DP6L-UFGW).

83 Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483 (2020) (https://perma.cc/85H3-TU3B)

84 *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005).

85 Caitlin M. Plummer & Imran J. Syed, *Criminal Procedure v. Scientific Progress: The Challenging Path to Post-Conviction Relief in Cases that Arise During Periods of Shifts in Science*, 41 VT. L. REV. 279, 286, 300 (2016) (https://perma.cc/AQP9-QY83).

86 *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

87 *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

88 *Id.* at 694.

does not mean following every lead.[89] A determination of whether counsel is effective is tied to "reasonableness under prevailing professional norms."

This creates a legal Catch-22. If some science – even a minority view or handful of journal articles – existed at the time of trial, then the shifted view is not "newly discovered evidence." But under this scenario, trial counsel who did not know of the contrary scientific evidence was not required to follow every lead to discover it to provide constitutionally effective assistance of counsel.[90] Furthermore, under **Shinn v. Ramirez**, if this evidence isn't discovered until federal court proceedings due to the ineffective assistance of state post-conviction counsel, that evidence cannot be admitted or presented in federal court.

This situation creates the anomaly where courts cannot, or do not, consider relief for someone who is wrongfully convicted even when the fully developed science conclusively shows their innocence. Indeed, even with proof that the state presented false evidence and false testimony at trial, a habeas petitioner may be without a remedy because the **proof does not align with the court's precedential decisions on what is newly discovered evidence, and what is ineffective assistance of counsel.**[91]

The Massachusetts Supreme Judicial Court has resolved this dilemma by applying their confluence of factors approach, discussed **infra**, to allow relief for post-conviction motions.[92] Interpreting Mass. R. Crim. Proc. 30(b), the Court in **Common-**

89 *See* Plummer & Syed (discussing the United States Supreme Court case Harrington v. Richter, which discussed what a defense attorney can and cannot be held responsible for in tracking down evidence); *see, e.g., Harrington v. Richter*, 562 U.S. 86, 106–07 (2011) (holding that the defendant's attorney did not render deficient service because "[f]rom the perspective of Richter's defense counsel when he was preparing Richter's defense, there were any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful . . . Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

90 *See, e.g., Skakel v. State*, 295 Conn. 447, 506 (2010) ("Whether trial counsel has fulfilled his or her duty to conduct a reasonable investigation forms the linchpin issue in a petition for a new trial made on the basis of newly discovered evidence.").

91 Plummer & Syed.

92 *Com. v. Epps*, 474 Mass. 768 n.28 (2016).

wealth v. Epps determined that it did not have to decide whether the shifted science on Shaken Baby Syndrome/Abusive Head Trauma was "newly discovered" or whether trial counsel's failure to find an appropriate expert was manifestly unreasonable. Instead, the Court "conclude[d] that the defendant was deprived of a defense from **the confluence of counsel's failure to find such an expert and the evolving scientific research** that demonstrates that a credible expert could offer important evidence in support of this defense."[93] The Court concluded that "**our touchstone must be to do justice**, and that requires us to order a new trial where there is a substantial risk of a miscarriage of justice because a defendant was deprived of a substantial defense, regardless whether the source of the deprivation is counsel's performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two."[94]

This predicament highlights the value and importance of a confluence of factors approach, discussed **infra**, as well as changed science writs, in order to provide an avenue of relief when the state has presented false evidence at trial. Otherwise, the failure to litigate the reliability of the evidence at trial may foreclose any avenues of relief—regardless of the discovery of changed science.

A. Changed Science Writs

Changed Science Writs allow petitioners to challenge their convictions if now-discredited scientific evidence was used against them at trial.

In 2013, the Texas legislature became the first in the country to enact a "junk science writ," providing an avenue for individuals to challenge convictions that were based on now-discredited scientific evidence.[95] In 2015, the legislature expanded the grounds for relief under the writ from "new scientific evidence" **to include changes in scientific conclusions by a testifying expert**, in order to address cases where state experts had changed their expert opinions. Under the Texas statute, a habeas corpus petition may be considered if "relevant [and admissible] scientific evidence is currently available and was not available at the time of the convicted person's trial because [it] was not ascertainable through the exercise of reasonable diligence . . . before the date of or during the convicted person's trial."

California became the second state to enact a changed science writ, allowing individuals to challenge their convictions in state habeas beginning in 2014.[96] A California court may consider a petition that challenges material and probative false evidence that was introduced at trial. **False evidence** is defined as including "opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances."[97] With the passage of Senate Bill 467 in 2022, the definition of **false testimony** has expanded to include opinions based on flawed scientific research or outdated technology that is now unreliable or moot, and opinions about

93 *Id.* at 767.

94 *Id.*

95 Tex. Code Crim. Proc. Ann. art. 11.073.

96 Cal. Penal Code § 1473.

97 Cal. Penal Code § 1473(e)(1).

Case Example for Importance of

Changed Science Writs

1992 National Fire Protection Association ("NFPA") 921 created as an internal standard for fire investigations to challenge arson myths; not widely followed

1994 State trial: Defendant convicted of felony murder by arson; fire investigator testifies that the fire was started intentionally and maliciously by defendant jerry-rigging a toaster; does not follow NFPA 921

1995 State and federal appeals denied

2000 National Academy of Sciences and Department of Justice adopt NFPA 921 as guiding standard in fire science

2000–2010 Arson myths exposed

2013 Defendant files state post-conviction petition:
Newly discovered evidence: expert affidavits detail the change in arson science and alternative cause of fire
Ineffective Assistance of Counsel: The fire investigator did not follow the NFPA 921 requirements and defense counsel failed to object to the unreliable testimony of the fire investigator

2014 A state court finds **no newly discovered evidence—** NFPA 921 was available at the time of trial, even if not widely used, and affidavits do not suffice as newly discovered evidence. Court finds **no ineffective assistance of counsel** because pursued reasonable trial strategy.

2016–2020 State and federal appellate courts affirm: defendant has no relief because the changed science is not "newly discovered evidence," and the failure to challenge the faulty scientific evidence at trial is not ineffective assistance of counsel. No successful claim without a changed science writ.

*Possible different outcome if in 2013 defendant filed a "changed science writ" that the scientific trial evidence was unreliable. Example based on **Samuel Anstey v. Ballard**, 237 W.VA. 411 (2016)*

which a reasonable scientific dispute has emerged regarding its validity.[98]

Using changed science writs of habeas corpus, plaintiffs can challenge their convictions if the science in their case has changed significantly. Given the fluctuation and rapid development in various forensic fields, these petitions are particularly applicable for criminal convictions reliant on forensic evidence. Changed science writs provide an avenue for courts to examine the evidence today and make a substantive decision on the evidence itself. As the Ninth Circuit has opined, "recognizing [a due process claim] is essential in an age where forensics that were once considered unassailable are subject to serious doubt."[99] Other states that have adopted some form of changed science writs include Connecticut, Wyoming, Michigan, West Virginia, and Nevada.[100]

Changed science writs may also include relief for scientific evidence in other realms, such as eyewitness identification and false confessions. The Supreme Court has been reluctant to recognize and acknowledge scientific studies over the past forty years that demonstrate the unreliability of traditional eyewitness protocols; the Court has likewise abstained from requiring updated procedures for police and for courts in admitting the evidence.[101] However some states have independently established greater requirements for reliability by creating **state rules of evidence, state legislation enshrining best practices** for police protocols, and **state case precedent** for ensuring more accurate eyewitness identifications with police and in courtrooms. For states that have to date failed to recognize the changed science of eyewitness identifications and false confessions,[102] a changed science writ may free state courts to genuinely and substantively reevaluate scientific evidence.

B. Junk Science is False Evidence that Violates Due Process

A due process claim based on the state's use of now-discredited evidence at trial — "false evidence" — may be successful regardless of whether the state knew the evidence was unreliable.

A due process claim brought because false evidence was presented at trial may also be successful. The Second and Ninth Circuits and the State of Texas, for example, grant relief to a

98 Cal. S.B. 467, End Wrongful Convictions Act (2022). This bill was supported by the California Innocence Coalition, and championed by Senator Scott Wiener, 11th Senate District. See Fact Sheet Senate Bill 467 – End Wrongful Convictions Act https://ncip.org/wp-content/uploads/2022/03/SB-467-Fact-Sheet-.pdf.

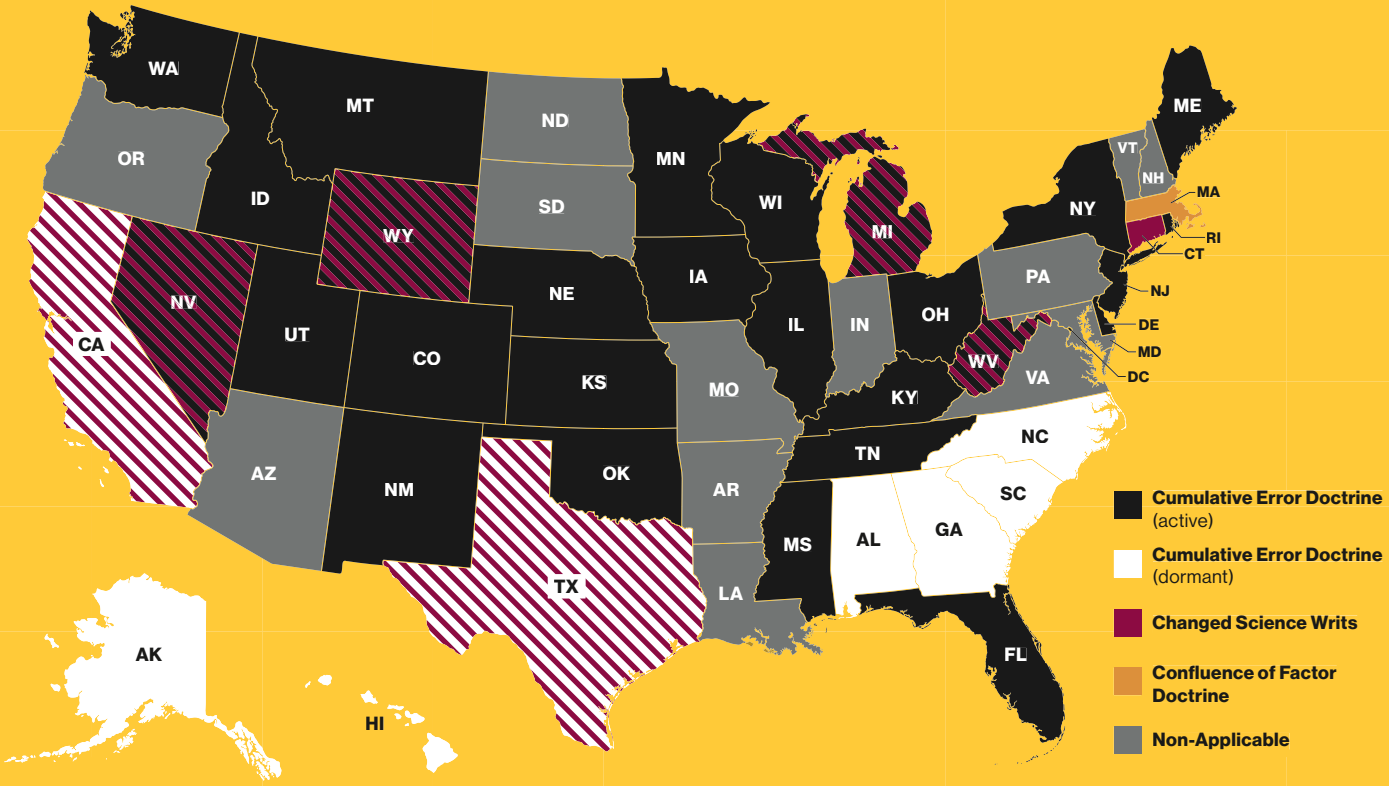
99 *Id.*

100 Beety, *Changed Science Writs and State Habeas Relief* at 526 ("In Connecticut, the state legislature passed a law in 2018 that removed the three-year time limit for a defendant to file a habeas petition based on new non-DNA evidence; this evidence can include scientific advancements, new guidelines, and expert recantations on forensic evidence. CONN. GEN. STAT. s. 52-582(a) (2019). In Wyoming the legislature passed the Post-Conviction Determination of Factual Innocence Act… WYO. STAT. ANN. ss. 7-12-401 to -407 (2019). In Michigan, petitioners may file a successive petition for relief based on scientific evidence and changed science. MICH. CT. R. 6.502(G)(2) - (3). In 2019, Nevada passed a law creating an avenue for people to present new, non-DNA evidence of factual innocence beyond two years after a conviction…includ[ing] relevant forensic evidence that was not available at trial or that materially undermines forensic evidence presented at trial."). In West Virginia, the legislature passed an act which allows for post-conviction habeas corpus review when "relevant forensic scientific evidence exists that was not available to be offered by a petitioner at the time of the petitioner's conviction or which undermines forensic scientific evidence relied on by the state at trial; and there is a reasonable possibility there would be a different outcome at trial." H.B. 2888, Leg. Reg. Sess. (W. Va. 2021) (https://perma.cc/QKT4-TTSZ).

101 See, e.g., *Perry v. New Hampshire,* 565 U.S. 228, 232–33, 235–36, 248 (2012) (holding that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement").

102 See, e.g., *Dassey v. Dittmann*, 877 F.3d 297, 300–01, 318 (7th Cir. 2017) (en banc) (reversing the district court's grant of habeas relief based on the Wisconsin state court finding that the defendant's confession was "voluntary").

Holistic Review of Evidence Standards



litigant who establishes that prosecutors used false evidence at trial, whether or not they knew the evidence was false. The Texas Court of Criminal Appeals in **Ex Parte Henderson** granted a new trial, stating that **regardless of whether the prosecutor was aware** of the reliability of the evidence, **use of now-discredited evidence by the state is a due process violation.**[103] Although it was a per curiam opinion, eight justices issued or joined differing concurrences and dissents. The Second and Ninth Circuits have held the same.[104] The Ninth Circuit correlated "a conviction based in part on false evidence" as incompatible with "fundamental fairness," and entitling the defendant to a new trial "if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different."[105] Importantly, the Third Circuit in **Lee v. Glunt** discussed how a conviction based on now-invalidated scientific evidence violates the defendant's due process rights, regardless of whether one could have known at trial that the science was imperfect.[106]

103 *Ex parte Henderson*, 384 S.W.3d at 834 (per curiam).

104 See United States v. Young, 17 F.3d 1201, 1203–04 (9th Cir. 1994); Sanders v. Sullivan, 863 F.2d 218, 224 (2d Cir. 1988).

105 Id. (citing United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989)).

106 Lee v. Glunt, 667 F.3d 397, 407 (3d Cir. 2012).

V. Racial Bias Claims in Jury Selection and Sentencing

Racial bias is so interwoven into the criminal legal system, it is axiomatic that it plays an outsized role in the wrongful convictions of innocent people. Indeed, Black people make up 53% of exonerations even though they are only 13% of the population.[107] Black people who are convicted of murder are about 80% more likely to be innocent than other convicted murderers.[108] As noted above, given that official misconduct is a factor in 70% of death penalty eligible murder convictions later proven to be wrongful convictions, official misconduct touches the cases of Black and Brown defendants in a spectacularly dramatic (and horrific) fashion.

A. The Racist Superpredator Myth: False Information Requiring Resentencing

If a sentencing court relied on racist myths – such as the superpredator myth – a petitioner may successfully challenge their wrongful sentence as a due process violation.

In January 2022, the Connecticut Supreme Court reversed Keith Belcher's 60-year sentence, imposed when he was a teenager, for sexual assault and armed robbery committed when he was 14 years old.[109] Belcher had moved to correct his sentence on the basis that **his sentence was imposed in an illegal manner violative of due process:** the sentencing judge had **relied on materially false information** by adopting the **discredited, false, and racist superpredator myth** and applying it to Mr. Belcher in imposing his sentence. Procedurally, Mr. Belcher was able to get back into court via a statute passed by Connecticut in the wake of the various Supreme Court decisions identifying the unique vulnerability of juveniles, which required courts to consider the **Miller** factors including age when sentencing a juvenile. Mr. Belcher raised various claims including the one regarding the court's reliance on the false superpredator myth in sentencing.[110]

107 Gross, et al., *Government Misconduct and Convicting the Innocent*, at 1. These figures also show disproportionate presence among Hispanics and Native Americans. *Id.*

108 *Id.*

109 *State v. Belcher*, 342 Conn. 1, 4 (2022).

110 *Id.* at 6-7.

The court noted that, historically, challenges to sentences as illegal for relying on false information had frequently arisen when "the court relied on factually inaccurate information in a presentence investigation report in imposing a defendant's sentence."[111] The court recognized "that there is a distinction between the inaccuracy of facts set forth in a report and the falsity of a theory. Both share, however, the core defect that renders a sentence illegal—in each instance, the sentencing court has relied on something that is not true.

In the present case, we believe that the phrase 'false information' is the best fit for the sentencing court's reliance on a false theory."

At Mr. Belcher's sentencing, the court made the following remarks, which formed the basis of the illegal sentence claim:

> To say that the conduct here was extremely serious and egregious is simply to understate the facts of what happened. The conduct here was just so inhumane as to be considered subhuman. This is despite the fact that, as disclosed in the [PSI], [the defendant's] ... testing shows average intelligence. He could have chosen another lifestyle, even at his very young age, but deliberately chose not to. **Professor [John J.] Dilulio of Princeton University has coined the term 'superpredator,' which refers to a group of radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize. Mr. Belcher, you are a charter member of that group.** You have no fears, from your conduct, of the pains of imprisonment; nor do you suffer from the pangs of conscience. I agree with [the prosecutor], the probation officer, and the victim, who, incidentally, still suffers physically and psychologically from your conduct, who all ask for substantial incarceration to ensure the safety of the community.[112]

The lower court rejected Mr. Belcher's argument, finding that the superpredator theory did not constitute "information," and finding the theory "descriptive" rather than "factual." The court went on to find that even though it was subsequently discredited, at the time of the sentence it was reasonable to rely on it. Finally, the court found that even though the theory had been discredited, the defendant "fit the definition of a 'superpredator' regardless of the truth of the theory" and that the sentencing court would have imposed the same sentence even if the superpredator myth had been repudiated by its creator, Prof. Dilulio, before Mr. Belcher's sentencing.

The Connecticut Supreme Court, applying an abuse of discretion standard, reversed the lower court. First, the court reviewed the superpredator theory and its history and found that both demonstrated that **"the theory constituted materially false and unreliable information."**[113] This review included a discussion of **the superpredator theory's racist core**, addressing the history of the superpredator myth and its relationship to the country's history of racial oppression and the demonization of Black Americans and of Black children and youth in particular. It also examined the **research data and empirical analysis** that "quickly demonstrated that

111 *Id.* at 4 n.2.

112 *Id.* at 10-11 (emphasis in original).

113 *Id.* at 13.

Exonerations By Race Of Defendant And Type Of Crime

N = 3,200 Source: National Registry of Exonerations

TYPE OF CRIME	BLACK	WHITE	HISPANIC	OTHER
Murder (1,167)	55%	32%	12%	2%
Sexual Assault (350)	59%	33%	7%	1%
Child Sex Assault (310)	28%	60%	10%	2%
Robbery (151)	64%	19%	15%	2%
Other Violent Crimes (342)	39%	42%	13%	6%
Drug Crimes (554)	69%	16%	14%	1%
White Collar (77)	10%	79%	3%	8%
Other Non-Violent Crimes (249)	52%	28%	16%	5%
ALL CRIMES	53%	33%	12%	2%

the superpredator theory was baseless."[114] Finally, the court noted that in 2001 the U.S. Office of the Surgeon General labeled the superpredator theory a myth.

The court applied this factual background and context to Mr. Belcher's case:

> In the context of the sentencing of the defendant, a Black teenager, the court's reliance on the materially false superpredator myth is especially **detrimental to the integrity of the sentencing procedure** for two reasons. First, **reliance on that myth invoked racial stereotypes**, thus calling into question whether the defendant would have received as lengthy a sentence were he not Black. Second, the use of the superpredator **myth supported treating the characteristics of youth as an aggravating, rather than a mitigating, factor...** turn[ing] upside down the constitutional mandate of **Roper** and its progeny.

***

In summary, by invoking the superpredator theory to sentence the young, Black male defendant in the present case, the sentencing court, perhaps even without realizing it, **relied on materially false, racial stereotypes that perpetuate systemic inequities—demanding harsher sentences—**that date back to the founding of our nation. In addition, **contrary to Roper and its progeny**, in relying on the superpredator myth, the sentencing court **counted the characteristics of youth as an aggravating factor** against the defendant. Although we do not mean to suggest that the sentencing

114 *Id.* at 14.

> judge intended to perpetuate a race-based stereotype, we cannot overlook the fact that the superpredator myth is precisely the type of materially false information that courts should not rely on in making sentencing decisions. Whether used wittingly or unwittingly, **reliance on such a baseless, illegitimate theory calls into question the legitimacy of the sentencing procedure and the sentence**.[115]

The Connecticut Supreme Court ultimately directed the lower court to grant Mr. Belcher's motion to correct an illegal sentence and re-sentence him.

B. Racism in Jury Selection: A New Avenue to Review

Implicit bias in jury selection – and juror removal – can be the basis of a successful due process claim to reverse a conviction.

A recent New Jersey Supreme Court decision, **State v. Andujar**, opens the door to a reconsideration path that may not be seen as immediately related to a post-conviction claim.[116] In **Andujar**, defendant Edwin Andujar, who did not plead actual innocence, argued that he was denied the right to a fair trial because racial discrimination infected the jury selection for his murder trial.[117]

The appeal centered on the juror selection process for F.G., a Black male from Newark. F.G. was questioned at sidebar for about a half hour, after which the court found that he could be a fair and impartial juror. F.G. volunteered answers to multiple voir dire questions, including having two cousins in law enforcement and knowing "[a] host of people" who had been accused of crimes -- five or six close friends in all. In providing details about those accusations, F.G. used terms like "CDS" and "trigger lock." F.G. also told the court about three crime victims he knew. He said that two cousins had been murdered, and a friend had been robbed at gunpoint. F.G. was asked if anything he had said would have an impact on him as a juror. F.G. suggested that he, like every other juror, has a unique background and perspective, which is why defendants are judged by a group. After additional questions, F.G. was asked whether the criminal justice system was fair and effective; F.G. responded, "I believe so because you are judged by your peers." **The State challenged F.G. for cause and asked that he be removed.** The prosecutor noted that F.G. "has an awful lot of background" and "uses all of the lingo about, you know, the criminal justice system." A second prosecutor voiced concern that because F.G.'s "close friends hustle, engaged in criminal activity . . . [t]hat draws into question whether [F.G.] respects the criminal justice system" and his role as a juror. In response, defense counsel from the Office of the Public Defender stated that "it is not a hidden fact that living in certain areas you are going to have more people who are accused of crimes, more people who are victims of crime," and that "to hold it against [F.G.] that these things have happened . . . to people that he knows . . . would mean that a lot of people from Newark would not be able to serve."[118]

The trial court denied the State's motion, explaining that "[e]verything [F.G.] said and the way he said it leaves no doubt in my mind that he . . . does not have

115 *Id.* at 16-17, 22-23.

116 *State v. Andujar,* 247 N.J. 275 (2021).

117 *Id.* at 283. It should be noted that any attempt at proving a wrongful conviction claim on this basis may be time-barred. However, if this issue is only determined years later (through, e.g., juror interviews, etc.) then there may be a wider road for introduction.

118 Stenographic Transcript of Jury Selection Vol One, A.M. Session at 97, *State v. Andujar*, 462 N.J.Super. 537 (2020) (No. A-000930-17-T1).

any bias towards the State nor the defense . . . I think he would make a fair and impartial juror."[119]

After the court's ruling to keep F.G. on the jury, **the prosecution ran a criminal history check on F.G.** The next day, the court revealed that the prosecutor "came to see me yesterday" and there were "warrants out for F.G." and "[t]hey were going to lock him up." Defense counsel noted there was **"one warrant out of Newark Municipal Court."[120] The State renewed its application to remove F.G. for cause**. When the court asked for the defense's position, counsel responded, "I don't oppose the State's application."[121] Defense counsel then expressed concern about tainting the jury and added, "I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants."[122] The prosecutor replied that "the State is not in the habit of . . . looking at a random juror's" criminal history, and reiterated concerns the State had voiced the day before to explain why it ran a background check.[123] The prosecutor denied that racial bias played a role in the State's application to remove F.G. for cause. Defense counsel then placed on the record a "concern that the State doesn't typically check people out, but in this case, they did single someone out to check for warrants." Defense counsel asked the court to award the defendant one additional peremptory challenge, arguing that the State had an unfair advantage in that it could access databases to run a criminal history check, but the defendant could not. Defense counsel also noted that the State's "target[ing]" of F.G. "implicates due process concerns... regarding [F.G.'s] rights to sit on a jury."[124] The jury convicted Andujar.[125]

In its decision on appeal, the **New Jersey Supreme Court held**, "Courts, not the parties, oversee the jury selection process," and found that **"any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge."** [126] In addition to finding that none of these basic criteria were met, the Court noted that "[b]ased on all of the circumstances, we infer that **F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State**, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can."[127] While the court found the defense's objection to the prosecutor's use of the criminal background check to be feeble, imprecise, and untimely, it noted

119 Id. at 98.

120 Stenographic Transcript of Jury Selection at 49, *State v. Andujar*, 462 N.J.Super. 537 (2020) (No. A-000930-17-T1).

121 *Id.*

122 *Id.* at 65

123 *Id.*

124 *Id.* at 90. It is important to note this additional back and forth between defense counsel and the prosecutor:
MS. THOMPSON [defense counsel]: Your Honor, I think the State's position is untenable in the sense that it means that no black man in Newark would be able to sit on this jury.
MS. MILLER [prosecutor]: I have a problem with that statement, and it is really baseless. It is not a fair comment to make at all.
MS. THOMPSON: Okay, I'm sorry, take that back about race --
MS. MILLER: I didn't mention his race whatsoever.

125 For his part, F.G. was asked to wait in the hallway, whereupon he was arrested and taken to the jail in the basement of the courthouse, despite the fact that his "history did not disqualify him from jury service." *Andujar*, 247 N.J. at 312. The outstanding charges, which had never been pursued, were dropped two months later.

126 *Andujar,* 247 N.J. at 284.

127 *Id.*

that "we cannot ignore the **evidence of implicit bias** that appears in the extensive record. Under the circumstances, we find that defendant's right to be tried by an impartial jury, selected free from discrimination, was violated. We therefore reverse his conviction and remand for a new trial."[128]

Here, the uneven sharing of information about a juror by the state abused fundamental notions of fairness regarding due process protections afforded to criminal defendants. While that abuse alone was sufficient to undermine the validity of the conviction, the additional presence of implicit or unconscious bias on the part of the State violated the defendant's right to be tried by an impartial jury. The State assumed that a Black potential juror with friends and family who had touches with the criminal justice system was incapable of having respect for that system; this was sufficient to reverse a conviction.

Implicit bias in a pre-trial proceeding became the constitutional basis for a legal innocence claim on appeal.

More importantly, that finding of implicit bias also became the basis for a Judicial Conference on Jury Selection to explore the nature of discrimination in the jury selection process, thus setting the stage for repair of bias within the system responsible for harsh or unjustified convictions in a state that leads the nation for racial disparities in prisons. Constitutional protections are again a seminal tool for addressing miscarriages of justice.

C. Racism By State Officials: Prosecutor-Initiated Case Reviews

Racist behavior by judges and law enforcement can lead to prosecutor-initiated reviews of touched cases.

128 *Id.*

Racially motivated misconduct does not sidestep the judiciary. A particularly egregious example is reflected in the behavior of former Louisiana state judge Michelle Odinet. Odinet was previously an assistant district attorney in New Orleans under the notoriously racist administration of longtime District Attorney Harry Connick, Sr., and a public defender in Lafayette, Louisiana. In November 2020, Odinet was elected as a Lafayette City Court judge. In December 2021, Odinet's own home security cameras recorded her repeatedly using a racial epithet to describe a Black man, whom she also likened to a roach, who may have broken into a car.[129] Odinet had a record peppered with overturned convictions. **Orleans Parish District Attorney Jason Williams' civil rights division launched a review of all cases that Odinet had prosecuted while she worked in New Orleans** in the mid-1990s. Odinet resigned from her position on the bench on January 1, 2022.

Similarly, Middlesex County District Attorney Marian Ryan in Massachusetts is "thoroughly reviewing any pending or closed cases" involving police officer John Donnelly, an officer in Woburn Massachusetts.[130] Donnelly had participated in the white supremacist Charlottesville, Virginia rally in August 2017, which culminated in the death of a counter-protester when a neo-Nazi drove his car into a crowd of counter-protesters. Donnelly served as a bodyguard at the rally for a prominent white supremacist and participated in planning the events.

The **New England Innocence Project** played a crucial role in **calling on the District Attorney to not only review cases, but to dismiss all cases and vacate all convictions** connected with Officer Donnelly.[131] The District Attorney has affirmatively stated the office is disclosing the review to defense counsel on the relevant cases.

129 Jaclyn Peiser, *A Video Filled with Racist Slurs was Taken at a Louisiana Judge's Home. She Apologized and Went on Unpaid Leave*, WASH. POST (Dec. 16, 2021) (https://perma.cc/3DJ8-W45C).

130 Christopher Mathias, *District Attorney to Review All Cases Handled by Cop Who Planned Charlottesville Nazi Rally*, HUFFINGTON POST (Oct. 14, 2022) (https://perma.cc/9YAU-A682).

131 The NEIP's statement included, "There is no integrity in a system that relies on [Donnelly's] credibility, judgment, or fairness. Nothing he has said or done in the job can be sufficient to bring criminal consequences to someone else."

VI. Claim to Review Multiple Errors Together as a Miscarriage of Justice: Holistic Review of the Evidence

A holistic review of the evidence standard in post-conviction litigation empowers a judge to consider all claims and all evidence together, including race and gender bias, acknowledging how individual factors in a case influence each other, and moving beyond the individual claim and harmless error standard.

Even after discovering evidentiary errors, **barriers to post-conviction relief** persist. These barriers include individual error review, harmless error, and the prohibition against raising successive claims (multiple errors are often discovered sequentially rather than at the same time). Taken singly, one by one, each error may be insufficient to meet the burden of proof on the client and thus to reverse the conviction. **Courts often simply refuse to consider the entirety of the errors** that were committed, and the result is denial of relief.

Research from a range of disciplines shows why this piecemeal approach is wrong. For example,

Holistic Review of the Evidence

Reviewing multiple errors together

Barriers to Post-Conviction Relief:	Problematic Because:	Overcoming Those Barriers with a Holistic Review of the Evidence Standard:
• Individual error review • Harmless error review • Prohibition against raising successive claims	• Evidentiary errors influence each other • Misconduct can occur at multiple stages	• Massachusetts **Confluence of Factors Doctrine** • AL, AK, CA, CO, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, MN, MI, MS, MT, NE, NV, NJ, NM, NC, OH, OK, RI, SC, TN, TX, UT, WA, WV, WI, WY: **Cumulative Errors Doctrine** • 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th Circuits: **Cumulative Error Doctrine** • 4th, 6th Circuits: AEDPA **"Evidence as a whole"**

research on the contributing causes of wrongful convictions shows that, in known DNA exonerations, many cases involved multiple types of evidentiary errors. Similarly, research on the ways in which the criminal legal system is impermissibly infected by racial bias shows that Black defendants, and other defendants of color, are treated disparately at nearly every inflection point in their case, from arrest, to charging, through sentencing.[132] While research on prosecutorial misconduct has struggled to detail all of the ways in which a prosecutor's misconduct infects a trial or trials, it is not unreasonable to assume that an officer of the court who is willing to engage in one form of misconduct (e.g., intentionally hiding **Brady** material) would also be willing to engage in other forms of misconduct (e.g., witness tampering). Moreover, research has shown that not only can multiple errors occur in a single case, but that those multiple errors affect each other and affect the factfinder's perception of the case.[133]

Thus, the traditional approach to evaluating errors singly is inconsistent with what we know to happen when a manifest injustice has occurred.

At least in those cases where the defendant is factually innocent, a wrongful conviction by definition means that every piece of evidence presented in support of the conviction is false, faulty, or flawed in some way.

Thus, advocating for a **holistic review of the record** can be an effective way to challenge

132 NAZGOL GHANDOOSH, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM (Feb. 3, 2015).

133 Stephanie Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 372-73 (2018) (https://perma.cc/4GQ8-NA5Y).

and reverse convictions where multiple factors, either individually or in confluence, may have contributed to a miscarriage of justice — whether because the defendant was factually innocent, because the conviction was obtained in violation of the defendant's constitutional rights, or some combination of the two. This review can acknowledge how wrongful convictions are tied to racism, police and prosecutor misconduct, over-sentencing, and false evidence. **Holistic review of the evidence empowers a judge to consider the law, facts (both old and new), and the circumstances surrounding a case and to declare a conviction, or a sentence, unjust.**

The legal system prioritizes finality and prefers a simple contained narrative. The story is considered over once the person is convicted and labeled as guilty. To reverse that conviction, to free someone from prison, is to be able to **tell a full and complete story** and overcome a legal bar that is dauntingly high, even for "perfect" defendants.

Using a holistic review of the evidence method allows a litigator to share a broader story of the case and a judge to reframe their own view – to focus on doing justice in the case before them as opposed to legal doctrine. Instead of evaluating each claim for whether it is individually harmless error, a holistic review allows the court to examine how individual factors in a case influence each other. The more comprehensive the story about the case, the more we can see whether the conviction is an injustice. This approach also acknowledges the reality that most post-conviction litigation is pro se and occurs under strict limitations periods, meaning that new claims are often necessarily brought to the court's attention in a piecemeal manner.

A holistic review of the evidence standard can also be called a **confluence of factors analysis, evidence as a whole, and cumulative error**. These standards may differ slightly and will be taken in turn below.

A. Confluence of Factors Analysis and Miscarriage of Justice – Massachusetts

Under the Massachusetts confluence of factors review, a motion judge looks beyond the individual grounds for post-conviction relief to assess whether, in light of the record as a whole, a number of factors acting together create a "substantial risk of a miscarriage of justice."

To consider the full story and to better advance the interests of justice purported to underlie the procedural process for seeking a new trial, some state courts have adopted a review process called a **confluence of factors analysis**. Massachusetts is the leading state in applying this standard in post-conviction review. This approach means that when a defendant files a motion for a new trial (the standard process in Massachusetts), **the court holistically looks at trial errors and evidence as a flexible confluence of factors, to determine whether a conviction was wrongful and whether justice may not have been done, instead of haphazardly reviewing individual errors**.[134] Importantly, this standard allows the court to consider old and new evidence of innocence in the aggregate, alongside claims that have already been raised and presumably rejected or at least found insufficient, on their own, for relief.

The court can examine and rule based on the aggregate influence of many errors, from investigation, through trial, to post-conviction. The approach accounts for forensic and investigative errors, and

134 *Commonwealth v. Rosario*, 477 Mass. 69, 78 (Mass. 2017).

Massachusetts Confluence of Factors Doctrine

a **cascade where one error infects the rest of the evidence**, leading to other errors. These errors can affect the overarching investigative process, and can affirm confirmation bias – where prosecutors and police only take into account evidence that supports their case. This approach also allows a motion judge to grant relief based on the combined effect of newly discovered evidence, official misconduct, errors by defense counsel, and constitutional and non-constitutional judicial error even when post-conviction counsel cannot establish all of the elements for any one of those grounds. After reviewing the record as a whole, the court can reverse because of "the substantial risk of a miscarriage of justice."[135] Under this review, a court may also examine racial bias and gender bias in court proceedings, whether or not all of the elements of a constitutional violation can be established.

The phrase "confluence of factors" first appeared in **Commonwealth v. Brescia**, where the trial judge granted a new trial based on the "nearly unique facts of [the] case" – the defendant had suffered an undiagnosed stroke mid-way through testifying.[136] The SJC affirmed the allowance of a new trial without finding any constitutional error or that the standard for post-conviction relief based on newly discovered evidence was met. Noting that "extraordinary fact patterns can frustrate even the most meticulous efforts to do justice," the Court held that in such cases judges must exercise their broad discretion to make a "case-by-case" determination of whether the trial

135 *Commonwealth v. Rosario*, 477 Mass. 69, 78 (Mass. 2017).

136 471 Mass. 381, 396 (Mass. 2015) ("The fairness of the defendant's trial was hampered by an extraordinary confluence of factors.")

was fair.[137] The Court advised that the "latticework" of standards for post-conviction relief developed in its prior decisions "have not eclipsed the broader principle that a new trial may be ordered if it appears that justice may not have been done."[138]

In a post-conviction Shaken Baby Syndrome case the following year, the Court considered but did not decide whether a new trial was required because of evolving science alone or trial counsel's failure to obtain a defense expert alone. Instead, citing **Brescia**, the Court affirmed the new trial order because "the confluence of counsel's performance and evolving scientific research" created a substantial risk of miscarriage of justice."[139]

The Massachusetts high court elaborated on its confluence of factors analysis in **Commonwealth v. Rosario**.[140] The motion judge granted Rosario a new trial based on a "totality of circumstances" – newly discovered arson science and evidence undermining the voluntariness of his confession – no one of which the court found sufficient on its own for post-conviction relief. Rosario's post-conviction attorneys at the **CPCS Innocence Program** and co-counsel argued that "the unique confluence of arson science and the confession in this case presents the very sort of 'extraordinary fact pattern' contemplated … in **Brescia**," and an amicus brief by the **Boston College Innocence Program, the New England Innocence Project**, and the Innocence Project urged the SJC to use the case to provide guidance to motion judges on how to evaluate the "confluence of factors" in light of the record as a whole, in lieu of "piecemeal review." The SJC affirmed the new trial order "based on the totality of the judge's findings and the 'confluence of factors' analysis developed subsequent to her decision in this case."[141] Examining the faulty fire science evidence alongside irregularities in the interrogation and likelihood of a false confession, the Court held that the **"confluence of factors combined to create a substantial risk of a miscarriage of justice."[142]**

Confluence of factors analysis **resists the historic "harmless error" review of constitutional error**. The case of Frances Choy is another recent example.[143] After two mistrials, Choy was wrongly convicted of arson and murder. The **Boston College Innocence Program** and co-counsel raised 15 grounds for post-conviction relief, including new evidence of factual innocence, faulty forensics, false confession, police and prosecutorial misconduct, ineffective assistance of counsel, and judicial error. One of their arguments was that explicit racial and gender bias expressed by trial prosecutors in emails they sent within their office over the course of eight years, as well as the three trials, constituted structural constitutional error requiring automatic reversal of Choy's convictions without any need to demonstrate how their racial and gender bias impacted the trial. While

137 *Id.* at 391.

138 *Commonwealth v. Brescia*, 471 Mass. 381, 388-89 (2015) ("if it appears that justice may not have been done, the valuable finality of judicial proceedings must yield to our system's reluctance to countenance significant individual injustices.").

139 *Epps*, 474 Mass. At 767. In a footnote, the SJC added, "we recognize that we can cite no case presenting the unusual circumstances found here that would justify such an analysis." *Id.* at 768.

140 477 Mass. 69 (2017).

141 *Id.* at 78-79 ([I]n rare cases, in order to fulfill the obligation incorporated in Mass. R. Crim. P. 30 (b) to determine whether "justice may not have been done," a trial judge may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial. See Brescia, 471 Mass. At 389-390, 391 n.11. See also Epps, 474 Mass. At 767-768.").

142 *Rosario*, 477 Mass. At 607.

143 *Commonwealth v. Choy*, 2020 WL 10053106 (Mass. Super. Sept. 17, 2020).

the motion judge, who was also the trial judge, did not reach this constitutional question, her memorandum of decision vacating Choy's convictions stated that, had she been aware of the trial prosecutors' "racially and sexually derogatory emails" at the time of the trial, she would have declared a mistrial. The court's ruling vacating Choy's convictions specified that the trial prosecutors' "intentional racial bias" was part of the confluence of factors underlying the court's conclusion that "justice may not have been done" in Choy's case.[144]

B. Cumulative Error – State Courts

High courts in 27 states and the District of Columbia actively recognize the doctrine of cumulative error and have used the doctrine to reverse convictions; high courts in 8 states have accepted cumulative error as a doctrine but not yet reversed a conviction based on it.[145]

High courts in 32 states and the District of Columbia recognize and accept the doctrine of cumulative error, where even if the errors **individually** are insufficient to reverse a conviction, **together** they constitute more than "harmless error."[146] These states are split on whether they have applied the doctrine to reverse a conviction. Our guide labels the states that have reversed a conviction as "active" and those that have not yet reversed a conviction as "dormant."

This guide also gathers court decisions based on direct appeal as well as court decisions on post-conviction review; this section provides examples of the development of this doctrine in state courts.

1. New Jersey

In New Jersey, the state's cumulative error review originated in a 1954 case, **State v. Orecchio**, when the New Jersey Supreme Court held that "[w]here, however, the legal errors are of such magnitude as to prejudice the defendant's rights or, **in their aggregate have rendered the trial unfair**, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury."[147] The New Jersey Supreme Court reaffirmed this standard in 2008, **State v. Jenewicz**, by stating, "We have recognized in the past that **even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal."**[148] In **Jenewicz**, the Court declared that "[t]he thematic effect of those errors requires that they be evaluated cumulatively . . . So viewed, the errors had a disproportionately harmful effect in defendant's trial than they would have, had each been examined individually."[149] The Court ultimately held that "the errors' cumulative impact prejudiced the fairness of defendant's trial," and

144 *Id.*

145 *See* Appendix 1. States where defendants have actively and successfully used cumulative error to reverse a case are: Colorado, Delaware, D.C., Florida, Idaho, Iowa, Kansas, Kentucky, Illinois, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.
The following states recognize the cumulative error doctrine, but courts have not yet used cumulative error to overturn a conviction: Alabama, Alaska, California, Georgia, Hawai'i, North Carolina, South Carolina, and Texas.

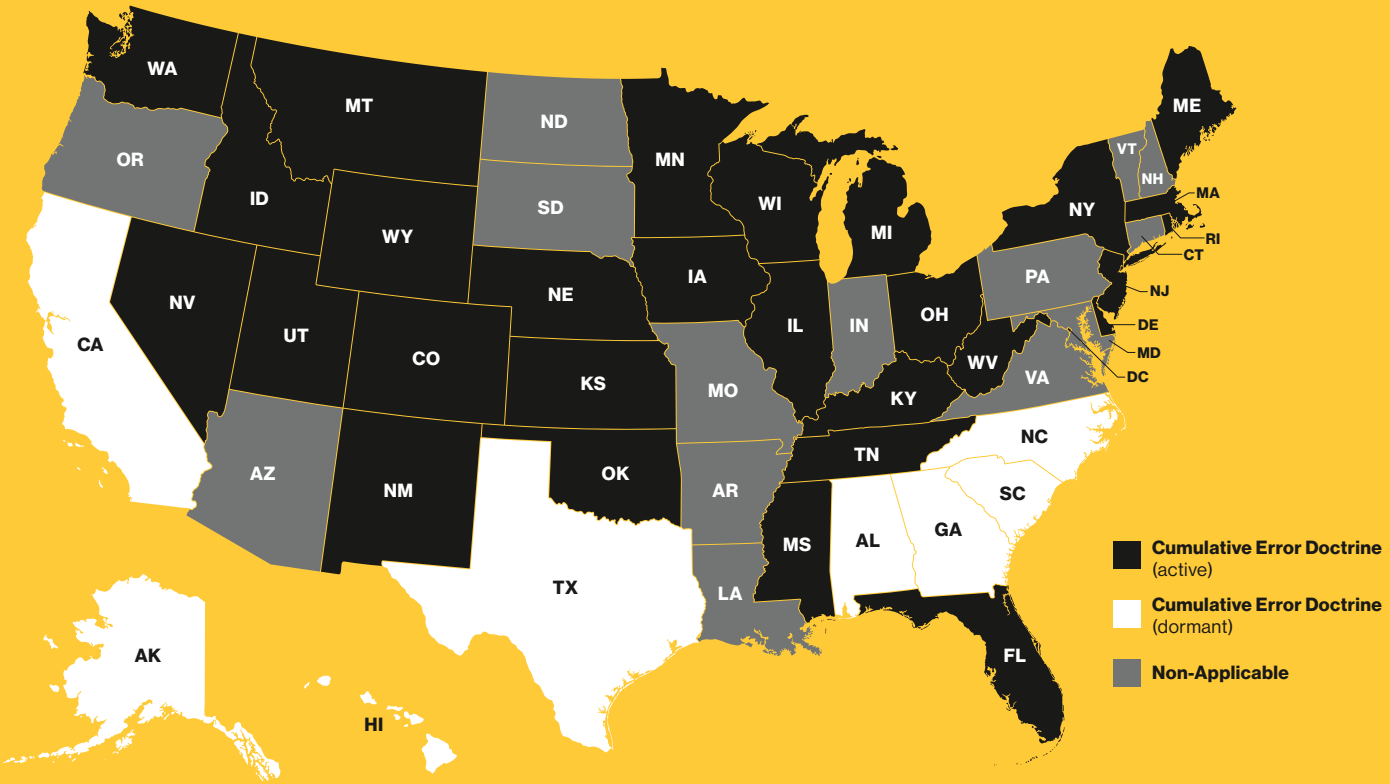
146 This Guide does not include states that have essentially nullified the claim of cumulative error by finding that each individual error must be itself more than harmless error for the doctrine of cumulative error to apply.

147 *State v. Orecchio*, 16 N.J. 125, 129 (1954).

148 *State v. Jenewicz*, 193 N.J. 440, 473 (2008) citing *State v. Koskovich*, 168 N.J. 448, 540, 776 (2001) (holding that cumulative error warranted reversal of death sentence regardless of whether any individual error warranted reversal).

149 *Jenewicz*, 193 N.J. at 474.

Cumulative Error Map by State



reversed the conviction.[150] Most recently in **State v. Garcia**, the New Jersey Supreme Court held that errors cumulatively amounted to plain error.[151]

2. Illinois

The Illinois Supreme Court has held "that cumulative errors occurring at trial deprive defendant of his due process right to a fair trial," citing the United States and Illinois Constitutions.[152] "When an error arises at trial that is of such gravity that it threatens the very integrity of the judicial process, the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected. Critically, the court will act on plain error regardless of the strength of the evidence of defendant's guilt."[153] For example, in **People v. Blue**, a capital murder case, the court found improper admission of a bloody police uniform, improper argument of a message to the victim's family and the Chicago Police Department, and prosecutorial misconduct in

150 *Id.*

151 *State v. Garcia*, 245 N.J. 412 (2021).

152 *People v. Blue*, 189 Ill. 2d 99, 104 (2000), citing U.S. Const., amend. XIV, § 1; Ill. Const.1970.

153 *Blue* at 53, citing *People v. Green*, 74 Ill.2d 444, 455 (1979) (Ryan, J., specially concurring). *See also People v. Whitlow*, 89 Ill. 2d 322, 342 (1982) ("The State next contends that, even if the comments were prejudicial, they constituted harmless error in light of the overwhelming evidence of the defendants' guilt. It has been held that improper comments may warrant a reversal of the conviction, even where there is considerable evidence against the accused.").

testifying objections and violating the advocate-witness rule: **errors that "assumed a synergistic effect."**[154] Most recently, an Illinois Appellate Court held in **People v. Sims** that "[w]here errors are not individually considered sufficiently egregious for an appellate court to grant a defendant a new trial, but **the errors**, nevertheless, **create a pervasive pattern of unfair prejudice to the defendant's case**, a new trial may be granted on the ground of **cumulative error**."[155]

3. Kentucky

Kentucky is an example of a state where, even if the errors need not be individually sufficient to reverse the conviction, the individual errors must nevertheless be substantial under the state's cumulative-error doctrine.[156] **"Multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair... We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial."**[157]

C. Cumulative Error – Federal Court

The Second, Fifth, Eighth, Ninth, and Tenth Circuits have reversed convictions by finding that cumulative error may not be "harmless error," even if the errors are deemed so individually, because of their combined influence on the jury and the outcome at trial.[158]

Federal courts have also examined petitions for post-conviction relief, as well as cases on direct appeal, through cumulative error review. Five U.S. Courts of Appeals have actively recognized the doctrine of cumulative error and reversed a conviction on this basis; three U.S. Courts of Appeals have accepted the doctrine, but not yet reversed a conviction.

The Second, Fifth, Eighth, Ninth, and Tenth Circuits have reversed convictions based on cumulative error. The Tenth Circuit has explained the basis in federal law for a cumulative effect analysis of harmless error.[159] In **United States v. Rivera**, the court found that a cumulative effect analysis of multiple errors is "**an extension of the harmless-error rule**, which is used to determine whether an individual error requires reversal" citing the federal harmless-error provisions of 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a).[160] Put plainly, "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility."[161]

The Ninth Circuit, likewise, has held that "[a]lthough each of the above errors, looked at separately, may

154 *Blue*, 189 Ill.2d at 139.

155 *People v. Sims*, 139 N.E.3d 186, 199 (Ill. App. 3d Dist. 2019).

156 *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992) ("We have held that each of the errors discussed in Parts I, II and III of this Opinion are so prejudicial that a reversal and remand is required. We further agree with the appellant, that if each of these errors were not, in and of itself, sufficient to require a reversal, the cumulative effect of the prejudice from all three would certainly so require.").

157 *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010).

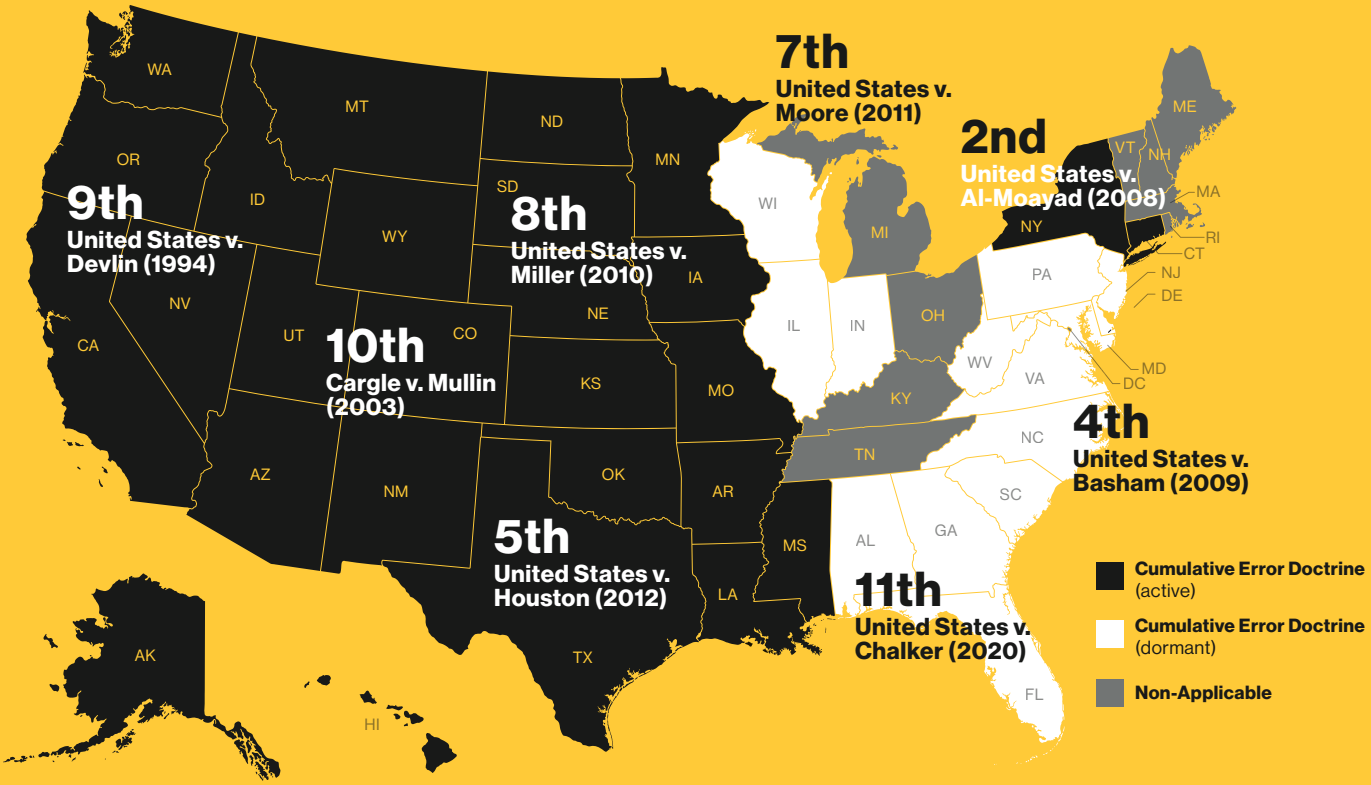
158 Circuits that have actively and successfully used cumulative error to reverse a case are: 2nd (*United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008)); 5th (*United States v. Houston*, 481 F. App'x 188 (5th Cir. 2012)); 8th (*United States v. Miller,* 621 F.3d 723 (8th Cir. 2010)); 9th (*United States v. Devlin*, 13 F.3d 1361 (9th Cir. 1994)); 10th (*Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003)).

159 *Rivera*, 900 F.2d at 1469.

160 *Id.*

161 *Id.*

Cumulative Error Map by Circuit



not rise to the level of reversible error, **their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted.**"[162]

The Third, Fourth, Seventh, and Eleventh Circuits have recognized the doctrine of cumulative error, but not yet reversed a conviction on this basis.[163] In the Third Circuit Court of Appeals decision **Marshall v. Hendricks**, the court, although ultimately denying relief, analyzed the claimed errors in combination, noting **"errors that individually do not warrant a new trial may do so when combined."**[164] The Third Circuit reified the cumulative error test in **Albrecht v. Horn**, relying on **Marshall v. Hendricks**.[165] In applying the Supreme Court's established standard

162 *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988). *See also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors."); *United States v. Dave*, 314 F.Appx. 40 (9th Cir. 2008).

163 The following circuits recognize the cumulative error but have not yet used cumulative error to overturn a conviction: 3rd (*Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002)); 4th (*United States v. Basham*, 561 F.3d 302 (4th Cir. 2009)); 7th (*United States v. Moore*, 641 F.3d 812 (7th Cir. 2011)); 11th (*United States v. Chalker*, 966 F.3d 1177 (11th Cir. 2020)).

164 *Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002).

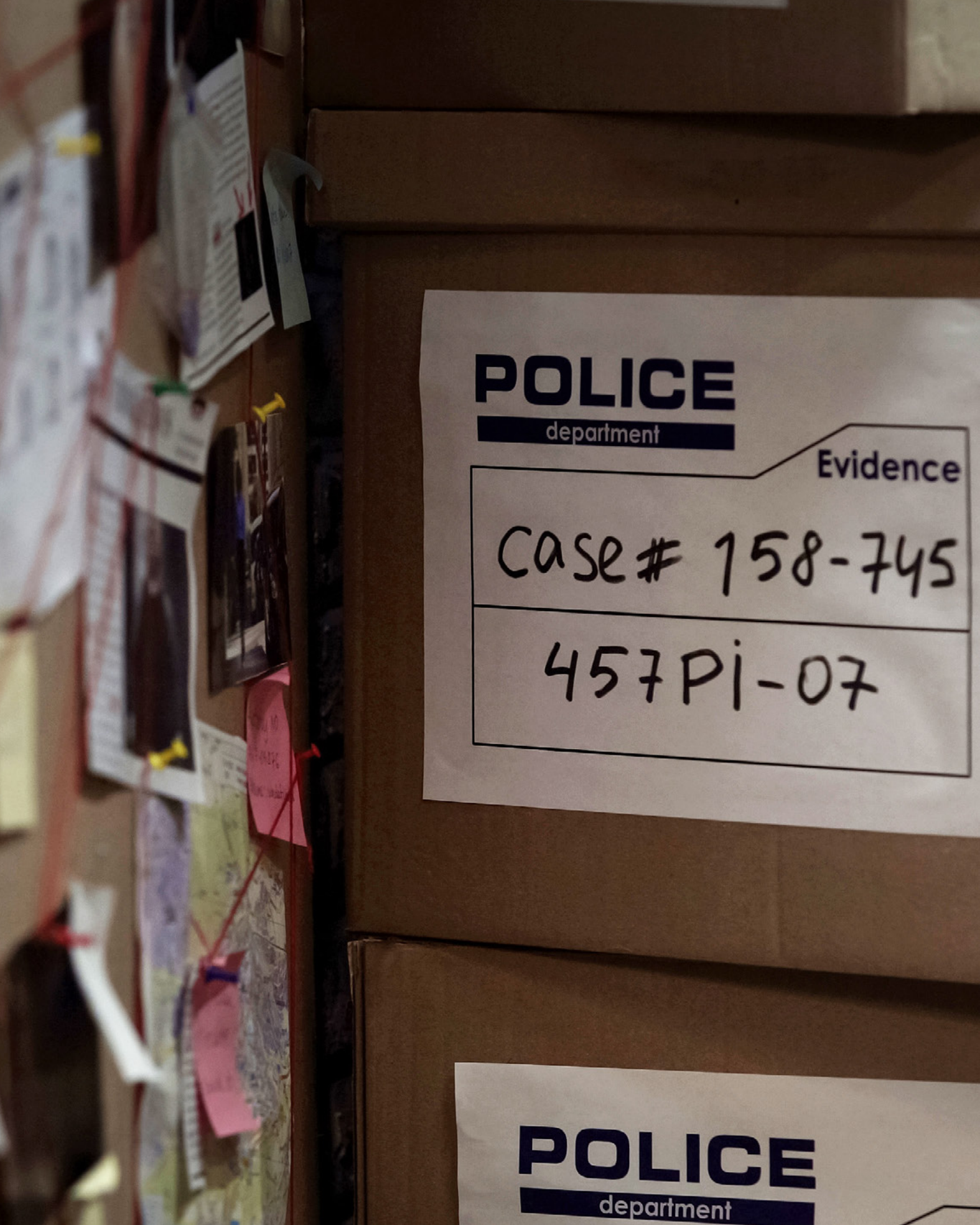
165 *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007).

of "actual prejudice" for evaluating harmless error on collateral review from **Brecht v. Abrahamson**, the Third Circuit wrote that "[c]umulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish 'actual prejudice.'"[166] Under the Supreme Court's 2022 **Brown v. Davenport** decision, federal appellate courts must now apply both the **Brecht** harmless error test and AEDPA's unreasonableness standard on habeas review of a state court's finding of harmless error.[167] The Third Circuit also relied on Darks v. Mullin, a Tenth Circuit opinion, which held that "a cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless."[168] Even though an individual error may be insufficient to reverse a conviction, cumulatively errors can pass the harmless error standard and warrant reversal.

166 *Id.*

167 *Brown,* 142 S.Ct. at 1517.

168 *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir.2003) (citing *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990)).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VII. Lost Evidence and Due Process – Revisiting Arizona v. Youngblood

Some states reject Youngblood's "bad faith" standard for a due process claim based on lost evidence, adopting instead a factors-balancing approach irrespective of whether police intentionally failed to preserve potentially exculpatory evidence.

Seeking to remedy miscarriages of justice often means that litigators are addressing old cases. A common issue in these cases is that evidence has not been preserved, has been intentionally destroyed, or has been lost. Innocence practitioners are likely well acquainted with **Arizona v. Youngblood**, 488 U.S. 51, 58 (1988), in which the Supreme Court held that a failure to preserve evidence which might be exculpatory does not violate a defendant's due process rights under the Federal Constitution unless the police acted in bad faith.

Within a decade of that decision, relying on the power of Justice Stevens' concurrence[169] as well as their own constitutions, some state courts carved out a jurisprudence **rejecting Youngblood's** bad faith standard and articulating a state-based due process approach which (1) enunciates a **broader**

169 Stevens noted: "[t]here may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Youngblood*, 488 U.S. at 61.

protection for due process in state constitutions than those in the United States Constitution; and (2) sees **principles of fundamental fairness as necessary elements of due process**, such that a State's failure to preserve evidence, when adjudged within the context of the entire record, could require post-conviction relief. In Alabama, Alaska, Connecticut, Illinois, Massachusetts, and West Virginia, state and district courts concluded that

the good or bad faith of the police in failing to preserve potentially exculpatory evidence was not dispositive of an alleged violation of the defendant's due process rights under the applicable state constitutions,

that a balancing of factors was required to determine harm, and that the defendant's rights were, in fact, violated under this balancing approach.[170]

Importantly, these cases were applied to those who may have had factual claims of innocence as well as non-factual claims. Even when a wrongfully convicted defendant is not exonerated, a grant of a new trial underscores the presumption of innocence and other constitutional protections, which provide space for all innocence claims to gain ground even without proof of factual innocence.

A. Belynda Faye Goff v. Arkansas, No. CR 95-59-1, (Carroll City, E. Div.) (2019)

The case of Belynda Goff is instructive here.[171] Ms. Goff was represented by the Innocence Project[172] in post-conviction litigation to prove her factual innocence after being convicted of murdering her husband. Ms. Goff served over two decades of a life sentence as a direct result of asserting her innocence; she would have been freed in 2006 (and likely earlier given her exemplary record) if she had (falsely) pled to a manslaughter charge.

Ms. Goff won access to DNA testing. That testing, which was carried out on all of the available items, failed to provide any probative information. However, deeply relevant evidence gathered from Stephen Goff's body was never submitted for DNA testing, having been "misplaced" or lost by a representative of the Carroll County Sheriff's Office who signed them out of the Arkansas State Crime Laboratory but never signed them back into the Carroll County Police Department's evidence room.

After several years of litigation, including hearings requiring the officer who checked out the evidence to testify about the whereabouts of the evidence, counsel filed a Motion for Resentencing or For Modification of Sentence Pursuant to Arkansas Code, § 16-112.208(3)(b). The motion argued:

> ...**the statutory right to DNA testing afforded to Ms. Goff by this Court has been**, for all intents and purposes, **eviscerated**, as **critical evidence that could provide exculpatory**

170 *See* Appendix 2. Several more of these cases may exist where this analysis was applied, but the due process violation issue was not reached. They may still be of use for argument purposes. See, e.g., *Rhodes v. State*, 2011 Ark. 146, 4 (2011).

171 *Goff*, No. CR 95-59-1.

172 Specifically by Karen Thompson, one of the authors of this guide, and, upon her departure from the Innocence Project in May 2019, by staff attorney Jane Pulcher.

> **information** and challenge the conviction that has wrongfully robbed Ms. Goff of her freedom **cannot be found**. The **loss of this material and probative evidence** has crippled Ms. Goff's ability to prove her innocence through this Court's post-conviction DNA testing grant—a legal reality that is fundamentally unfair and thus robs Ms. Goff of her right to due process. For these reasons, Ms. Goff respectfully requests that this Court exercise its powers and modify Ms. Goff's sentence to a 20-year time served plea and order her release from the custody of the Department of Corrections, or, alternatively, order a new trial.[173]

In support of the request for reconsideration, counsel further argued that:

> The Arkansas Supreme Court has recently reconsidered the legitimacy of **Youngblood's** "bad faith" requirement. Ms. Goff now asks this Court to do the same and modify her sentence because 'the State's failure to preserve physical evidence, specifically the fingernail clippings, deprived [her] of due process under the Arkansas Constitution.' **Rhodes v. State**, 2011 Ark. 146, 4 (2011); **see also** Ark. Constitution, Art. 2, Section 8; **Morales v. State**, 232 Conn. 707, 657 A.2d 585 (Conn. 1995). Ms. Goff urges this Court to adopt the **Morales** balancing test considered by the Arkansas Supreme Court in **Rhodes**. Where, as here, **a due process violation is present in the form of the loss of material evidence, the trial court may fashion an appropriate remedy, including, but not limited to, modification of sentence or dismissal of charges**. This Court should find that the loss of Stephen Goff's fingernail clippings and various other evidence by the Carroll County Sheriff's Office or the [Arkansas State Crime Laboratory] renders Ms. Goff's conviction fundamentally unfair and, accordingly, she should be granted a time-served plea, or, alternatively, a new trial.[174]

While the Court held that it was unnecessary to address the merits of the motion, it encouraged the district attorney to join with Innocence Project counsel to craft a resentencing agreement, holding that it was "empowered, pursuant to ACA § 16-112-201(a), 'to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate' in a proceeding under Act 1780," Arkansas' post-conviction DNA testing statute.[175] While the case did not result in an exoneration or a new trial, Ms. Goff was subsequently resentenced to time served and was released from prison in June 2019.[176] Here, even the specter of due process became a useful sword, obtaining release for an incarcerated person on an actual innocence claim where lost evidence and testing failed to produce an exonerating DNA profile.

173 *Goff*, No. CR 95-59-1.

174 Id.

175 Id.

176 It should be recognized that release from prison—while obviously the best outcome—can still be deeply complicated in situations where innocence has not been proven and thus the conviction has not been overturned. In the years since her release, Ms. Goff suffers from the realities facing all those who have served time for a felony that has not been erased from their records. The "extracurricular things in life that have to be endured," as Ms. Goff put it, remain, including an inability to obtain a car loan, employment, and certain limitations to obtaining housing.

VIII. The Unforgiving Legal Landscape: Federal Courts Emphasize Why a New Approach to Innocence Litigation is Needed

The U.S. Supreme Court and AEDPA have restricted federal habeas relief, creating a pressing need for new strategies to litigate miscarriages of justice in state courts.

Since 1989, over 3000 people have been fully exonerated in the United States.[177] Defendants found guilty of capital offenses have been exonerated.[178] In the more than 30 years since the beginning of the innocence movement, what has been obvious to innocence practitioners has also become undeniable to the legal community and the nation at large:

177 THE NATIONAL REGISTRY OF EXONERATIONS, (https://perma.cc/QXG4-YEZ6) (last visited Oct. 29, 2022). Notably, the National Registry of Exonerations does not list individuals whose convictions were reversed, prosecutors re-brought the original charges, and the defendant took a time-served Alford Plea to preserve their innocence and not face further time in prison.

178 See Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55 (2008) (https://perma.cc/RR6T-77VB); D. Michael Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (https://perma.cc/HQV9-7SKX). Samuel R. Gross et al., Rate of False Conviction of Criminal Defendants Who are Sentenced to Death, 111 PNAS 7230, 7230 (2014) (https://perma.cc/FR6F-5DSE) (detailing a 2014 study that estimates 4.1% of criminal defendants incarcerated on death row are innocent.).

a substantial number of innocent people are residing within the prison walls of the United States.

Despite this revelation, it is beyond dispute that our criminal legal system thwarts serious review of criminal convictions. **As scholars have recognized, meaningful review of criminal convictions is nearly impossible under the multi-headed hydra of appellate preservation requirements, deferential review, harmless error analysis, the limits of habeas corpus, statutes of limitations, stringent requirements for "new evidence," the Antiterrorism and Effective Death Penalty Act ("AEDPA")'s requirements (and the Supreme Court's deep, limiting cuts to that statute), siloed analyses of claims, and other, fuzzier problems such as cognitive biases, the desire for finality, and inadequate resources.**[179]

Nor are these problems merely theoretical; it has been empirically demonstrated that these procedural, legal, cognitive, and cultural obstacles have repeatedly thwarted justice, and thus that the current legal system fails to provide adequate avenues or meaningful opportunities for legal review of claims of innocence.[180] While there is room to debate the balance between finality and justice, a system that almost entirely fails to grant relief to demonstrably innocent persons through the normal channels of review has surely gone off course.

Despite the decades of serious scholarly work critiquing the obstacles to meaningful judicial review of criminal convictions for people claiming actual innocence or other miscarriages of justice, neither courts nor legislatures have taken sufficient action to ensure change. Indeed, rather than acknowledge the flaws and create avenues for even limited relief for the factually innocent,[181] the Supreme Court and federal appellate courts have frequently further restricted access to meaningful review. Recent decisions from the U.S. Supreme Court have particularly limited the avenues to challenge wrongful convictions by curtailing access to federal relief.[182]

These limits create an opportunity for modern applications of the oldest protections and drive the new approaches this guide articulates around miscarriage of justice litigation for the broadest swath of defendants. Put simply: protecting those who are innocent from wrongful conviction is a core value of constitutional criminal law and

179 *See, e.g.*, Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 6, 2501 (2020) (https://perma.cc/S62W-Z5C6); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) (https://perma.cc/45K3-5SRK); JOSHUA DRESSLER ET AL., *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* (7th. ed., 2020); Brandon L. Garrett, *Innocence, Harmless Errors, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 56-62 (2005) (https://perma.cc/A3LE-8HLH); Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2126-2129 (2018) (https://perma.cc/SSD7-2UN9); Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411 (2021) (https://perma.cc/BWD4-VGE9); Harry T. Edwards, *To Err is Human, but not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171-72, 1185 (1995) (https://perma.cc/4PNG-CJZA); Cassandra Burke Robertson, *Invisible Error,* 50 CONN. L. REV. 161 (2018) (https://perma.cc/69UC-6KAN); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 1291 (2006) (https://perma.cc/Y295-MG24); Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1812 (2020) (https://perma.cc/F85K-J7B3); BRANDON L. GARRET & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* 151-162 (2013); Joshua M. Lott, *The End of Innocence? Federal Habeas Corpus Law After In Re Davis*, 27 GA. STATE U. L. REV. 443, 468 (2011) (https://perma.cc/6PRB-7DJA); Stephanie Roberts Hartung, *Post-Conviction Procedure: The Next Frontier in Innocence Reform*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 254 (Daniel S. Medwed ed., 2017) (https://perma.cc/A9S7-YP7Y); Stephanie Roberts Hartung, *Habeas Corpus for the Innocent,* 19 U. PA. J.L. & SOC. CHANGE 1, 35 (2016) (https://perma.cc/J7RP-9YP2); Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases* 10 STANFORD J. CIV. RTS. & CIV. RTS. & CIV. LIBERTIES 55 (2014) (https://perma.cc/QGS3-CJE2).

180 In his study *Judging Innocence*, Professor Garrett's work identifies that 6% of factually innocent people – later so proved by post-conviction DNA testing – were initially denied relief by reviewing courts. Garrett, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

181 *See, e.g.*, Hartung, *Habeas Corpus for the Innocent,* at 35.

182 *See, e.g., Shinn v. Ramirez*, 596 U.S. __, 142 S. Ct. 1718 (2022) (denying federal courts the ability to review new evidence in support of established claims if said evidence wasn't previously presented to the state courts in post-conviction review), discussed *infra.*

procedure.[183] This foundational truth should also be both a starting place and a constant return for innocence practitioners/advocates; innocence arguments must be seen for and used as what they are: constitutional entitlements. Indeed, "[t]he spirit of innocence protection informs the Fourth Amendment, drives the Fifth and Sixth Amendments, and anchors both the Eighth Amendment's proportionality principle and the Due Process Clause of the Fourteenth Amendment."[184] As the Supreme Court held in **California v. Trombetta**, 467 U.S. 479 (1983), "[t]aken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."[185] Fundamentally, "[w]e are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."[186]

A. Federal Courts: AEDPA "Evidence as a Whole" Review

Federal habeas law was historically intended to serve as a constitutional check on state courts. AEDPA instead restricted federal courts in that capacity. However, one opening may be in the language of AEDPA itself, which has been interpreted to encourage a holistic review of all petitions and all evidence previously submitted in a case. Even in light of **Shinn v. Ramirez** (2022), as long as the evidence has been put before a state court, federal courts can review the entire record holistically, looking at the "evidence as a whole."

AEDPA added the §2244(b)(2)(B)(ii) and § 2255(h)(1) "evidence as a whole" standard to the controlling statutes in 1996, making the standard applicable in federal court to litigants in federal and state prisons.[187] The standard itself was derived from pre-AEDPA Supreme Court decisions, where litigants needed to show either "cause and prejudice" or factual innocence, implicating a "fundamental miscarriage of justice."[188]

Federal courts looking at the "evidence as a whole" may consider evidence from original and successive petitions and review evidence excluded at trial or submitted in prior unsuccessful post-conviction proceedings, in addition to newly discovered evidence. "Simply put, the 'evidence as a whole' is exactly that: all the evidence put before the court at the time of its... evaluation."[189]

The Fourth and Sixth Circuits have applied AEDPA's "evidence as a whole" provision to consider all evidence from original and successive petitions together when analyzing a post-conviction case.

183 *Coffin v. United States*, 156 U.S. 432, 453 (1895).

184 Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 148-49 (2012) (https://perma.cc/KNV2-HKRE).

185 *California v. Trombetta*, 467 U.S. 479, 485 (1983).

186 *Oregon v. Hass*, 420 U.S. 714, 723 (1975).

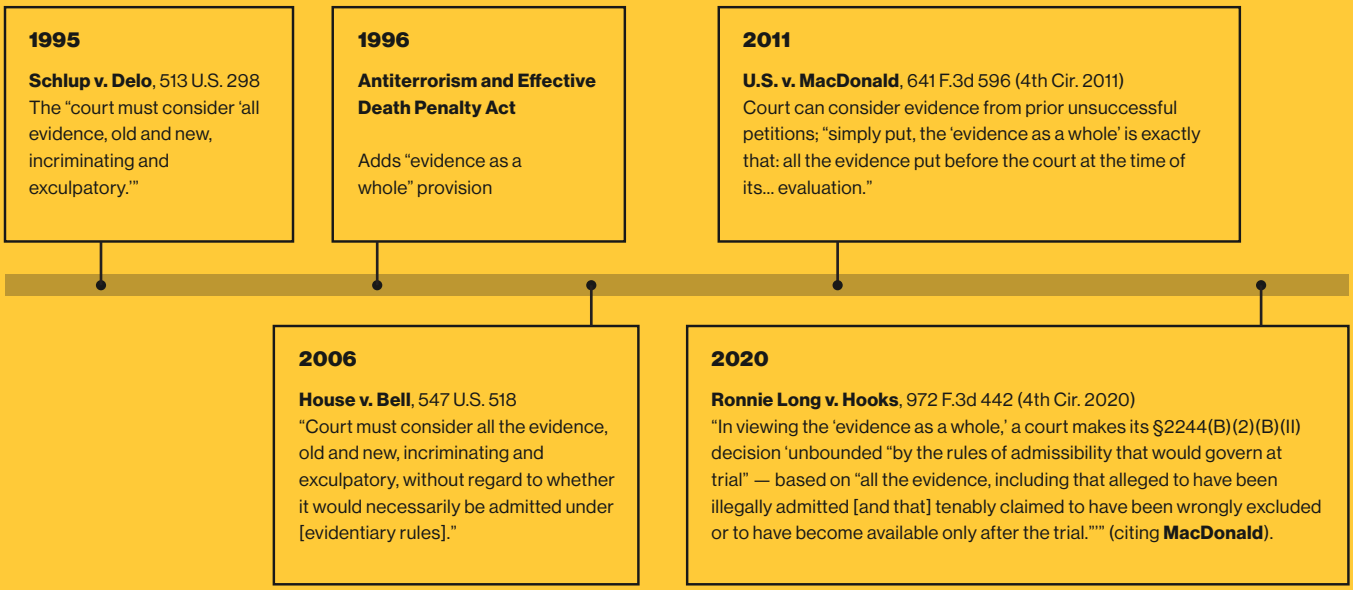
187 See Antiterrorism and Effective Death Penalty Act of 1996. §2244(b)(2)(B)(ii), § 2255(h)(1) (1996). (https://perma.cc/M4YN-2658).

188 McCleskey v. Zant, 499 U.S. 467, 494-95 (1991).

189 United States v. MacDonald, 641 F.3d 596, 598 (4th Cir. 2011).

Timeline of Federal "Evidence as a Whole" Review Cases

AEDPA Requirement: Evaluate the "Evidence as a Whole" in Post-Conviction Review §2244(B)(2)(B)(II)



As another form of the cumulative error doctrine, some federal courts are looking more closely at the AEDPA requirement to evaluate the "evidence as a whole" in post-conviction.[190] In **Long v. Hooks**, the Fourth Circuit **en banc** powerfully applied the "evidence as a whole" provision to reverse the wrongful conviction of Ronnie Long in North Carolina, represented by the **Duke Wrongful Convictions Clinic**.[191] Judge Stephanie Thacker, in a 9-6 decision, wrote "In viewing the 'evidence as a whole,' a court makes its § 2244(b)(2)(B)(ii) decision 'unbounded "by the rules of admissibility that would govern at trial"' — based on 'all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial.'"[192] The **Long** decision cited prior precedent, **U.S. v. MacDonald** (4th Cir. 2011).

Similarly, the Sixth Circuit in **Clark v. Weldon** held "AEDPA asks whether Jackson's identification, 'if proven and viewed in light of the evidence as a whole,' 28 U.S.C. § 2244(b)(2)(B)(ii), would have changed the outcome of the trial."[193] The Court's opinion continues, "this understanding of 'the evidence as a whole' comports with the Fourth Circuit's holding in **United States v. MacDonald** that "the 'evidence as a whole' is exactly that: all the evidence

190 *MacDonald*, 641 F.3d at 611, citing Schlup 513 U.S. 298, 327-28 (1995).

191 *Long v. Hooks*, 972 F.3d 442 (4th Cir. 2020).

192 *Id.* at 470, citing *United States v. MacDonald*, 641 F.3d at 612.

193 *Clark v. Warden*, 934 F.3d 483, 496 (6th Cir. 2019).

put before the court at the time of its § 2244(b)(2)(B)(ii) or § 2255(h)(1) evaluation.'"[194] [195]

The "evidence as a whole" approach may be a powerful remedy to the problem of successive petitions that are individually dismissed rather than courts reviewing the evidence across petitions collectively. However, the reality of recent decisions out of the Supreme Court have made this approach increasingly tenuous.

B. Federal Habeas, AEDPA's Burden, and the Supreme Court in 2022

For the last twenty-five years, federal habeas review of innocence cases has been a hindrance rather than a healer. Since the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, this critical piece of legislation – enacted "without the benefit of the exoneration data available today" – has overhauled federal habeas corpus procedure and imposed further roadblocks and barriers to innocent prisoners seeking post-conviction relief.[196] As we search for additional ways to free the innocent and to address the miscarriages that lead to wrongful convictions, the tools to federally challenge constitutional violations and wrongful convictions are being blunted at an ever-increasing clip. For instance, recent years have seen a steady erosion by the federal courts of defendants' ability to correct errors in their cases through habeas relief.[197] While obtaining habeas relief has always been a nearly insurmountable obstacle, today, the ability of criminal defendants to correct a defective, unconstitutional conviction stands on the line with impossibility.

1. Shinn v. Ramirez, 596 U.S. __, 142 S. Ct. 1718 (2022).

- **Federal courts in post-conviction can no longer consider new evidence, including evidence of factual or legal innocence, to support a claim of ineffective assistance of counsel, if that evidence was not first presented in state court. This holds true even if the failure to present said evidence in state court was because the defendant's lawyer was ineffective.**

One of the more harrowing decisions issued by the United States Supreme Court in 2022 was **Shinn v. Ramirez**, 596 U.S. __142 S. Ct. 1718 (2022). In **Shinn**, Respondents David Martinez Ramirez and Barry Lee Jones were each convicted of capital crimes in Arizona state court and sentenced to death. On direct review, the Arizona Supreme Court affirmed each conviction and denied both men state post-conviction relief. Both men filed for federal habeas relief under 28 U.S.C. § 2254, arguing that their trial counsel had been ineffective for failing to conduct adequate investigations.

In David Ramirez's case, his trial attorney failed to present evidence of Ramirez's intellectual disability

194 *Id.* (considering recanted eyewitness testimony and alternative identifications).

195 Finally, although reluctant to ever use this authority, courts have in theory the common law power to vacate a conviction to prevent a miscarriage of justice. *See United States v. Williams*, 790 F.3d 1059, 1075–76 (10th Cir. 2015) (referencing common law and pre-AEDPA miscarriage of justice exception to procedural bars). Although AEDPA limited this power in certain circumstances, like successive petitions, this common law power still exists. In *McQuiggin v. Perkins*, the Supreme Court acknowledged the miscarriage of justice exception where AEDPA has remained silent, such as first habeas petitions. It must exist: this authority "is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931 (2013).

196 Hartung, *Missing the Forest for the Trees*, at 75.

197 Section 104 of AEDPA, passed in 1996, requires federal courts to deny relief to a person convicted of a crime seeking habeas review — even where constitutional violations have tainted a trial — so long as the state court that previously reviewed the case was not "unreasonable" in its application of federal or constitutional law.

– evidence that may have spared Ramirez the death penalty. Ramirez's state post-conviction attorney failed to raise a claim of ineffective assistance against the trial counsel and the State of Arizona conceded that post-conviction counsel "performed deficiently."[198]

In Barry Jones's case, trial counsel failed to present evidence of his actual innocence. His counsel failed to investigate and find out – as his federal defenders did – that the timeline used by prosecutors to pinpoint Jones as the assailant was medically impossible.[199] State post-conviction counsel likewise failed to investigate and failed to raise a claim of ineffective assistance against trial counsel.

The federal district court held in each case that the men's ineffective-assistance claims were procedurally defaulted because they had not been properly presented in state court. In line with Supreme Court precedent, and to overcome the procedural default in habeas cases, the men were thus required to demonstrate "cause" to excuse the procedural defect and "actual prejudice."[200] To fulfill this burden, both Ramirez and Jones relied on Martinez v. Ryan, 566 U.S. 1 (2012), which held that ineffective assistance of post-conviction counsel may be cited as cause for the procedural default of an ineffective-assistance-of-trial-counsel claim.

In Ramirez's case, the District Court permitted him to supplement the record with evidence not presented in state court for his argument to excuse the procedural default, all of which was grounded in post-conviction counsel's failure to conduct a complete mitigation investigation or to obtain and present available mitigation evidence at sentencing.[201] After assessing the new evidence, the court excused the procedural default but rejected Ramirez's ineffective-assistance claim on the merits. On appeal, the Ninth Circuit reversed and remanded for more evidentiary development to litigate the merits of Ramirez's ineffective-assistance-of-trial-counsel claim.

In Jones's case, the District Court held a 7-day evidentiary hearing on "cause" and "prejudice," with more than 10 witnesses. The Court concluded that Jones's procedural default was excused, and found that Jones's state trial counsel had, in fact, provided ineffective assistance.[202] The Ninth Circuit affirmed the vacating of Jones's conviction.

The State of Arizona petitioned the Supreme Court in both cases, arguing that § 2254(e)(2) does not permit a federal court to order evidentiary development when post-conviction counsel is alleged to have negligently failed to develop the state court record. Instead, the only evidence that could be presented for the ineffective assistance of counsel ("IAC") claim was what was already in the record – proving IAC by a **lack** of evidence, rather than presenting the affirmative evidence that could have changed the jurors' opinion and remained undiscovered by prior counsel.

Justice Thomas, writing for the majority, stated that **"to allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion**

198 *Ramirez v. Ryan*, 937 F.3d 1230, 1235 (9th Cir. 2019), rev'd sub nom. *Shinn v. Ramirez*, 596 U.S. __ 142 S. Ct. 1718 (2022).

199 See Liliana Segura's excellent series on Barry Jones' wrongful conviction, *Death and Dereliction*, THE INTERCEPT, (https://perma.cc/4HNR-F65W). Segura was awarded the 2017 Innocence Network Journalism Award for her coverage of Barry Jones' case.

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

201 *Shinn*, 596 U.S. 142 S. Ct. at 1728.

202 Notably, one of the federal public defenders representing Mr. Jones was Karen Singer Smith, now an attorney with the Arizona Justice Project, an Innocence Network member organization. Mr. Jones presented compelling evidence to the court of his factual innocence.

rule."[203] Accordingly, federal habeas courts must apply a corollary to the exhaustion requirement, "the doctrine of procedural default," thus allowing federal courts to "generally decline to hear any federal claim that was not presented to the state courts 'consistent with [the State's] own procedural rules.'"[204] The Court reaffirmed that "a state prisoner is responsible for counsel's negligent failure to develop the state post-conviction record," rejected the application of §2254(e)(2) post-conviction ineffective counsel claims as lacking "any principled limit," and underscored what they termed **Martinez's** narrow scope, which "did not prescribe largely unbounded access to new evidence whenever post-conviction counsel is ineffective."[205] **Thomas emphasized instead the need for finality in state court decisions.**

In her dissent, Justice Sotomayor rooted her critique in the clear constitutional protections for criminal defendants, noting that the Sixth Amendment right to counsel remains "'a bedrock principle' that constitutes the very 'foundation for our adversary system' of criminal justice."[206] This decision, she noted, would "leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel."[207] Sotomayor also observed the greater ramifications of the majority's interpretation of the rights afforded defendants in **Martinez** and in federal habeas litigation generally by noting that "[t]he doctrinal consequence of the Court's distortion of precedent is to render **Martinez** and **Trevino** [**v. Thaler**, 569 U.S. 413 (2013)] dead letters in the mine run of cases."[208]

203 *Id.* at 1732.

204 *Id.*

205 *Id.* at 1735, 1737.

206 *Id.* at 1740.

207 *Id.*

208 *Id.* at 1747.

Sotomayor criticized the "hyperbole" of the Court in underscoring finality and the "unyielding purpose" of AEDPA to "categorically prioritize... maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system."[209] Sotomayor posited that the **Shinn** decision "reduces to rubble many habeas petitioners' Sixth Amendment rights to the effective assistance of counsel."[210]

As the Innocence Project's Executive Director Christina Swarns commented, **Shinn** "closed the federal courthouse doors to evidence of ineffective assistance of counsel that was not first presented to the state courts... [a] decision [that] will leave thousands of people in the nightmarish position of having no court to hear their very real claims of innocence."[211] The banner of relief offered in **Martinez** was, effectively, shredded.

Sotomayor also criticized the majority's emphasis on the monstrous facts of the cases, noting "that no matter how heinous the crime, **any conviction must be secured respecting all constitutional protections**."[212] This dicta recognizes that **innocence is innocence**, whether actual or legal, **i.e.** anywhere

209 *Id.* at 1748.

210 *Id.* at 1750.

211 Christina Swarns, *Innocence Project Statement From Executive Director Christina Swarns on Shinn v. Ramirez and Jones*, INNOCENCE PROJECT (May 24, 2022) (https://perma.cc/H7BU-3ZNA).

212 *Shinn,* 596 U.S142 S. Ct. at 1741 (emphasis added).

that a violation of a constitutional right is used as a basis for a conviction.[213] Portraying defendants as "undeserving" of constitutional protections in a legal innocence claim cannot be allowed to justify the violations of foundational Sixth Amendment precepts, and certainly not close the door to what, for so many, is the last avenue for relief.

2. Brown v. Davenport, 596 U.S. __142 S.Ct. 1510 (2022).

- **When a state court has ruled a trial error was "harmless," the reviewing federal court must apply the AEDPA and Brecht v. Abrahamson tests of review, determining whether under AEDPA "every fair-minded jurist would agree that an error was prejudicial," and under Brecht "whether a federal habeas court itself harbors grave doubt about the petitioner's verdict."**

In **Brown v. Davenport**, 596 U.S. __142 S. Ct. 1510 (2022), decided a month before **Shinn**, the Supreme Court showcased its intolerance of habeas relief. In **Brown**, Ervine Davenport was convicted of first-degree murder after a trial in which he was bound with handcuffs, waist chains and ankle shackles at the defense table in front of the jury. In **Deck v. Missouri**, 544 U.S. 622 (2005), the Supreme Court deemed this type of shackling to be so prejudicial as to demonstrate a violation of a criminal defendant's 14th Amendment rights to due process. Referencing **Deck**, the Michigan Supreme Court acknowledged that the trial court judge erred in allowing Davenport to be shackled in front of the jury. The Court directed the Kalamazoo County Circuit Court to hold a hearing on the issue; that court subsequently determined that Davenport's shackling was "harmless error" that did not affect the jury's ability to render a decision based on the facts presented at trial.

Davenport sought habeas relief and faced the challenge of meeting AEDPA's "unreasonableness" standard. The U.S. Court of Appeals for the Sixth Circuit found that the shackling **did** rise to the level of unreasonableness, and the State of Michigan had to either retry or release Davenport because of the egregious and blatant constitutional violation. Relying on **Brecht v. Abrahamson**, 507 U.S. 619 (1993), the Sixth Circuit held that to reverse a state court's finding of harmless error, a federal court in habeas review needed to determine that the error had a "substantial and injurious effect or influence."[214] The court cited **Deck's** holding that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"[215]

The Sixth Circuit reasoned that because the **Brecht** test was more onerous than AEDPA's unreasonableness test, **Brecht** superseded AEDPA for the

213 As the Innocence Network argued in its amicus brief to the Supreme Court:

> In amicus's experience, as illustrated through a handful of real-life examples, many exonerations based on ineffective assistance depend critically on the development of post-trial evidence. Without such evidence, basic failures to investigate cannot be corrected, faulty forensic evidence cannot be unmasked, and the innocent individuals who are the victims of these deficiencies have no route to justice. A fair and reliable criminal process cannot tolerate that outcome.

Brief of the Innocence Network as Amicus Curiae in Support of Respondents at 4, *Shinn v. Ramirez*, 596 U.S. __142, S. Ct. 1718 (No. 20-1009).

214 *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

215 *Deck v. Missouri*, 544 U.S. 622, 630 (2005).

purposes of habeas review, a holding the Supreme Court itself recognized in its own decision in **Fry v. Pliler**, 551 U.S. 112 (2007).

In a 6-3 opinion authored by Justice Gorsuch, the Supreme Court reversed the Sixth Circuit, holding that AEDPA's unreasonableness standard must be applied to a harmless-error review. **"Today, then, a federal court must deny relief to a state habeas petitioner who fails to satisfy either this Court's equitable precedents or AEDPA. But to grant relief, a court must find that the petitioner has cleared both tests."**[216] Applying this new formulation to Mr. Davenport's case resulted in a denial of his request for habeas relief. Justice Gorsuch, in dismissing the Court's prior precedent, stated that **Deck's** Supreme Court analysis of AEDPA's harmless-error review was "curated snippets extracted from decisions."[217]

Interpreting AEDPA's unreasonableness standard as more stringent than prior bars reveals the ways in which the emergent federal habeas jurisprudence is no longer about securing constitutional protections for criminal defendants, but rather aims to end its utility altogether by further hampering the ability to bring successful claims.

Both of these decisions, and their attendant radical changes, underscore the importance of state court litigation.

State courts are the most likely to see criminal defendants[218] and have greater flexibility to draw on a range of state constitutional, statutory, and common law sources to remedy miscarriages of justice.

By developing the most robust records possible in state court post-conviction litigation and pursuing the development of novel approaches to attack unconstitutional or false convictions, innocence litigators can adapt to these dramatic changes in federal relief.

216 *Brown v. Davenport*, 596 U.S. __142 S. Ct. 1510, 1524 (2022).

217 *Brown*, 596 U.S. 142 S. Ct. 1510 at 1516. *Brown's* holding, however, fits into older legal controversies such as which constitutional errors should be subject to harmless error review, how harmless error review should proceed with respect to those errors, and whether harmless error review is, in fact, a constitutional principle "derivable from constitutional criminal procedure rights or an appellate court's obligation to provide due process," i.e. "constitutional common law." See John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 COLUM. L. REV. ONLINE 118, 120-21 (2018) (https://perma.cc/CB28-YUHU).

218 Because state supreme courts laterally cite to each other in recognition of the relevance and persuasive nature of each other's jurisprudence, filing deeply robust post-conviction motions not only helps avoid the newly laid traps of habeas jurisprudence by creating the most fulsome record possible, but allows for new openings and paths to both exonerations and constitutional repair within the state context, where defendants are known and knowable by peers and not at the remove of the federal system. See Jonathan S. Hack, Ph.D., *Looking to Peers: Transjudicial Citations Behavior Among State Supreme Courts*, 95 N.D. L. Rev. 291, 295 (2020) (https://perma.cc/D7XM-2RPF); *see generally* Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Gregory A. Caldeira, The Transmission of Legal Precedent: A Study of State Supreme Courts, 79 AM. POL. SCI. REV. 178 (1985); Lawrence M. Friedman *et al., State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981) (https://perma.cc/MHG3-79AH); Rachael K. Hinkle & Michael J. Nelson, *The Transmission of Legal Precedent Among State Supreme Courts in the Twenty-First Century,* 16 STATE POL. & POL'Y Q. 391 (2016). Once again, however, it is important to state that innocence organizations across the United States are underfunded and understaffed, as are public defenders who are the first advocates at trials. This guide represents hopeful suggestions, not judgmental fingers about the reality of the criminal legal system.

Timeline of

Major Post-Conviction "Wrongful Conviction" Cases

1988

Arizona v. Youngblood
A criminal defendant must show bad faith on the part of police to prove that loss or destruction of evidence was denial of due process.

1993

Herrera v. Collins
Established actual innocence standard and possibility of freestanding actual innocence claim

1995

Schlup v. Delo
Established "innocence gateway" to excuse procedural defaults and reach constitutional issues

1996

Antiterrorism and Effective Death Penalty Act passed

2004

Innocence Protection Act (18 U.S.C. § 3600)
Allowed incarcerated people in federal court to apply for DNA testing of evidence

2006

House v. Bell
Established "extraordinarily high" standard for freestanding innocence claims

2009

In re Troy Anthony Davis
"Exceptional" cases of innocence may be granted evidentiary hearings

NAS Report: "Strengthening Forensic Science in the U.S.: A Path Forward"
Identified flaws in all forensic science disciplines except DNA

2010

Holland v. Florida
In "extraordinary circumstances" a court may allow for equitable tolling for federal habeas deadlines

2011

Kirk Bloodsworth Post-Conviction DNA Testing Program
Established to help fund costs of post-conviction DNA testing

Skinner v. Switzer
Confirmed a 42 U.S.C. § 1983 claim is proper for incarcerated people seeking post-conviction DNA testing of evidence

Connick v. Thompson
A prosecutor's office cannot be held civilly liable under inadequate training for a single Brady violation by one person

2012

National Registry of Exonerations
Founded to provide information on every person wrongly convicted and cleared of all charges based on new evidence in the U.S. since 1989

Missouri v. Frye
Required defense attorneys to convey plea offers from prosecution

Martinez v. Ryan
Ineffective assistance of counsel claims not barred by procedural default in federal habeas petitions if prior counsel was ineffective

2013

McQuiggin v. Perkins
Miscarriage of justice exception allows procedural bar to be waived for actual innocence claims

2014

Hinton v. Alabama
Counsel is ineffective for failing to request expert funds if an expert is necessary to support defense theory of the case

2022

Shinn v. Ramirez
A federal habeas court may not consider evidence outside the state court record for claims of ineffective assistance of state post-conviction counsel

Reed v. Goertez
Determining when statute of limitations runs for a 42 U.S.C. § 1983 claim for DNA testing

IX. Conclusion

The final section of this guide acts not so much as a traditional conclusion, but as a summary of concrete steps and strategic objectives for litigating innocence cases, taking an opportunity to "look at the water we swim in."

This summation seeks to assist in efforts to address miscarriages of justice more holistically, within a lens of seeking justice, strengthening constitutional protections for all criminal defendants, and putting the power of the courts and stakeholders nearest to the individuals and communities most directly impacted.

Collaboration

Continue the expansion and collaborative inter-organizational legal efforts in innocence work.

No one is an island. From listening to the words of clients regarding rogue public officials and how "rumors" could be endemic evidence of misdeeds, to working with Conviction Integrity Units, prosecutors, and public defender offices, contextualize your case and develop the most fulsome records possible prior to any post-litigation filing. Who might be doing mass exoneration work in your area? What civil rights organizations have been fighting misconduct or using transparency to shine light on malfeasance? Knowing the full universe of facts and actions from all the stakeholders presents opportunities and possibilities that could help you move the needle in cases that might seem stuck in other ways (lost evidence, recalcitrant actors, jurisdictions with low tolerance or active disinterest in correcting wrongful convictions of any sort, or that have long histories of using bias as a means of legal justification). Fusing different strands of legal approaches strengthens the litigation itself by adding more legs to the chair.

Creative Litigation

Infuse innocence litigation with constitutional and statutory claims not necessarily crafted for innocence work.

Constitutional claims are innocence claims. Fluency in some of the basic overlapping provisions in both Federal and state constitutional contexts provides a huge body of case law with which to encircle wrongful conviction misdeeds. This provides unavoidable claims for equity that extend beyond actual innocence to all criminal defendants who have been harmed by having constitutional rights ignored or violated. Similarly, statutory provisions around protections for vulnerable classes or acknowledging historical bias that has led to unjustifiable charges may inform not only the fragility of the case brought against an individual defendant, but also provide clear and powerful tools. With these tools one can wage an offensive opposition not only to the conviction but to the systems that depend on those violations in order to justify misconduct that leads to the wrongful or unconstitutional convictions.

Policy Reform

Every win should be bolstered in law through legislation.

The innocence movement is powerful but remains diffuse; network wins remain atomized for many reasons, not in least part due to each win becoming a mushroom after rain instead of algae on the pond. Each win should inform and fertilize the legislation that we can build to protect criminal defendants in the places where the harms occur. Given the direction of federal courts, state courts carrying out state policy must be the site of justice ideas built on the truths that post-conviction innocence litigation reveals. These reforms also become the result of the synthesis of collaboration, litigation, and legislation. Even as some institutions groan under the failures of safeguards, creating new buffer zones help us form new areas of relief.

The innocence movement has proven itself to be an adaptable, forward thinking, daring area of creative lawyering. That inventiveness has no time to rest on its laurels or become stagnant. As practitioners and individuals whose work touches the criminal legal system, it is up to us to continue to employ ingenuity and engage in justice-facing acts in all that we do. We stand and lay our hands on each other's shoulders in order to create spaces of equity and justice within systems that struggle to hold that purpose. For those who live with and are directly impacted by those failures, we must use all the tools available to us to do better and be better.

Appendix 1

State High Courts that have Actively or Passively Recognized the Doctrine of Cumulative Error

High courts in 27 states and the District of Columbia actively recognize the doctrine of cumulative error and have used the doctrine to reverse convictions; high courts in 8 states have accepted cumulative error as a doctrine but not yet reversed a conviction based on it.

States where defendants have actively and successfully used cumulative error to reverse a case are:

- Colorado (**Howard-Walker v. People**, 443 P.3d 1007 (2019))
- Delaware (**Starling v. State**, 130 A.3d 316 (Del. 2015))
- D.C. (**Price v. United States**, 697 A.2d 808 (D.C. 1997))
- Florida (**McDuffie v. State**, 970 So.2d 312 (Fla. 2007))
- Idaho (**State v. Field**, 144 Idaho 559 (2007))
- Iowa (**Moore v. State**, 843 N.W.2d 477 (Iowa Ct. App. 2014))
- Kansas (**State v. Smith-Parker**, 301 Kan. 132 (2014))
- Kentucky (**Funk v. Commonwealth**, 842 S.W.2d 476, 483 (Ky. 1992))
- Illinois (**People v. Blue**, 189 Ill. 2d 99, 104 (2000))
- Maine (**State v. Linnell**, 408 A.2d 693 (Me. 1979))
- Michigan (**People v. Rosales**, 160 Mich. App. 304 (1987))
- Minnesota (**State v. Penkaty**, 708 N.W.2d 185 (Minn. 2006))
- Mississippi (**Murray v. Gray**, 322 So.3d 451 (Miss. 2021))
- Montana (**State v. Smith**, 402 Mont. 206 (2020))
- Nebraska (**State v. Hill**, 2003 WL 21321179 (Neb.App 2003))
- Nevada (**Valdez v. State**, 124 Nev. 97 (2008))
- New Jersey (**State v. Jenewicz**, 193 N.J. 440, 473 (2008))
- New Mexico (**State v. Gaytan**, No. A-1-CA-38369, 2021 WL 3422968 (N.M. Ct. App. Aug. 5, 2021))
- New York (**People v. Case**, 150 A.D.3d 1634 (2017))
- Ohio (**State v. Gerald**, 2014 WL 4177102 (Ohio App. 4 Dist. 2014))
- Oklahoma (**Chandler v. State**, 572 P.2d 285 (1977))
- Rhode Island (**State v. Pepper**, 103 R.I. 310 (1968))
- Tennessee (**Metz v. State**, No. M201900883CCAR3PC, 2021 WL 58197 (Tenn. Crim. App. Jan. 7, 2021))
- Utah (**State v. Thompson**, 318 P.3d 1221 (2014))
- Washington (**State v. Sick**, 114 Wash. App. 1053 (2002))
- West Virginia (**State v. Smith**, 156 W. Va. 385 (1972))
- Wisconsin (**State v. Thiel**, 264 Wis.2d 571 (2003))
- Wyoming (**Black v. State**, 405 P.3d 1045 (Wyo. 2017))

The following states recognize the cumulative error doctrine, but courts have not yet used cumulative error to overturn a conviction:

- Alabama (**Jones v. State**, 322 So.3d (Ala. Crim. App. 2019))
- Alaska (**Fryberger v. State**, No. A-13443, 2022 WL 14761853, (Alaska Ct. App. Oct. 26, 2022))
- California (**People v. Gordon**, No. F080257, 2022 WL 17073667 (Cal. Ct. App. Nov. 18, 2022))
- Georgia (**State v. Lane**, 308 Ga. 10 (2020))
- Hawai'i (**State v. Kahalewai**, 55 Haw. 127 (1973))
- North Carolina (**State v. Allen**, 2021-NCSC-88, 378 N.C. 286 (2021))
- South Carolina (**State v. Daise**, 421 S.C. 442 (Ct. App. 2017))
- Texas (**Quintanilla v. State**, No. 13-18-00162-CR, 2019 WL 3953099 (Tex. App. Aug. 22, 2019))

Finally, this Guide does not include states that have essentially nullified the claim of cumulative error by finding that each individual error must be itself more than harmless error, for the doctrine of cumulative error to apply. Pennsylvania is one example where the cumulative effect doctrine only applies for claims of ineffective assistance of counsel, and only if the individual claims also warrant relief. In this application, multiple instances of ineffectiveness "in combination" can warrant a new trial. See Commonwealth v. Perry, 537 Pa. 385, 392-93 (1994). See also Commonwealth v. Washington, 592 Pa. 698, 750-51 (2007) ("Where a claimant has failed to prove prejudice as the result of any individual errors, he cannot prevail on a cumulative effect claim unless he demonstrates how the particular cumulation requires a different analysis.").

The Guide also does not include states that have neither accepted nor rejected the cumulative error doctrine, such as Oregon and North Dakota. See, for example, State ex rel. Juv. Dep't of Jackson Cnty. V. Smith, 185 Or. App. 197, 228 (2002) ("The Oregon courts have never explicitly adopted the cumulative error doctrine. Even if the doctrine applies, there was no cumulative error here."); Olson v. Griggs Cnty., 491 N.W.2d 725, 732 (N.D. 1992).

Appendix 2

State Courts Moving Beyond Arizona v. Youngblood's "Bad Faith" Standard for a Due Process Claim Based on Lost Evidence

In Alabama, Alaska, Connecticut, Illinois, Massachusetts, and West Virginia, state and district courts concluded that **the good or bad faith of the police in failing to preserve potentially exculpatory evidence was not dispositive of an alleged violation of the defendant's due process rights under the applicable state constitutions**, that a balancing of factors was required to determine harm, and that the defendant's rights were, in fact, violated under this balancing approach.

Gurley v State, 639 So. 2d 557 (Ala. Crim. App. 1993)
The accidental loss of charred remains of a wallet violated the defendant's due process rights under the Alabama Constitution, entitling him to a new trial where defendant was convicted of capital murder but was doubly prejudiced by the loss or destruction of the charred billfold because he was unable to subject it to testing and because the trial court excluded the photographs of the wallet, but allowed oral testimony about the object from the police investigator who seized it. The court adopted a three-part analysis weighing the culpability of the state for the loss of the evidence, the materiality of the lost evidence, and the prejudice to the accused.

People v. Newberry, 166 Ill. 2d 310 (1995)
Holding that a denial of due process occurred where the state destroyed controlled substances taken from the defendant following the defendant's discovery request. The court noted that although there was no showing of bad faith on the state's part, there was also nothing in the record to indicate that the laboratory procedures used to test the substance were especially reliable or that further testing would not have yielded more favorable results to the defendant. Having been precluded from obtaining comparable evidence by other reasonably available means, the court explained that the sole basis for bringing criminal charges against the defendant was the chemical content of the substance seized by the police, and when the substance was discarded, it was lost to the defendant forever, precluding him from meeting or disputing the test results by evidence of equal integrity and persuasiveness.

Commonwealth v. Henderson, 411 Mass. 309 (1991)
The court held that the loss of notes taken by a police officer pertaining to the victim's description of her assailant warranted dismissing an indictment charging the defendant with unarmed robbery. The victim recognized the defendant while sitting as a juror in his trial on other charges and went to police to provide a description matching the defendant. In assessing whether the loss of the description violated the defendant's rights, the court balanced the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant. It specifically ruled that the due process provision of the Massachusetts Constitution holds the government to a higher standard than the bad-faith test stated in Youngblood. Further, the court held that the fact that the police did not act in bad faith when they negligently lost the potentially exculpatory evidence was not dispositive of the case and concurred in the trial judge's decision to dismiss the indictment.

Thorne v. Dep't of Pub. Safety, 774 P.2d 1326 (Alaska 1989)
The failure to preserve a videotape of a field sobriety test violated the defendant's due process rights under the Alaska Constitution where the defendant was arrested for driving while intoxicated (DWI) and videotaped tests given at the pretrial facility were destroyed prior to the civil license revocation hearing because the defendant entered a no contest plea to the criminal charge of negligent driving, and because the defendant did not request preservation of the videotape. Upon hearing defendant's motion claiming the absence of the destroyed videotape made the proceeding unfair, the court held that the state violated the rights of the defendant under the Alaska due process clause in destroying the videotape, reasoning that if the state charged the defendant with DWI in a criminal case, he would be entitled to the videotape at such a proceeding and so he was consequently entitled to the evidence at the civil proceeding. The court further opined that fundamental fairness dictated that the state had the obligation to preserve evidence potentially relevant to an issue of central importance at the license revocation proceeding; given the only ground the defendant had at the hearing for challenging the revocation of his license was whether the arresting officer had reasonable grounds to believe he was driving while intoxicated, the court concluded that the videotape was necessary for a meaningful and fundamentally fair hearing and remanded the case back to the hearing officer with directions to presume that the videotape was favorable to the defendant.

State v. Morales, 232 Conn. 707 (1995), *on remand* (App.)
The defendant did not have to show police acted in bad-faith in failing to preserve the victim's jacket in a rape case to prove a claim that he was deprived due process of law under art. 1 § 8 of Connecticut Constitution where victim alleged defendant wiped semen on her leather jacket after raping her. Police seized the jacket and held it for 6 weeks before returning it to the victim. Court acknowledged that while bad faith is the litmus test for determining whether the failure to preserve potentially useful evidence has deprived the defendant of due process under the Federal Constitution, under the Connecticut Constitution the court must balance the following factors: the materiality of the missing evidence; the likelihood of mistaken interpretation of the evidence by the witnesses or the jury; the reason the evidence is unavailable; and the prejudice to the defendant caused by the unavailability of the evidence. Weighed in light of the fact that the identity of the assailant was the crucial issue in the case, the court remanded the case back to the lower appellate court with directions to reconsider the defendant's claim regarding the state's loss of evidence.

State v. Osakalumi, 194 W. Va. 758 (1995)
The court reversed defendant's conviction for first-degree murder on the basis that the state failed to preserve the couch on which the victim was allegedly shot. Prior to trial, police destroyed a bloodied couch in which the police had found a bullet, hair, and bone fragments. The state relied on the trajectory of the bullet in demonstrating that the victim's wound was not self-inflicted. The defendant argued that the unavailability of the couch violated his right to due process under the W. Va. Const. Art. III, §§ 10, 14. Adopting Justice Stevens' Arizona v. Youngblood concurrence regarding fundamental fairness, the court considered whether the requested material, if in the possession of the state at the time of the defendant's request for it, would have been subject to disclosure; whether the state had a duty to preserve the material; if the state did have a duty to preserve the material, whether the duty was breached; and what consequences should flow from the breach. Because the state relied so heavily on the trajectory of the bullet to prove that the death was a homicide, the court found the state breached its duty to preserve evidence in destroying the couch. The court also found that the judge's instruction to the jury on the loss of the couch was insufficient to protect the defendant's right of due process under the West Virginia Constitution and ordered his conviction reversed and remanded for a new trial.

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