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Litigating Innocence: Why Systemic Reforms Are Needed to Exonerate Innocent, *Pro Se* Individuals

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Introduction

Thanks to the rise in official exonerations since the 1980s and the work of organizations like the Innocence Project[1] and the National Registry of Exonerations,[2] no one can, in good faith, deny that innocent people are wrongfully convicted and imprisoned in the United States. Some studies even estimate that as many as 5–15% of convictions are wrongful, meaning thousands of individuals in the United States are factually innocent yet facing incarceration with the lasting and devastating effects of a prison sentence.[3]

Despite this growing awareness, only 3,250 official exonerations have occurred since 1989.[4] For decades, the "Great Writ"—the writ of federal habeas corpus—provided a mechanism through which innocent persons could overturn unlawful convictions by state courts.[5] However, federal legislation passed in 1996, known as the Antiterrorism and

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1. The Innocence Project represents wrongfully convicted individuals and works to free innocent people. *About*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/about/ [perma.cc/9WP5-T34K]. The organization also completes work to prevent wrongful convictions from happening. *Id.*

2. The National Registry of Exonerations collects, tracks, and provides information about exonerations of criminal defendants across the United States. See *Our Mission*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx [perma.cc/W25M-PR3R], for more information.

3. Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J.C.R. & C.L. 55, 73 (2014).

4. Dustin Cabral, *Exonerations by State*, THE NAT'L REGISTRY OF EXONERATIONS (Jan. 9, 2023), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [perma.cc/J9US-8NJH].

5. For a discussion on the history of habeas corpus in the United States, see Lynn Adelman, *Who Killed Habeas Corpus*, DISSENT MAG. (2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights [perma.cc/LKQ3-K98M].

Effective Death Penalty Act (AEDPA),[6] combined with narrow judicial interpretations of that statute, have led many to conclude that the "Great Writ is dead."[7]

For factually innocent defendants, at least, that seems to be the case.[8] Federal habeas corpus is no longer the saving grace through which wrongfully convicted people can hope to obtain release. Prior to AEDPA's enactment, a prisoner was ultimately released in 1.8% of total habeas corpus cases.[9] However, more recently, a 2012 study showed that in non-capital cases, federal courts granted habeas corpus release in only 0.82% of cases.[10] In particular, *pro se* defendants face the greatest obstacles in proving their innocence and obtaining relief, often having to reinvestigate decades-old cases and file complicated legal appeals entirely on their own.[11]

As the federal courts have effectively closed their doors to innocent, *pro se* defendants, states have attempted to create mechanisms to address the issue of wrongful convictions.[12] Unfortunately, the number of individuals able to access relief barely scratches the surface of innocent persons behind bars.[13]

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6. 28 U.S.C. § 2254.

7. *E.g.*, Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (Hill, J., dissenting) (discussing how a defendant's sentence was upheld due to procedural reasons, despite the court acknowledging that his sentence was enhanced in error).

8. Factually innocent defendants means those who factually did not commit the crimes for which they are convicted, rather than legally innocent defendants, who may have unjustified, extreme, or erroneous sentences. While the current state of post-conviction proceedings harms both types of defendants, for the purposes of this Article, the Author focuses on factually innocent defendants.

9. Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1821 n.85 (2020). Most of these successes were from death penalty cases. *See* Hartung, *supra* note 3, at 69.

10. Wood, *supra* note 9, at 820 n.76.

11. This Article focuses on *pro se* individuals. Within the context of this Article, *pro se* refers to those who may have had counsel at trial or on direct appeal but lack representation for state post-conviction proceedings and federal habeas appeals. This Article focuses on these unrepresented individuals because post-conviction and habeas appeals are usually the first time where a defendant may introduce evidence beyond the trial record. Thus, they are forced to reinvestigate their cases on their own. This Article also largely refers to these individuals as "defendants" regardless of the current procedural posture of their cases.

12. 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, 656 (2005) (discussing new state statutes that allow for post-conviction testing of biological evidence in innocence cases); *see also* Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB. L. REV. 1045 (2016) (discussing states, such as California, with statutes that allow for convictions to be overturned based on new evidence).

13. *Compare* Hartung, *supra* note 3, at 72 (estimating that up to 15% of convictions are wrongful convictions of the innocent), *with* Cabral, *supra* note 4 (reporting only just over

This Article examines the impossible circumstances *pro se* defendants face when trying to prove their innocence through federal and state post-conviction proceedings. In particular, it focuses on the challenges they face in developing evidence of their innocence and finding a court that will allow them to present it. Furthermore, this Article examines proposed solutions to address wrongful convictions and argues that, absent substantial systemic reform, these solutions are inadequate to solve this issue.

As federal habeas corpus was traditionally the final hope for innocent state prisoners, Part I of this Article begins by examining the current landscape of federal habeas corpus and its "innocence gateway," and explores how courts across the country have interpreted what successful passage through that gateway requires. Additionally, this Part discusses state post-conviction proceedings, new statutes for innocent defendants, and the barriers state processes pose to innocent individuals. Part II analyzes how these limitations particularly impact and harm *pro se* defendants seeking release based on their factual innocence. Finally, Part III examines potential solutions and argues that a combination of radical reforms, including conviction review and the right to post-conviction counsel, are necessary to solve this crisis of innocence.

I. Background

A. How AEDPA Changed Federal Habeas Review

To understand the challenges *pro se* defendants face in litigating their innocence, it is necessary to understand AEDPA's pitfalls and the basic framework of federal habeas corpus litigation. In habeas corpus proceedings, state prisoners present their claims of constitutional violations to the federal courts. Until the 1990s, federal habeas corpus provided defendants, albeit with limitations, a way to have a federal court "independently review the merits" of those constitutional claims.[14] Starting in the 90s, the U.S. prison population began to increase, with state prison populations doubling by 2007.[15] With the number of federal habeas petitions rising, and due to concerns regarding delay, perceived abuse of the writ of habeas corpus, and increasing time between death sentences and executions, Congress proposed legislation that aimed at

3,300 exonerations of the wrongfully convicted since 1989). State and federal post-conviction procedures fail "to identify and remedy wrongful convictions far too frequently." Hartung, *supra* note 3, at 72.

14. *See* Adelman, *supra* note 5.

15. Hartung, *supra* note 3, at 67.

increasing finality in state judgments.[16] Despite the protests of habeas and criminal justice experts, Congress passed AEDPA in 1996.[17]

AEDPA severely limited prisoners' ability to get relief by putting in place both procedural and substantive limitations on federal courts' review. First, AEDPA created an exhaustion requirement, meaning that state prisoners must first bring their constitutional claims to state courts.[18] If they fail to do so, the claim may be procedurally defaulted; once defaulted, claims are typically ineligible for review by a federal court.[19] Second, AEDPA forbids successive habeas corpus petitions.[20] Under this rule, claims mentioned in a prior habeas petition must be dismissed.[21] Additionally, claims not previously presented must be dismissed unless they fit into "one of two narrow exceptions."[22] Finally, AEDPA enacted a one-year statute of limitations, giving prisoners only one year from the end of their state collateral review[23] to file their habeas petition.[24] If claims are not timely filed, they can be dismissed as procedurally defaulted.[25] Furthermore, petitions that contain both defaulted and not defaulted claims can be dismissed.[26]

Substantively, AEDPA created a deferential standard in favor of state courts, even if their decisions are erroneous. Federal courts must defer to state court rulings "that are based on incorrect interpretations of federal constitutional law as long as such interpretations [are] . . . 'reasonable.'"[27] Furthermore, AEDPA limited what federal law could even qualify for relief. Federal courts may not grant relief on any authority except clearly established Supreme Court precedent.[28]

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16. *Id.*

17. For a more thorough discussion of the political impetus behind federal habeas corpus, including the passage of AEDPA and the innocence movement, see *id.* at 67–70. Before AEDPA was passed in 1996, only thirty individuals had been exonerated due to DNA evidence reform in the 1990s. *Id.*

18. 28 U.S.C. § 2254(b)(1)(A).

19. CHARLES DOYLE, CONG. RSCH. SERV., RS22432, FEDERAL HABEAS CORPUS: AN ABRIDGED SKETCH 4 (2010).

20. *See* 28 U.S.C. § 2244(b)(1).

21. DOYLE, *supra* note 19.

22. *Id.* at 2. These exceptions are that the claim "relies on a newly announced constitutional interpretation made retroactively applicable" or that "it is predicated upon newly discovered evidence, not previously available through the exercise of due diligence, which together with other relevant evidence establishes by clear and convincing evidence that but for the belatedly claimed constitutional error no reasonable factfinder would have found the applicant guilty." *Id.* at 2–3.

23. See *infra* notes 42–44 and accompanying text for a discussion of collateral review.

24. 28 U.S.C. § 2244(d)(1); *see infra* Section I.B.

25. DOYLE, *supra* note 19.

26. *Id.*

27. Adelman, *supra* note 5.

28. *Id.*

The Court's decision in *Cullen v. Pinholster* was even more disastrous for federal habeas petitioners, as it limited the types of evidence that could be presented to a federal court.[29] The Court held that federal courts are limited to the record that was before the state court that adjudicated a petitioner's claims on the merits.[30] This holding means that petitioners in federal court cannot present new evidence that has emerged since their state proceedings. For *pro se* defendants who often require longer periods of time to investigate their case, this holding can bar them from ever having all the evidence in their case considered by a court.[31]

In May 2022, the Court further limited petitioners' ability to gain relief in federal court. *Shinn v. Ramirez* overturned relief for two petitioners on Arizona's death row, Barry Lee Jones and David Ramirez.[32] In doing so, the Court held that under AEDPA, federal courts may not hold evidentiary hearings or even consider evidence beyond the state court record based on the fact that petitioner's state post-conviction counsel were ineffective.[33] Therefore, if a petitioner has ineffective trial counsel who fails to investigate and develop a record of their innocence, as well as post-conviction counsel who fails to do so, they will not be permitted to conduct such evidentiary development in federal court.[34]

Despite these procedural and substantive hurdles, defendants are not guaranteed the right to legal counsel for federal habeas proceedings. While capital defendants—defendants facing the death penalty—are guaranteed counsel, those who receive lesser sentences must either hire their own counsel or proceed *pro se*.[35] This fact is why 90% of non-capital federal habeas petitions involve *pro se* litigants.[36] Without counsel, *pro se* defendants are left to navigate the complicated landmine of federal habeas corpus alone, while simultaneously attempting to gather evidence to prove their innocence.

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29. Cullen v. Pinholster, 563 U.S. 170 (2011).

30. *Id.* at 181.

31. *See* Hartung, *supra* note 3, at 80–82 (discussing AEDPA's statute of limitations and how it creates piecemeal appeals in federal habeas litigation).

32. Shinn v. Ramirez, 142 S. Ct. 1718 (2022).

33. *Id.* at 1739–40.

34. *Id.*

35. *Id.* at 28–29 (citing 18 U.S.C. § 3599(a)(2)).

36. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1223 (2012). For a discussion of the demographics of *pro se* defendants, see *infra* Section I.D of this Article.

B. Litigating Innocence at the State Level

AEDPA requires that a state prisoner fully exhaust their claims first in their state's courts before filing their federal habeas petition.[37] If they fail to do so, their federal habeas claims can be dismissed as procedurally defaulted.[38] In order to understand why innocent *pro se* defendants face an impossible burden in obtaining federal habeas relief, it is necessary to have a basic understanding of the state appellate process.[39]

After a conviction in the trial court, a defendant then moves on to their direct appeal. Direct appeal claims are limited to procedural errors that happened at trial and the trial record, meaning these appeals cannot include any new evidence.[40] Therefore, any relevant evidence discovered after the trial, even if it points to a defendant's innocence, would not be admissible at this stage of appeals. At this level of the appellate process, defendants are guaranteed the right to counsel.[41]

If a defendant fails on direct appeal, they then move to their state's collateral appeal, which is often called post-conviction review or state habeas. At this stage in the appellate process, defendants are usually no longer guaranteed the right to counsel, although some states do appoint counsel.[42] These post-conviction claims allow for the presentation of new evidence; in fact, some states allow newly discovered evidence to serve as grounds for post-conviction relief.[43] However, states also enact their own procedural and substantive limitations on relief, including strict statutes of limitations and high standards for evidence of innocence.[44]

Some states also have mechanisms for convicted persons to file motions for new trials based on newly discovered evidence.[45] However, these motions must usually be filed at the trial court level, meaning prisoners may be asking for a new trial from the very judge that convicted or sentenced them.[46] Some scholars have noted the opportunity for prejudice and bias in this process, as well as political pressure to uphold

37. 28 U.S.C. § 2254(b)(1) (stating that a writ for habeas corpus "shall not be granted" unless the applicant has exhausted their remedies in state court, with limited exceptions).

38. *See id.* § 2254(b)(2).

39. See Hartung, *supra* note 3; Medwed, *supra* note 12; Brooks et al., *supra* note 12; Brandon L. Garrett, *Judging Innocence*, 100 COLUM. L. REV. 55, 101 (2007), for more thorough analyses of state-level post-conviction issues.

40. Hartung, *supra* note 3, at 59.

41. *Id.* at 88.

42. *Id.* at 87–88.

43. Medwed, *supra* note 12, at 665.

44. *Id.* at 676.

45. *Id.* at 679.

46. *Id.*

convictions in states where judges are elected.[47] Furthermore, defendants are not usually provided counsel in order to file these types of motions.[48]

The process described above is procedurally complicated, and *pro se* prisoners may not be able to develop the evidence required to prove their innocence and obtain relief in state post-conviction proceedings.[49] Furthermore, these problems were exacerbated post-AEDPA by states' efforts to make their own appellate processes more restrictive by limiting appeals and cutting funding for public defense.[50] Notably, in his 2011 book, Professor Brandon Garrett at Duke University School of Law conducted a study of the first 250 exoneration cases in the United States.[51] In these cases, every defendant's claim of innocence was rejected by state courts.[52] This fact shows state courts' reluctance to consider claims of actual innocence and their interest in upholding their courts' convictions for the purposes of finality and the preservation of jury verdicts.[53]

Yet states have created some mechanisms for innocent defendants to obtain relief. All states have some type of post-trial relief based on claims of newly discovered evidence.[54] Some states also allow for motions for new trials based on new evidence or for new post-conviction, collateral proceedings.[55] However, these avenues for relief often contain high legal and factual standards, statutes of limitations, and bars on discovery and evidentiary hearings.[56]

A mistake at the state appellate level could mean that a defendant's constitutional claims will never be reviewed by a federal court on the

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47. Hartung, *supra* note 3, at 62; *see also infra* Section II.B.iii (discussing how state judicial and prosecutorial elections might affect appellate outcomes).

48. Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999) ("Hornbook constitutional law tells us that the state has no obligation to provide counsel to a defendant beyond his first appeal as of right.").

49. *See infra* Section II.A.

50. Radley Balko, *Opinion: Why We Can't Trust the States to Prevent Wrongful Convictions*, WASH. POST (Aug. 9, 2021), https://www.washingtonpost.com/opinions/2021/08/09/why-we-cant-trust-states-prevent-wrongful-convictions/ [perma.cc/6EVE-4TBW].

51. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6–7 (2011).

52. *Id.* at 202.

53. *See* Medwed, *supra* note 12, at 664–65 ("[S]tate courts have traditionally viewed newly discovered evidence claims with disdain, fearing the impact of such claims on the finality of judgments and the historic role of the jury as the true arbiter of fact, and harboring doubts about the underlying validity of new evidence." (footnotes omitted)).

54. *Id.* at 665 ("[E]very state provides for a motion for a new trial on the basis of newly discovered evidence.").

55. *Id.* at 659.

56. *Id.* (discussing state post-conviction procedures available to defendants who lack DNA evidence).

merits, due to AEDPA's rules regarding exhaustion and procedural default.[57] However, federal habeas corpus does provide a final hope for innocent defendants who may have made fatal mistakes during their state appellate proceedings—the actual innocence gateway.

C. The Actual Innocence Gateway: The Wrongfully Convicted's Last Chance

Functionally, the actual innocence gateway is just that—a pathway that allows a defendant to obtain federal review of their procedurally defaulted or otherwise barred claims.[58] The gateway does not provide an independent avenue for relief; it simply allows a federal court to consider claims that it otherwise could not.[59]

The actual innocence gateway's standard was first established in *Murray v. Carrier* and later clarified in *Schlup v. Delo*.[60] In *Schlup*, the Supreme Court held that prisoners may access the gateway and argue the merits of their constitutional claims if they can present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."[61] The Court stressed that such cases of actual innocence are "extremely rare," and thus set a high standard for evidence of innocence.[62] A defendant must present evidence that makes it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[63]

Thus, an actual innocence gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not

57. As discussed earlier in this Article, even if a defendant properly files all of their state appeals, AEDPA's deference to state court decisions may still preclude relief for factually innocent prisoners. *See generally* Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, THE CHAMPION (2005), https://www.nacdl.org/Article/June2005-APrimerOnPost-ConvictionHabeas [perma.cc/S95F-TRT5] (providing background on AEDPA and state habeas corpus review).

58. While the gateway initially only allowed review of procedurally defaulted claims, the decision in *Perkins* expanded the gateway to also allow review of claims barred due to AEDPA's statute of limitations. McQuiggin v. Perkins, 569 U.S. 383 (2013). However, filing an untimely petition can be used as a factor in determining the reliability of a defendant's claims of innocence. *See also* Schlup v. Delo, 513 U.S. 298, 332 (1995).

59. *See* Herrera v. Collins, 506 U.S. 390, 404 (1993) ("[T]his body of our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

60. *See* Murray v. Carrier, 477 U.S. 478 (1986); *Schlup*, 513 U.S. 298.

61. *Schlup*, 513 U.S. at 316.

62. *Id.* at 321.

63. *Id.* at 327.

presented at trial."[64] Circuit courts have interpreted this phrase differently, though, and have created separate standards for what types of new evidence they will consider when reviewing an actual innocence gateway claim.[65]

The more widely used "newly presented" standard allows defendants to present any evidence that was not presented at trial.[66] This standard would allow for a variety of evidence in actual innocence gateway litigation, including evidence not presented due to trial counsel's ineffectiveness, evidence unknown to trial counsel or the defendant at the time of trial, and evidence that was excluded by the trial court judge.[67] For example, this standard would allow for newly discovered forensic evidence, testimony from the defendant that was not offered at trial, or even recanted testimony from important witnesses. Currently, the "newly presented" standard has been adopted by the Second, Sixth, Seventh, Ninth, and Tenth Circuits.[68]

The Third, Fifth, and Eighth Circuits, however, follow a "due diligence" standard, which states that courts will only consider evidence "new" for the purposes of the actual innocence gateway if the evidence was not available at trial through the exercise of due diligence by the defendant or their counsel.[69] Unlike the "newly presented" standard, this approach only allows evidence that was unknown, and could not have been discovered through due diligence, at the time of trial.70 Evidence that was excluded due to trial counsel's ineffectiveness or due to a trial judge's decision cannot be considered for the purposes of the actual innocence gateway under this standard.[71] This standard would require, for example, new witnesses or police officers

64. *Id.* at 324.

65. The majority of circuits follow the two approaches next discussed in this Article: the "newly presented" and the "due diligence" standards. However, some outlier approaches persist. For example, in *Rica v. Ficco*, the First Circuit seemed to follow a "newly presented" standard, but it ultimately denied relief to the defendant because evidence presented at trial competed with evidence presented in the actual innocence gateway petition. Rica v. Ficco, 803 F.3d 77, 84–85 (1st Cir. 2015).

66. For an in-depth analysis of the various evidentiary standards used by circuit courts for the actual innocence gateway, and an argument in support of the "newly presented" standard, see Jay Nelson, *Facing up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 69 HASTINGS L.J. 711 (2008). While this Article acknowledges that the "newly presented" standard is more favorable to *pro se* defendants, this Author argues that both standards are particularly insurmountable for innocent, *pro se* defendants.

67. *Id.* at 720.

68. *See, e.g.*, *id.* at 718–19. Minnesota state courts also appear to follow this standard. *See* MINN. STAT. § 590.01, subdiv. 1a (2022); Rainier v. State, 566 N.W.2d 692, 695 (Minn. 1997) (discussing new forensic evidence).

69. Nelson, *supra* note 66, at 718–20.

70. *Id.* at 712–13.

71. *Id.*

who engaged in misconduct at the time of the trial to come forward.[72] It may even necessitate new forensic evidence, further burdening *pro se* defendants.[73]

Moreover, as discussed previously regarding *Cullen* and *Shinn*, AEDPA and the Supreme Court have further restricted the development of new evidence in federal courts.[74] Section 2254(e)(2) also states that if a petitioner "has failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing . . . unless the applicant shows" that the claim falls within a few narrow exceptions.[75] These exceptions are if "the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court;" the claim includes facts that could not have been discovered previously through due diligence; or "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[76] Thus, a prisoner would need to already have strong evidence of their innocence in order to gain an evidentiary hearing or have an underlying constitutional claim based on a new rule that is both constitutionally based and retroactively applied. Part II of this Article discusses how evidentiary development is particularly difficult for innocent, *pro se* defendants, making the "due diligence" standard adopted by these circuit courts much less favorable to these types of petitioners.

D. The Demographics of Pro Se *Defendants*

While it is difficult to ascertain the exact demographics of non-capital, *pro se*, habeas corpus petitioners, some data does exist on these defendants. As discussed earlier, 90% of non-capital habeas petitions involve *pro se* prisoners.[77] *Pro se* defendants are also more likely to be indigent and people of color.[78] For example, Black Americans are incarcerated in state prisons at nearly five times the rate of White

72. *Id.* at 723.

73. *See infra* Part II.

74. *See supra* text accompanying notes 29, 32.

75. 28 U.S.C. § 2254(e)(2).

76. *Id.*

77. *See* Uhrig, *supra* note 36 and accompanying text.

78. *See* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey, *and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 182, 188–89, 194 (2015) (describing how people of color, specifically Black and Hispanic individuals, are overrepresented in the prison system due to "systemic bias," and almost 95% of inmates are indigent).

Americans.[79] Latinx persons are incarcerated in state prisons at 1.3 times the rate of White individuals.[80] Furthermore, Black and Hispanic individuals are more likely to receive life sentences, and life sentences without parole, which means that people of color are more likely to serve long sentences that may need to proceed to habeas corpus appeals.[81]

Further, LGBTQ+ people "are incarcerated at a rate two to three times that of the general population."[82] These individuals face sexual violence within prisons at a higher rate than other inmates, meaning they may be forced to live in segregated or solitary confinement while incarcerated, which could further limit their ability to access their prisons' already limited resources.[83]

Individuals with mental disabilities are also disproportionately represented in prisons; in fact, the majority of those incarcerated struggle with mental illnesses or other issues.[84] Of state prisoners, 56% have mental health problems, and around 24% have at least one symptom of a psychotic disorder.[85] Further, nearly four in ten state prisoners reported having a disability of some kind, including physical, mental, and intellectual disabilities.[86]

Incarcerated individuals are also more likely to be indigent. Nearly 95% of prisoner-initiated suits are filed *in forma pauperis*.[87] Additionally, those who had significant incomes prior to their incarceration may become indigent due to notoriously low wages within prisons and prison and court fees.[88]

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79. ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/ [perma.cc/NL9X-4TQW].

80. *Id.* at 5.

81. Alison Walsh, *The Criminal Justice System Is Riddled with Racial Disparities*, PRISON POL'Y INITIATIVE (Aug. 15, 2016), https://www.prisonpolicy.org/blog/2016/08/15/cjrace/ [perma.cc/Y6MH-LY53].

82. Hill, *supra* note 78, at 189.

83. *Id.* at 189–92.

84. *Id.* at 190–91.

85. *Id.* at 191.

86. LAURA M. MARUSCHAK & JENNIFER BRONSON, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., DISABILITIES REPORTED BY PRISONERS (2016), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf [perma.cc/E6DL-C56T].

87. Hill, *supra* note 78, at 194 n.102 (quoting Sharone Levy, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 371 (2000)). *In forma pauperis* describes the manner in which indigent individuals are "permitted to disregard filing fees and court costs." *In forma pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

88. *Id.* at 195 (discussing how commissary costs, prison fees, and other expenses consume prisoners' meager wages).

Moreover, individuals associated with one or more of these marginalized communities may also face incarceration at higher rates.[89] These statistics demonstrate that *pro se* defendants are among the most vulnerable and disadvantaged communities in the United States. They may face race or sex discrimination, severe resource limitations, and even physical and mental disabilities that could impact their success in both reinvestigating their cases and filing successful state and federal habeas appeals.[90] Furthermore, these identities may cause them to face bias from the very judges who will decide their fates.[91] When analyzing how the actual innocence gateway and its evidentiary standards impact *pro se* defendants, it is both necessary and illuminating to keep these statistics in mind to fully understand the impossible challenges they may face in proving their innocence.

II. Analysis

A. Investigating Innocence: Why Pro Se *Defendants Struggle to Prove Their Cases*

New evidence is necessary to support most post-conviction claims.[92] Definitions of new evidence vary based on the type of claim a defendant raises and the jurisdiction in which the defendant resides. For the most part, new evidence is evidence that was discovered after a defendant's conviction.[93] Some states place an additional requirement of "due diligence" on this new evidence, similar to that imposed by some circuits in their interpretation of the *Schlup* actual innocence gateway.[94] This requirement means that, in order to be "new," the evidence must not have been discoverable at the time of trial if the defendant or their attorney had exercised due diligence.[95]

Whether this evidence was simply not presented at trial or whether it was known to a defendant and their counsel, this new evidence will require some sort of investigation to uncover or properly compile into a

89. *Id.* at 186.

90. *Id.* at 184–94.

91. *Id.* at 183 (describing, for example, how implicit bias may affect judges reviewing pleadings by *pro se* litigants).

92. Medwed, *supra* note 12, at 665 (explaining how both motions for new trials and petitions for post-conviction relief may require new evidence); *see, e.g.*, Brooks et al., *supra* note 12 (describing new evidence standards in post-conviction statutes across the United States).

93. Brooks et al., *supra* note 12, at 1056.

94. *Id.* at 1066–70 (discussing which states' new evidence statutes require due diligence); *see also supra* Sections I.B–C (discussing the different interpretations of "new evidence" used by the federal circuits).

95. Brooks et al., *supra* note 12, at 1051–53.

legal filing. Innocent, *pro se* defendants face incredible obstacles in reinvestigating their cases while incarcerated, and thus may not ever be able to succeed during state post-conviction or federal habeas proceedings.

For example, in *McQuiggin v. Perkins*, Floyd Perkins, an innocent man convicted of a murder in Flint, Michigan, relied on the assistance of his friends and family to help in the investigation and collection of evidence in his case, including affidavits from witnesses.[96] Even with their assistance, Perkins failed to file his habeas corpus petitions according to AEDPA's strict requirements.[97] Perkins took eleven years to file his federal habeas petition.[98] His trial and post-conviction counsel failed to properly develop the factual record in his case, leaving him to rely on friends and family, who lacked legal training, to do so while he was incarcerated.[99]

First, many innocent defendants know nothing about the crime for which they were convicted. Unless the defendant was present and just not the offender, or unless the defendant witnessed some other aspect of the crime, they will not know the factual details of a crime.[100] What they know about a crime will be limited to what was presented at their trial.[101] This information asymmetry gives *pro se*, innocent defendants a very limited starting point for reinvestigating their cases. For an innocent person, the day of the crime may have been an ordinary day. They may not remember what they did on that fateful day. If they do remember, their memories may be incomplete because it is likely that many years will have elapsed since the incident occurred.[102] Unfortunately, for innocent defendants, the truth "may not make a very good story."[103] But a court requires not only a good story, it requires a story supported by new evidence that

96. Tiffany Murphy, *'But I Still Haven't Found What I'm Looking For': The Supreme Court's Struggle to Understand Factual Investigations in Federal Habeas Corpus* 5 (Univ. of Ark. Sch. of L., Working Paper No. 15–8, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644022 [perma.cc/R5ZY-LG2B].

97. *Id.*

98. *Id.* at 7.

99. *Id.* at 7–8.

100. Jeffrey D. Stein, *Opinion: How to Make an Innocent Client Plead Guilty*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html [perma.cc/679F-G2Q7].

101. *Id.*

102. *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020), https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ [perma.cc/NJ8Q-HUEF] (describing how memory deteriorates over time and why memories can become distorted).

103. Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 513 (2000) (explaining the experience of criminal defense attorneys who represent innocent clients).

sufficiently proves the wrongfully convicted person's innocence to the court.

Thus, an innocent defendant may start with what was presented at their trial as their factual basis for their search for new evidence. However, the truth given at trial may not be accurate or even complete. The National Registry of Exonerations states that, out of all of the official exonerations since 1989, 54% have involved misconduct by government officials significant enough to contribute to the individual's wrongful conviction.[104] This misconduct may include perjury by police officers at trial, fabricated evidence, concealed exculpatory evidence, and witness tampering.[105] Thus, an innocent person's knowledge from their trial may not be helpful in terms of finding new evidence or reinvestigating their case. In fact, what was presented at their trial may even hinder their investigations, causing them to rely on false information or fail to consider important, but concealed, evidence.[106]

In fact, the leading cause of wrongful convictions is perjury.[107] When witnesses, victims, or government officials lie, not only are defendants wrongfully convicted, but these lies impact their ability to reinvestigate their case.[108] Furthermore, courts often look unfavorably upon witness recantations when examining post-conviction petitions.[109] Unfortunately for defendants, this fact may mean that even if a defendant is able to procure a recantation, that evidence may not be sufficient for a court to grant relief.

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104. SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE, AND OTHER LAW ENFORCEMENT 1 (2020).

105. *See id.* at 1–3.

106. Brian Gregory, Brady *Is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U. S.F. L. REV. 819, 828–30 (2012) (describing how prosecutors and judges must speculate on the importance of evidence to a defendant, and how suppressed evidence may impact a defendant's case).

107. *Perjury*, INNOCENCE PROJECT NEW ORLEANS, https://ip-no.org/what-we-do/advocate-for-change/shoddy-evidence/perjury/ [perma.cc/JAS7-4UZ2].

108. *2019 Exoneration Report: Official Misconduct and Perjury Remain Leading Causes of Wrongful Homicide Convictions*, DEATH PENALTY INFO. CTR. (Apr. 3, 2020), https://deathpenaltyinfo.org/news/2019-exoneration-report-official-misconduct-and-perjury-remain-leading-causes-of-wrongful-homicide-convictions [perma.cc/8ED7-AGKG] (stating how perjury, false accusations, and official misconduct are often major causes of wrongful convictions); *Why Do Wrongful Convictions Happen?*, KOREY WISE INNOCENCE PROJECT, https://www.colorado.edu/outreach/korey-wise-innocence-project/our-work/why-do-wrongful-convictions-happen [perma.cc/BGZ5-AXYK] (describing how perjury and official misconduct impacted wrongful conviction cases).

109. ALEXANDRA E. GROSS & SAMUEL R. GROSS, WITNESS RECANTATION STUDY: PRELIMINARY FINDINGS (2013), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1090&context=other [perma.cc/T273-D2LE] (describing how courts often do not deem a witness' recantation significant or relevant enough for exoneration unless there is significant corroborating evidence).

Even if an innocent defendant has an accurate and adequate factual basis to begin their search for new evidence, they are necessarily hampered by their incarceration. Prisoners' ability to communicate with the outside world is severely limited by prison telephone, mail, and visitation systems.[110] Since many *pro se* defendants are also indigent, the price of telephone calls and postage may mean a defendant is unable to communicate with witnesses, legal experts, forensic specialists, and even loved ones who would be able to assist with their cases.[111] For example, in Minnesota, the Department of Corrections charges $0.75 for a fifteen-minute, in-state call from a state prison.[112] However, Minnesota inmates only earn, on average, between $0.25 and $2.00 per hour for prison jobs.[113] With these meager wages, defendants must also pay for various prison fees, commissary, and other needs they or their families may have, if there is no one else who can financially support the defendant.[114] They must also pay for the cost of hiring experts, whose opinions may be the new evidence needed to prove their innocence.[115] Prison officials may also limit a prisoner's time on telephones. For example, in New York state prisons, the ability to make a phone call is purely one of "privilege" subject to restriction.[116] These restrictions mean that innocent defendants may not be guaranteed the ability to conduct necessary phone interviews with individuals important to their case. Furthermore, these calls are monitored and often recorded by law enforcement and prison officials.[117] Prisons may also limit who prisoners can contact. Some facilities only allow prisoners to contact individuals on approved lists.[118]

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110. *See* JORDAN KUSHNER, JODY CUMMINGS, R. ANTHONY JOSEPH, STEPHEN M. LATIMER, ANDREW CAMERON, RICHARD F. STORROW, PATRICIA A. SHEEHAN & MICHAEL SLOYER, THE JAILHOUSE LAWYER'S MANUAL 642–73 (12th ed. 2020).

111. *See, e.g.*, *id.*

112. Mariah Zell & Kathryn Quinlan, *Inmates Need Access to Affordable Communication*, MINNPOST (Mar. 24, 2021), https://www.minnpost.com/community-voices/2021/03/inmates-need-access-to-affordable-communication/ [perma.cc/9UU7-U3XD].

113. *Id.*

114. *See, e.g.*, Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/AU23-5S8L] (describing prisoners' expenses).

115. Expert witnesses may charge fees of more than $1,000 per hour. *See* Dean Narcisco, *Expert Witnesses Like Those in Husel Trial Can Be Costly, But Can Sway Jury, Attorneys Say*, COLUMBUS DISPATCH (Apr. 1, 2022), https://www.dispatch.com/story/news/crime/2022/04/01/expert-witnesses-can-cost-thousands-but-can-sway-trial-outcomes/7210172001/ [perma.cc/B523-9LKX].

116. *What You Need to Know About Communication with People in Custody*, THE LEGAL AID SOC'Y (Nov. 2019), https://legalaidnyc.org/get-help/bail-incarceration/what-you-need-to-know-about-communication-with-people-in-custody/ [perma.cc/F6JE-W2EK].

117. *Id.*; KUSHNER ET AL., *supra* note 110, at 672.

118. *What You Need to Know About Communication with People in Custody*, *supra* note 116.

Mail can also be limited. For example, while prisoners may be able to send a few letters for free each week, other postage would require payments that indigent defendants cannot afford.[119] Furthermore, there are strict limitations on the types of mail that prisoners can receive, including page limits. In Minnesota, for example, incoming mail is limited to sixteen ounces per item, and photographs received are limited to twenty photos per mailing.[120] Prison staff may also check the contents of some mail.[121]

These prison-implemented restrictions make investigations difficult for innocent, *pro se* defendants, but they are not the only barriers. By the time an innocent person is filing post-conviction or habeas petitions, they may have been incarcerated for years, even decades.[122] This time away from their communities isolates the defendants.[123] They may lose contact with their friends and families.[124] This loss of connection may mean that incarcerated defendants cannot find individuals crucial to proving their innocence. Witnesses important to their case, victims, or even the real perpetrators may move or pass away.[125] Without support from the outside world, the innocent person may not be able to conduct interviews, collect affidavits and other documents, or gather leads.

An individual's defense attorney for a post-conviction appeal has far more access to reinterview crucial witnesses from trial.[126] They may travel to the local courthouse to gather documents from the case file. They may canvas the neighborhood in which a crime occurred, talk to residents, and gather contact information for those who have since moved away. They must hire experts on witness identification or talk to forensic scientists about evidence in the case. Unlike their incarcerated

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119. KUSHNER ET AL., *supra* note 110, at 645.

120. *Contact*, MINN. DEP'T OF CORR., https://mn.gov/doc/family-visitor/send/#:~:text=Incoming%20mail%20is%20limited%20to,must%20have%20the%20backing%20removed [perma.cc/7BV5-NZAL].

121. *Id.*

122. *See, e.g.*, Smith, *supra* note 103, at 507–09 (describing the legal process of appealing a wrongful conviction and the investigative efforts a lawyer and her students undertook for an inmate who had been in prison for over a decade by the time of her appeal).

123. *See, e.g.*, Melissa Li, *From Prisons to Communities: Confronting Re-Entry Challenges and Social Inequality*, AM. PSYCH. ASS'N (2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities [https://perma.cc/Z5HW-ESKL] ("A consequence of incarceration is that relationships with families and the broader community are strained.").

124. *Id.*

125. *E.g.*, Smith, *supra* note 103, at 490 (indicating that the likely perpetrator of the offense for which an individual was wrongfully convicted died before he could be contacted during appeal).

126. *See, e.g.*, *id.* at 507–09 (describing how a law school professor and their students reinterviewed witnesses during an investigation into an incarcerated, innocent defendant's case).

clients, attorneys can travel, even across the country, to track down witnesses, surprise them and gain new information, and obtain signed affidavits that can be used in later legal filings.[127] They could even go to the crime scene.[128] All of these actions are likely impossible for an incarcerated defendant.

Furthermore, many of the crimes for which innocent people are convicted are violent, traumatic crimes to both victims and their communities. Out of the 3,367 exonerations tracked by the National Registry for Exonerations, around 60% of those convictions were for child sex abuse, sexual assault, or homicide.[129] This statistic does not include other potentially violent crimes, such as physical assault, arson, or robbery.

In order to reinvestigate and gather new evidence, an innocent, *pro se* defendant may be forced to reach out to victims, their families, and their communities to ask questions about likely one of the most traumatic events in their lives. Some of those individuals may believe in the defendant's guilt; therefore, they may not be willing to speak to the defendant or anyone in the defendant's support system.[130] Such contact may even be viewed as harassment or witness tampering by the courts or by law enforcement, who may also doubt the defendant's innocence.[131]

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127. *Id.*

128. *E.g.*, *id.* at 509.

129. *Exonerations By Year and Type of Crime*, THE NAT'L REGISTRY FOR EXONERATIONS (Jan. 25, 2023), https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx [perma.cc/C6BN-NBRC].

130. The wrongful conviction of Adnan Syed, made famous by the podcast *Serial*, is an example of the tension between wrongfully convicted individuals and victims and their families. *See Serial*, SERIAL PRODS., https://serialpodcast.org/ [https://perma.cc/G4J8-EUX7]. Despite the fact that Syed's conviction was vacated, and despite evidence pointing to alternative suspects, Hae Min Lee's family have appealed the decision to overturn his conviction. Alex Mann, *Adnan Syed Case: Attorneys for Hae Min Lee's Brother Escalate Allegations Ahead of Oral Arguments in Appeal*, BALT. SUN (Jan. 24, 2023), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-adnan-syed-case-hae-min-lee-brother-appeal-allegations-increase-20230124-y4ta3bct5fawliqbckcy3x7bpy-story.html [perma.cc/WZ3D-SHWK]. They are also asking the appeals court to reinstate his murder charges. *Id.*

131. In the Adnan Syed case, Syed's advocate, family friend Rabia Chaudry, discovered after Syed's trial that he had an alibi witness his attorney never contacted. *See* Nicky Woolf, *Key Witness in Serial Case Asia McClain Says Prosecutor Suppressed Testimony*, GUARDIAN (Jan. 20, 2015), https://www.theguardian.com/tv-and-radio/2015/jan/20/key-witness-adnan-syed-serial-asia-mcclain [perma.cc/F4NX-ED97].This witness, Asia McClain, agreed to Chaudry's request to sign an affidavit. *Id.* Years later, McClain was contacted by a private investigator in Syed's case. *Id.* After this contact, McClain contacted the prosecutor on the case, Kevin Urick, who convinced her not to participate in an upcoming post-conviction hearing in Syed's case. *Id.* At that hearing, prosecutor Urick then testified falsely under oath that McClain signed the affidavit under duress and that Syed's family was harassing her. *Id.* McClain has publicly stated that these comments by the prosecutor were false. *Id.* However, this case shows the danger a wrongfully convicted person and their family can face if they attempt to contact witnesses in their case. *Id.*

Moreover, as previously noted, a defendant may be limited by their prison in who they can contact.[132]

Finally, a defendant must do more than collect evidence of their factual innocence in order to gain their release at the federal habeas level. The actual innocence gateway is only a means through which procedural default can be excused. To be successful in federal habeas, innocent defendants must also gather evidence of an underlying constitutional claim, such as ineffective assistance of counsel or prosecutorial misconduct.[133] The Supreme Court has stated that prisoners in both federal and state facilities have the right to visit law libraries in order to prepare their legal filings.[134] However, prisoners have claimed in federal court that state prison law libraries are inadequate in helping them prepare their appeals.[135] Yet, the Supreme Court has also made it more difficult for inmates to succeed on these claims.[136] Furthermore, AEDPA's procedural and substantive complexities will most likely mean that without the assistance of legal experts, any filings made by *pro se*, innocent defendants will be inadequate.[137]

These barriers are why statutes of limitations and high evidentiary standards in AEDPA and state post-conviction statutes are so damaging and unreasonable for *pro se*, innocent defendants. Even with monetary resources, the support of friends and family, access to a law library, and adequate communications with the outside world, an innocent defendant may never be able to gather the necessary evidence to obtain relief. *Pro se*, innocent defendants must master AEDPA, state post-conviction review, and all their complexities, as well as the legal standards of their constitutional claims, within short statutory time periods. For prisoners who have not received a legal education, relief is likely impossible.[138]

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132. KUSHNER ET AL., *supra* note 110, at 645.

133. Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation[.]").

134. Bounds v. Smith, 430 U.S. 817, 828 (1977). *But see* Hill, *supra* note 78, at 194–97 (discussing *Bounds* and prisoners' remaining difficulties in filing *pro se* petitions in federal courts).

135. Hill, *supra* note 78, at 196–97.

136. *Cf.* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries,* 101 GEO. L.J. 1171, 1206–10 (2013) (describing how Lewis v. Casey, 518 U.S. 343 (1996), heightened the standing requirement for claims that the State failed to provide adequate law library facilities and limited the types of claims that inmates could bring).

137. EVE BRENSIKE PRIMUS, LITIGATING FEDERAL HABEAS CORPUS CASES: ONE EQUITABLE GATEWAY AT A TIME 1–2 (2018), https://acslaw.org/wp-content/uploads/2018/07/July-2018-Primus-Issue-Brief-Habeas-Corpus.pdf [perma.cc/82FK-6ST5] (stating that only 0.29% of non-capital state prisoners obtain federal habeas relief).

138. *Id.*; NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT:

B. Absent Repealing AEDPA, Proposed Reforms to Federal Habeas Corpus Are Inadequate for Pro Se *Defendants*

By the mid-1990s, both federal courts and Congress began limiting the availability of relief for federal habeas petitioners.[139] Motivating AEDPA's creation was the case of Timothy McVeigh—the Oklahoma City bomber who killed 168 people in April 1995—who asked to waive all legal proceedings and be executed.[140] However, his execution was delayed when a stay of execution was granted to allow him to litigate issues potentially contained within disclosed FBI documents.[141] Although AEPDA would affect all habeas petitioners, the bill was politically sold as a measure that would reduce extended post-conviction review of death penalty cases and accelerate executions.[142] However, only 2% of all federal habeas petitions filed each year are capital cases.[143]

Yet this desire to decrease abuse of the writ may have just shifted the burden of post-conviction litigation to state courts. To fully exhaust their claims at the state level, so as not to fail due to procedural default at federal habeas, a defendant may need to file multiple petitions in state court.[144] If additional evidence is found during federal habeas, they may also need to return to state court to fully develop that claim.[145] The desire to reduce federal habeas litigation could be increasing costs and appeals at the state post-conviction level.

Scholars have proposed numerous reforms to federal habeas corpus that would help innocent and unconstitutionally imprisoned individuals gain relief.[146] Yet absent repeal of AEDPA and a return to previous federal habeas jurisprudence, these reforms fail to address the specific difficulties that *pro se*, innocent defendants face. The following sections address different aspects of these reforms and why they are inadequate for these types of petitioners.

HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 at 9–10 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf [perma.cc/3XE4-JCWY] (describing how most habeas petitions after AEDPA are dismissed or denied).

139. PRIMUS, *supra* note 137, at 4; James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412–13 (2001).

140. *See* Liebman, *supra* note 139, at 412.

141. *Id.*

142. *Id.* at 414.

143. *Id.* at 414 n.8.

144. *See* PRIMUS, *supra* note 137, at 4–6 (describing procedural default rules in federal habeas).

145. *Id.* at 4–5.

146. *See, e.g.*, *id.* at 2–3 (describing possible reforms to federal habeas corpus); Hartung, *supra* note 3, at 82–107 (arguing potential reforms to federal habeas corpus).

i. The Innocence Gateway and Its Evidentiary Standards

Federal circuits have interpreted the "new evidence" requirement for the actual innocence gateway differently.[147] The standard adopted by the majority of federal courts, what this Article refers to as the "newly presented" standard, simply requires that new evidence be any evidence that was not presented at trial.[148] Certainly, this standard is more favorable to *pro se* defendants, innocent defendants, and some have proposed adopting this standard nationwide to help factually innocent defendants.[149] This standard allows them to present evidence that was excluded by a trial judge or even evidence that ineffective counsel failed to produce or investigate.[150] Yet this standard still does not fully remedy the difficulties a *pro se* defendant would face in attempting to gather evidence or compile their habeas petition, such as a dearth of resources, access to witnesses, and legal knowledge.[151]

For example, if a defendant had an alibi witness for the time of the crime that was not presented at trial, that information could later be used under this standard in their actual innocence gateway claim. On the other hand, under the "due diligence" standard discussed below, this evidence would not be available for an actual innocence gateway claim, because the defendant or their ineffective counsel could have presented this information at trial.[152]

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147. *See supra* Section I.C.; Nelson, *supra* note 66 (discussing the textual support for different standards of interpretation).

148. *See* Nelson, *supra* note 66.

149. *Id.* at 720.

150. *Id.* at 720–25.

151. *See supra* Section II.A.

152. A situation like this famously happened in the Adnan Syed case, featured on the podcasts *Serial* and *Undisclosed*. *See Serial*, *supra* note 130; *Undisclosed*, https://undisclosed-podcast.com/episodes/season-1/ [https://perma.cc/9EMH-87Z3]. When he was in high school, Syed was convicted of killing his friend and ex-girlfriend, Hae Min Lee, on January 13, 1999. *E.g.*, Emma Dibdin, *A Complete Timeline of the Case Against Adnan Syed*, HARPER'S BAZAAR (Mar. 31, 2019), https://www.harpersbazaar.com/culture/film-tv/a26721305/adnan-syed-case-trial-timeline/ [perma.cc/E59Z-6F2F]. A classmate, Asia McClain, claimed to have seen and had a conversation with Syed in the school library at the time of the murder. *E.g.*, Beatrice Verhoeven, *'Serial' Witness Asia McClain on the Last Time She Saw Adnan Syed: 'He Didn't Seem to Be Jealous*,*'* THE WRAP (Mar. 17, 2019), https://www.thewrap.com/serial-alibi-witness-asia-mcclain-last-time-she-saw-adnan-syed-jealous/ [https://perma.cc/85Y7-VKK5]. However, Syed's attorney failed to contact McClain or any other potential alibi witnesses, and McClain's testimony was not presented at trial. *Id.* Only through the post-trial efforts of Syed's family friend and advocate, Rabia Chaudry, was an affidavit obtained from McClain. *Id.* Syed presented this information in his state post-conviction appeals, which he lost in 2019. *Id.* Syed was later released due to the work of his attorney and a sentencing review unit in Baltimore in September 2022 after serving twenty-three years in prison. Michael Levenson, *Judge Vacates Murder Conviction of Adnan Syed of 'Serial*,*'* N.Y. TIMES (Sept. 19, 2022), https://www.nytimes.com/2022/09/19/us/adnan-syed-murder-conviction-overturned.html [perma.cc/K6F9-WBUQ].

The "due diligence" standard states that the only evidence considered "new" for the purposes of the actual innocence gateway is that which was not available at trial and could not have been discovered earlier through due diligence.[153] This standard excludes any evidence that was not presented at trial due to decisions by the judge, and even more detrimentally, it places the harm of an attorney's mistake on the defendant.[154] If a trial defense attorney makes a poor strategic decision or fails to investigate a key aspect of an innocent person's defense, that failure may prevent a defendant from ever presenting that evidence as part of their actual innocence gateway claim.[155] But "due diligence" does not only apply to a defendant's attorneys; it also applies to a defendant personally.[156] For many defendants, though, their ability to participate in their defense may be restricted by pre-trial incarceration, which can present the same investigative barriers as incarceration after a wrongful conviction.[157] Before trial, if a defendant is not able to pay the bail set in their case, they may not be able to help their defense attorney in gathering evidence and witnesses.[158] A 2000 study even showed that conviction rates may be higher for those who were detained pre-trial than those who had been released.[159] Additionally, those charged with more serious offenses, who face longer sentences if wrongfully convicted, may be those least likely to be released before trial.[160] Thus, a defendant's pre-trial incarceration may isolate them and make them unable to accomplish the "due diligence" required by this standard.

Theoretically, one type of evidence that would fit within the "due diligence" standard is newly discovered forensic evidence. However, evidence from a case remains in the custody of the government even after

153. Nelson, *supra* note 66, at 719 (quoting the Eighth Circuit's interpretation of the standard).

154. *Id.* at 722–23, 725.

155. *Id.* at 725.

156. *Id.* at 720–21; *see also* Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022) (explaining how prisoners are at fault for not developing the state court record for their case, in addition to their post-conviction attorneys).

157. *See* Diana D'Abruzzo, *The Harmful Ripples of Pretrial Detention*, ARNOLD VENTURES (Mar. 24, 2022), https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention [perma.cc/4WRR-3H8X] (noting that individuals not incarcerated pre-trial are able to participate in their own defense).

158. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005).

159. *Id.* at 1131 (discussing a 2000 study of state felony defendants in urban counties).

160. *See* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007), https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf [perma.cc/3Q2V-LEGT].

trial, meaning that a defendant may need to fight in court for access to evidence relevant to their case.[161]

While the "newly presented" standard may be more favorable to innocent, *pro se* defendants, both standards are inadequate for these types of prisoners. In fact, the actual innocence gateway itself is not an effective remedy for wrongfully convicted persons. At its core, the gateway only ensures that a defendant's constitutional claims can be reviewed on their merits.[162] If their constitutional claims are not substantial enough, or if a petitioner is unable to gather adequate evidence to support an underlying constitutional claim, an innocent prisoner could still be denied relief.[163]

ii. AEDPA's Statute of Limitations Prevents Complete Habeas Petitions

In *McQuiggin v. Perkins*, the Supreme Court extended the actual innocence gateway to excuse default for petitions filed after AEDPA's one-year statute of limitations.[164] This holding means that federal habeas petitioners who file after this deadline may be able to access the innocence gateway and have their constitutional claims considered on their merits.[165] However, the Supreme Court instructed that a defendant's delay in filing their petition should be considered when weighing evidence of their innocence.[166]

This means that defendants must not only present new evidence to federal courts, but they must explain why that evidence could not have been presented at trial or before the current proceedings.[167] Furthermore, the statute of limitations forces defendants to either file early, meaning their petitions are potentially incomplete, or they can wait until they have gathered all the necessary evidence of their innocence, but the statute of limitations may have expired by that point.[168]

Some have argued that in order to fairly interpret *Perkins* and its exception to the statute of limitations, courts must allow petitioners to

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161. *E.g.*, *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://innocenceproject.org/causes/access-post-conviction-dna-testing/ [perma.cc/3R48-RJ9R]. For other issues with state post-conviction statutes, see Section II.C.

162. Schlup v. Delo, 513 U.S. 298, 313–15 (1995).

163. *Id.* (describing that the innocence gateway allows for review of a constitutional error claim and does not create an independent ground for relief for innocence).

164. *See* McQuiggin v. Perkins, 569 U.S. 383 (2013).

165. *Id.*

166. *Id.* at 399.

167. Murphy, *supra* note 96, at 32–33.

168. *Id.* at 34 ("Evidence does not arrive in one clump but often is uncovered piece by piece[.]").

articulate efforts they or their counsel made in gathering evidence.[169] Courts must also fully appreciate and consider the obstacles petitioners face as a result of prison life.[170] Finally, courts must also consider petitioners' intellectual and mental abilities, as well as their education level, in deciding whether surpassing the statute of limitations weighs unfavorably against petitioners' innocence.[171]

However, these solutions, while certainly more favorable to defendants within AEDPA's limitations, still fail to address the fact that AEDPA's statute of limitations focuses unnecessarily on the finality of improper convictions and serves no purpose in the context of innocent, *pro se* defendants. What purpose is served by a court admonishing or potentially forcing innocent persons to remain in prison, simply because they could not gather sufficient evidence within AEDPA's time constraints? The efforts surrounding these petitioners' legal filings and their occupancy in prisons are a waste of judicial and corrections resources; the limitations serve no cause other than to preserve a wrongful conviction for a conviction's sake.[172]

iii. The Politicization of the State System: AEDPA's Deference to State Judgments and Factual Determinations Is Contrary to the Purpose of Federal Habeas Corpus

Historically, federal habeas corpus served as an opportunity for state prisoners to challenge their state convictions and allow their constitutional claims to be considered by impartial Article III judges.[173] When AEDPA passed in 1996, the legislation created significant deference to state court judgments and determinations of fact.[174] Proponents of the bill argued that federal review of state convictions was no longer as necessary, as states could be trusted to ensure that wrongful convictions would not happen.[175]

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169. *Id.* at 36.

170. *Id.* at 37.

171. *Id.* at 37–39.

172. Brooks et al., *supra* note 12, at 1075 ("[I]t does not make sense to have limits on the presentation of evidence. The cost of incarceration continues to rise each year. There may be some financial benefits in restricting filings by inmates, but these savings are dramatically overwhelmed by the cost of corrections. In addition, there is the moral question of incarcerating someone for a crime that new evidence can disprove. . . . Society is certainly not served by restricting the ability to bring that evidence to light by . . . time restrictions on evidence." (footnotes omitted)).

173. *See*, *e.g.*, Adelman, *supra* note 5 ("Nevertheless, even with the impediments the Court created, a state prisoner generally had the right to have a federal court independently review the merits of her or his constitutional claim. And a federal court had the authority and, in fact, the duty, to grant a writ of habeas corpus if a prisoner was in custody as a result of a constitutional violation.").

174. *See supra* Part I.

175. Balko, *supra* note 50.

However, as discussed in the following sections, states have failed to do so, and AEDPA's trust in state courts was misplaced. Post-conviction procedures have become more complicated, and high legal standards have made it nearly impossible for innocent, *pro se* defendants to gain relief. For example, in Missouri in 2001, a prosecutor infamously argued that innocence was not enough, and a defendant should still be executed despite his theoretical innocence.[176] Furthermore, state prosecutors routinely fight the testing of physical evidence in defendants' cases and defend wrongful convictions, even before the Supreme Court.[177] Government misconduct is one of the leading causes of wrongful convictions, with estimates projecting that 54% of wrongful convictions involve misconduct by government officials, including prosecutors, judges, and police officers.[178] AEDPA's deference to state decisions ignores these issues and goes against the spirit of federal habeas corpus review.

Furthermore, state judicial processes are particularly vulnerable to political influence. In many states and localities, judges, prosecutors, and sheriffs are elected.[179] These are the very people charged with investigating, prosecuting, and adjudicating crimes. When these public officials are up for re-election, they must often prepare to face criticism that they are "soft on crime" or not doing enough to protect their communities.[180] This political pressure means that public officials may be pressured to preserve convictions, particularly in high-profile cases

176. *See id.*

177. *See* sources cited *supra* note 130. These cases have even been argued before the Supreme Court. In 2021, the Supreme Court heard the case of Barry Jones, an Arizona prisoner sentenced to death who was granted relief through the actual innocence gateway by the federal district court. *See* Balko, *supra* note 50. The Ninth Circuit affirmed this decision. Before the Court, prosecutors argued that evidence of his innocence should not be considered under AEDPA for procedural reasons. *Id.* Thus, even before the Supreme Court, prosecutors argue that even if a defendant has convincing evidence of their innocence, they should be punished and even executed in spite of it. *Id.*

178. *See* Gross et al., *supra* note 104, at 11.

179. *Id.* at 155.

180. *See, e.g.*, Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html [perma.cc/PQT8-F2ZL] (discussing how progressive prosecutors are facing political pressures and even recall efforts because many U.S. cities are experiencing increases in violent crime); *see also* Nikki Rojas, *Looking at Role of Prosecutors, Politics in Mass Incarceration*, HARV. GAZETTE (Dec. 8, 2021), https://news.harvard.edu/gazette/story/2021/12/looking-at-role-of-prosecutors-politics-in-mass-incarceration/ [perma.cc/78JF-Y6AF] (citing a working paper by a doctoral candidate at Harvard Law School which found causal evidence that prosecutions and sentences increase in prosecutorial election years, and that these election effects were larger when local prosecutor races were contested).

involving murder, sexual assault, or vulnerable victims.[181] These are the same types of cases that appear to be the most common among wrongful convictions.[182]

Thus, when faced with the prospect of an election, and the potential overturning of a high profile, provocative case in their community, many prosecutors and judges may be more likely to uphold the conviction, even in the face of evidence of innocence, due to these political pressures.[183] Absent repeal of AEDPA and a return to independent federal review of state convictions, this aspect of AEDPA's regime will continue to punish innocent state prisoners whose exonerations may be prevented by the effects of local and state politics.

C. State Solutions to Wrongful Convictions Ignore Pro Se *Defendants' Investigative Barriers*

i. New Evidence Claims in State Courts

All states now have forms of post-trial relief available to defendants based on newly discovered evidence, including motions for new trials, collateral post-conviction procedures, and new evidence statutes.[184] These statutes usually require newly discovered evidence that proves a defendant's innocence under high legal and evidentiary standards.[185] However, judges are usually hesitant to grant release on these types of

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181. *See* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002) (explaining, after studying techniques voters may use when deciding whether to re-elect prosecutors, "an optimal voter strategy is always to reelect prosecutors who obtain convictions"); *see also* KATE BERRY, BRENNAN CTR. FOR JUST., HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1–2 (2015) https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases [perma.cc/77AA-DT8W] (surveying various empirical studies that all found that "the pressures of upcoming re-election . . . make judges more punitive toward defendants in criminal cases" and that elected judges reverse fewer death penalty convictions than appointed judges); Michael Hardy, *Kim Ogg Blames Rising Crime on Houston Judges. 14 of Her Prosecutors Are Vying to Unseat Them.*, TEX. MONTHLY (Mar. 2022), https://www.texasmonthly.com/news-politics/harris-county-judicial-elections-ogg/ [perma.cc/ZA6M-8V85] (describing how Harris County, Texas, District Attorney Kim Ogg and her office criticized elected judges, and even ran against them in judicial elections, because those judges set lower bail amounts for criminal defendants).

182. *Exonerations by Year and Type of Crime*, *supra* note 129 (showing that the most common crimes among the official exonerations are sexual assault, child sex abuse, homicide, and drug possession and sale).

183. *See* BERRY, *supra* note 181, at 10–11 (citing studies from the 1990s and the 2010s that suggest upcoming elections may make judges less willing to overturn capital sentences).

184. *See* Medwed, *supra* note 12 (discussing the history of new evidence claims and state habeas procedures).

185. *Id.* at 659; *see also* Brooks et al., *supra* note 12 (surveying new evidence statutes across the United States, their requirements, and the legal and factual standards that defendants must meet to gain relief).

fact-based claims because of issues concerning finality, the role of juries as determiners of fact in our criminal system, and doubts about the reliability of new evidence—particularly non-forensic evidence.[186]

These types of claims may also have short statutes of limitations. For example, in Ohio, a defendant has only four months from the date of the verdict to file a claim, while in Oregon that time limit is just ten days after the entry of judgment.[187] Some states have longer statutes of limitations, with some allowing up to five years to file a new evidence claim, while only two states—New Jersey and New York—have no statute of limitations.[188]

For *pro se*, innocent defendants, claims based on new evidence are unlikely to succeed for a variety of reasons. First, these types of claims for relief based on new evidence are usually filed with the original trial judge, the very person who sentenced the innocent person.[189] This reality may mean that biased state judges, who may have an interest in not overturning their own sentences and convictions, may not be likely to grant relief.[190] If these judges presided over the trial, they may also have their own impressions of the evidence of the case that could impact their willingness to grant relief.[191] For example, if a new witness comes forward and states that someone else committed the crime, a judge in this position may be more inclined to believe witnesses they personally heard at the trial, such as victims.[192] Since many state judges are elected, they may also face political pressure to preserve convictions in particularly high-profile or provocative cases.[193]

Second, the statute of limitations that govern these types of claims are particularly problematic when considered in light of the fact that many defendants are not guaranteed counsel for these types of post-conviction motions. As previously discussed, *pro se* defendants, especially those who are incarcerated, face significant barriers in reinvestigating their cases.[194] Contacting victims or witnesses may result in witness

186. Medwed, *supra* note 12, at 664–65.

187. Brooks et al., *supra* note 12, at 1070–75 (surveying the statute of limitations for states' new evidence claims).

188. *Id.*

189. Medwed, *supra* note 12, at 659–60.

190. *Id.* at 699–700.

191. *Id.*

192. *See id.* at 663–64 (providing the example of a new evidence claim in which the judge discounted a victim's post-trial, positive identification of a different suspect by stating that the victim was simply too afraid to positively identify the defendant at the time of trial).

193. *See* BERRY, *supra* note 181 (describing the influence of criminal convictions in state judge election campaigns due to concerns of appearing "soft on crime").

194. *See supra* Section II.A. *See generally* Smith, *supra* note 103 (detailing the case of Patsy Kelly Jarrett and the legal and evidentiary barriers she encountered in her failed habeas and clemency petitions).

tampering or harassment allegations.[195] The realities of incarceration prevent the *pro se* defendants from contacting new witnesses, tracking down leads, and even visiting the crime scenes.[196] Many of these defendants are also limited in financial resources that could help them hire experts and investigators.[197] These obstacles mean that *pro se* defendants will need substantially more time to gather evidence of their innocence, if they are even able to do so. Thus, the statute of limitations might prevent *pro se* defendants from ever gaining relief through these types of state post-conviction claims.

Third, many of these statutes have high legal and factual standards that may be impossible for *pro se* defendants to meet. For example, many of them have "due diligence" requirements, which may limit what evidence a defendant can present.[198] More problematic, though, are the high legal standards accompanying these claims. The majority of states require that the new evidence, if presented at trial, probably or more likely than not would have changed the result of the trial.[199] This is a higher standard than other constitutional claims for post-conviction relief, such as ineffective assistance of counsel.[200] Other states have an even higher standard, requiring "clear and convincing evidence" that the result would have been different or "clear and convincing evidence" that the defendant is innocent or not guilty beyond a reasonable doubt.[201]

These standards require *pro se*, innocent defendants to gather significant evidence of their innocence from behind bars. Furthermore, because of the procedural complexities of these claims, defendants with limited mental or intellectual abilities may not be able to compile a sufficient legal filing for the court. For example, these defendants must not only craft a convincing story of their innocence, but they must also educate themselves on the requirements of the standard of proof for their jurisdiction. Additionally, they must appropriately present their evidence to the state court, which may be difficult considering that some jurisdictions are hesitant to grant evidentiary hearings.[202] The decision to grant or not grant an evidentiary hearing is also within the discretion of

195. *See supra* text accompanying note 131.

196. *See* Smith, *supra* note 103.

197. *See* Hill, *supra* note 78, at 195.

198. *See supra* Section II.C.i (discussing "due diligence" standards in the context of the actual innocence gateway in federal habeas corpus). State due diligence requirements operate similarly, requiring that new evidence only encapsulates evidence that could not have been uncovered pre-conviction by a defendant or their attorney if they exercised due diligence. *See* Brooks et al., *supra* note 12.

199. *Id.* at 1058–60.

200. *Id.*

201. *Id.* at 1060–62.

202. Medwed, *supra* note 12, at 681.

the trial court; appeals of these types of decisions may not be possible or favorable to defendants.[203] Thus, a *pro se* defendant's ability to master these procedural hurdles may make the difference in whether they are able to present adequate evidence of their innocence to support these types of claims.[204]

ii. Post-Conviction DNA Testing Statutes

Every state now has a post-conviction DNA statute, though many are limited in scope and substance and may not allow for the testing of a defendant's evidence.[205] For example, some statutes place the burden on the wrongfully convicted person to prove that, if tested, the DNA will implicate another individual, effectively forcing a *pro se* defendant to solve the crime while incarcerated.[206] Furthermore, this would require a prisoner to file a motion in court in order to test their evidence, which may include complicated legal standards, court fines, and other burdens for indigent and *pro se* defendants.[207] Many of these statutes are also limited to DNA and do not include other types of forensic analysis,[208] even though biological evidence is not available in 80–90% of all cases.[209] Moreover, the number of potential wrongful convictions with DNA evidence is likely to decrease as DNA testing becomes more frequent and available in pre-trial stages.[210]

Even if a defendant does have biological evidence that could be tested in their case, they may still face a significant obstacle—the prosecutor. Prosecutors are the gatekeepers of the evidence in a defendant's case; if prosecutors agree to test the evidence, no further

203. *Id.* at 663–64 (discussing an attempt to appeal the denial of an evidentiary hearing in state court, in which the appellate court affirmed the trial court's decision because the judge had "providently exercised its discretion").

204. *See supra* Part I (discussing the demographics of *pro se* defendants. These individuals may have mental and intellectual disabilities, lack of access to educational resources, and other barriers imposed by incarceration that may make them unable to navigate complicated post-conviction proceedings).

205. *Access to Post-Conviction DNA Testing*, *supra* note 161.

206. *Id.*

207. *Id.* (describing various statutes and how prisoners can request the DNA in their case be tested); Olivia Fields, *A DNA Test Might Help Exonerate This Man. A Judge Won't Allow It.*, THE MARSHALL PROJECT (Mar. 18, 2019), https://www.themarshallproject.org/2019/03/18/a-dna-test-might-help-exonerate-this-man-a-judge-won-t-allow-it [perma.cc/K38E-6P3L] (examining a case where a judge in North Carolina refused to allow DNA testing despite evidence of innocence); Bruce A. Green & Ellen Yaroshefky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 509–16 (2009) (explaining prosecutorial discretion in post-conviction cases and how prosecutors can decide whether or not to agree to test evidence in a case).

208. Brooks et al., *supra* note 12, at 1054.

209. Medwed, *supra* note 12, at 656.

210. *Id.* at 657 (noting that the availability of DNA before trial will decrease the number of post-conviction innocence claims based on DNA).

court proceedings may be needed. However, prosecutors often dispute testing in potential innocence cases.[211]

For example, prosecutors have recently fought requests for additional DNA testing in the infamous West Memphis Three case.[212] In 1994, Damien Echols, Jason Baldwin, and Jessie Miskelley—then teenagers themselves—were convicted of the murder of three eight-year-old boys whose bodies were found near West Memphis, Arkansas.[213] In 2011, the three men were released from prison due to favorable forensic testing and an Alford plea, which allowed them to maintain their innocence but plead guilty in exchange for time served.[214] The men took the plea, in part, because Echols was sentenced to death and facing a looming execution date.[215] At the time of the plea, the prosecutors and the three men agreed that if further DNA testing became possible, the men would be able to seek that testing.[216] However, in 2022, prosecuting attorney Keith L. Chrestman denied their request for more testing, forcing Echols and his attorney to file a motion in court.[217]

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211. For more examples of prosecutors resisting defendants' efforts to test physical evidence, see for example Adrian Sainz, *Prosecutor Fights Death Row Inmate's DNA Testing Request*, AP NEWS (July 30, 2020), https://apnews.com/article/tennessee-memphis-e8989cf6b24d914d99c82e276b07713b [perma.cc/2W5C-WVAF]; *Florida Attorney General Fights to Block DNA Testing that Local Prosecutor Approved for Two Prisoners Who Have Been on Death Row More Than Four Decades*, DEATH PENALTY INFO. CTR. (June 9, 2021), https://deathpenaltyinfo.org/news/florida-attorney-general-fights-to-block-dna-testing-that-local-prosecutor-approved-for-two-prisoners-who-have-been-on-death-row-more-than-four-decades [perma.cc/C9CA-PPRW]; Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html [perma.cc/6DAL-XNWL].

212. Bill Bowden, *Damien Echols' Attorneys: Prosecutor Wrong to Deny New DNA Testing in West Memphis Three Case*, ARK. DEMOCRAT GAZETTE (Feb. 22, 2022), https://www.arkansasonline.com/news/2022/feb/22/damien-echols-prosecutor-wrong-to-deny-new-dna/ [perma.cc/9QLF-44ZR].

213. George Jared, *Judge Denies Advanced DNA Testing in West Memphis 3 Case*, KUAR (June 23, 2022), https://www.ualrpublicradio.org/local-regional-news/2022-06-23/judge-rejects-new-evidence-testing-in-west-memphis-3-case [perma.cc/DSV7-CWA3].

214. Bowden, *supra* note 212. In some wrongful conviction cases, prosecutors offer plea deals known as *Alford* pleas, which allow defendants to maintain their innocence while also pleading guilty. However, these types of deals prevent wrongfully convicted persons from receiving compensation. *See* VICE, *Innocence Ignored: The Alford Plea Prevents Compensation for the Wrongfully Convicted*, YOUTUBE (Oct. 29, 2018), https://www.youtube.com/watch?v=KG3zGzY2hsk [https://perma.cc/LKF2-7BFY].

215. Suzi Parker, *After 18 Years, "West Memphis 3" Go Free on Plea Deal*, REUTERS (Aug. 19, 2011), https://www.reuters.com/article/us-crime-westmemphis3-arkansas/after-18-years-west-memphis-3-go-free-on-plea-deal-idUSTRE77I54A20110819 [perma.cc/W8RK-EG4J] ("Baldwin resisted the deal at first because he felt it would negate attempts to clear his name and prove his innocence, he said. When asked why he finally agreed, Baldwin said it was for his friend on Death Row. 'They were trying to kill Damien,' he said.").

216. *Id.*

217. Bowden, *supra* note 212.

Before these recent court filings, West Memphis officials had claimed that the evidence in the case had been lost or destroyed in a fire, making it unavailable for further DNA testing.[218] These city officials—including the Police Chief, Michael Pope—misled Echols' legal team about the status of the evidence.[219] Despite their claims that the evidence was destroyed, when it was inspected by Echols' legal team, it was carefully catalogued and preserved.[220] Echols' legal team had only been able to inspect the evidence at the West Memphis Police Department because of a court order.[221] Echols continues to litigate new DNA testing in his case.[222]

Even if prosecutors and police departments preserve evidence, act in good faith, and allow defendants access to the evidence, forensic testing may not be possible or valuable. On average, it takes nearly eleven years post-conviction to exonerate a person.[223] Many of these cases may involve old evidence that was not preserved properly at the time of the crime due to a lack of awareness of the significance of forensic evidence.[224] Therefore, by the time innocent *pro se* defendants test the evidence in their case, it may be too degraded to provide adequate results for exoneration.[225]

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218. *E.g.*, Joyce Peterson, *New Access to Evidence Thought Destroyed in 1993 'West Memphis Three' Case*, ACTION NEWS 5 (Dec. 21, 2021), https://www.actionnews5.com/2021/12/22/new-access-evidence-thought-destroyed-1993-west-memphis-3-case/ [perma.cc/V923-8RXC].

219. *See id.* (discussing how McClendon and Pope denied being the reason for the delay in accessing evidence, yet Damien Echols' legal team had been told evidence had been destroyed in a fire, only to find it catalogued after a court order allowed Echols' lawyers to inspect the evidence); Sarah Polus, *Evidence Believed Lost in West Memphis Three Case Found at Police Department*, THE HILL (Dec. 23, 2021), https://thehill.com/homenews/state-watch/587211-evidence-believed-to-be-lost-in-west-memphis-3-case-reportedly-found-at/ [https://perma.cc/8XVL-XQLY] (claiming that Pope was "not truthful" and that his resignation after the evidence was discovered was related to this case); Lara Farrar, *West Memphis Three to Get Hearing This Week on New DNA Testing*, ARK. DEMOCRAT GAZETTE (June 20, 2022), https://www.arkansasonline.com/news/2022/jun/20/west-memphis-three-to-get-hearing-this-week-on/ [https://perma.cc/7ZQ4-LASM] ("[Prosecuting attorney] Chrestman confirmed the evidence might no longer exist. That turned out to not be the case . . . .").

220. *See* sources cited *supra* note 219.

221. *E.g.*, Peterson, *supra* note 218.

222. Michael Buckner, *Echols Appeals Denial to DNA Test Evidence in West Memphis Three Case*, THV 11 (Aug. 2, 2022), https://www.thv11.com/article/news/crime/damien-echols-appeals-denial-test-evidence-west-memphis-three/91-d0eb2c51-d26c-4a32-8b6b-715dd1afedaa [perma.cc/4MTC-LXQD] (describing Echols' efforts to obtain DNA testing, including a pending appeal on a trial court's denial of testing).

223. Maitreya Badami, *Why Do Exonerations Take So Long?*, SANTA CLARA UNIV. SCH. OF L.: N. CAL. INNOCENCE PROJECT (Nov. 7, 2016), https://law.scu.edu/experiential/northern-california-innocence-project/why-do-exonerations-take-so-long/ [perma.cc/QZQ5-FWPJ].

224. Medwed, *supra* note 12, at 656–57 (emphasis omitted).

225. *Id.*

Furthermore, even DNA evidence that excludes a defendant may not be enough for a court to grant relief. For example, in many rape cases, after DNA testing shows that sperm found in the victim did not come from the defendant, prosecutors may argue that the DNA came from an unidentified co-perpetrator or a consensual lover from before the crime, "even when the *theory at trial was that there was only one attacker*."[226] This means that even in the face of DNA evidence, courts may not grant relief because that evidence does not convincingly point to the defendant's innocence according to the prosecutor's new theory of the case.[227]

Moreover, if a defendant can test the evidence in their case, they may still need the assistance of forensic scientists or other experts.[228] Since most *pro se* defendants are indigent, many will not be able to afford to pay these experts for their time and analyses.[229] Thus, a defendant may not succeed in their claim because they could not afford the assistance needed. Limitations in their ability to research experts and contact them may also hinder defendants' use of experts in their proceedings.[230] Yet any delay in pursuing the physical evidence in their case could nevertheless be seen as failing to act with the sometimes-required due diligence.

iii. Executive Clemency and Pardons

Some have suggested that executive clemency serves as the fail-safe to catch the cases of innocence that may not receive relief from state or federal courts.[231] However, declining clemency rates suggest that this option is simply not enough to protect innocent defendants, particularly *pro se* individuals.[232] Capital cases, where defendants are typically provided with the assistance of counsel, provide damning statistics on the decreasing use of clemency. From 1900 to 1973, governors granted

226. Brooks et al., *supra* note 12, at 1063.

227. *Id.* (stating that a "clear and convincing" standard for evidence of innocence would mean that relief would not be possible in this type of situation).

228. *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://innocenceproject.org/dna-revolutionary-role-freedom/ [perma.cc/5YNG-7YNW] (describing how the Innocence Project began using DNA in exonerations, what the process is for getting DNA tested, and examples of exonerations that used DNA evidence).

229. *Cf. You Can Free the Innocent*, INNOCENCE PROJECT (Sept. 11, 2009), https://innocenceproject.org/you-can-free-the-innocent/ [perma.cc/D3JD-7H8Q] (stating that the Innocence Project spends around $8,500 on DNA testing in an average case).

230. *See, e.g.*, *supra* text accompanying note 111; *cf.* Jonathan Abel, *supra* note 136 (discussing the history of and legal issues surrounding prison law libraries, and critiquing the ineffectiveness of these libraries in providing inmates with access to the courts).

231. Medwed, *supra* note 12, at 717.

232. Austin Sarat, *With Julius Jones' Commutation, Cruelty Is the Point*, SLATE (Nov. 19, 2021), https://slate.com/news-and-politics/2021/11/julius-jones-commutation-is-cruelty-masquerading-as-mercy.html [perma.cc/2CGG-D9XK].

clemency in 20% to 25% of death penalty cases; however, from 1973 to 2020, commutations were only granted in 0.02% of cases.[233]

These statistics suggest bleak prospects for *pro se* defendants. First, capital cases are typically the most high-profile of cases, which means they may receive more media attention and public support than the cases in which *pro se* defendants are involved.[234] Second, many capital defendants are represented by counsel in their clemency petitions, whereas *pro se* defendants are left to plead their cases on their own.[235] Additionally, lacking access to legal counsel may mean that *pro se* prisoners lack the knowledge needed to present a compelling clemency petition.[236] Third, the nature of their incarceration means that *pro se* defendants may struggle to generate public interest in their cases; restrictions on their ability to communicate with the outside world generally makes it more difficult for these prisoners to contact journalists and other media figures who could help pressure governors into granting their clemency requests.[237]

Finally, both parole boards and executive officers have been known to punish prisoners who refuse to accept responsibility for their

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233. *Id.*

234. *See, e.g.*, Amir Vera & Dakin Andone, *Oklahoma Governor Grants Clemency to Julius Jones, Halting His Execution*, CNN (Nov. 19, 2021), https://www.cnn.com/2021/11/18/us/julius-jones-oklahoma-execution-decision/index.html [perma.cc/3SRY-PUVD] (describing a last-minute grant of clemency before an execution after "widespread attention" following a documentary, an online petition, protests, statements from celebrities, and news conferences); Gaige Davila, *With 1 Month Until Execution, Melissa Lucio Seeks Clemency from Death Row*, HOUS. PUB. MEDIA (Mar. 25, 2022), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2022/03/25/421916/with-1-month-until-execution-melissa-lucio-seeks-clemency-from-death-row/ [perma.cc/YP58-EJHT] (stating how Lucio's case received significant attention following a documentary released two years before clemency proceedings); Lillian Segura & Jordan Smith, *Facing His Eighth Execution Date, Richard Glossip Asks for Clemency*, THE INTERCEPT (Jan. 2, 2023), https://theintercept.com/2023/01/02/richard-glossip-execution-clemency/ [perma.cc/VG2N-LDUK] (detailing years of media efforts on behalf of Mr. Glossip, including documentaries, reporting from various news sources, and other advocacy efforts by Glossip and his legal team); *see also* Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004) (describing how media sources cover death penalty cases and play a part in shaping public opinion in covered cases).

235. Harbison v. Bell, 556 U.S. 180, 182–83 (2009) (holding that federal law allows for appointment of counsel to represent clients sentenced to death during their state clemency proceedings).

236. *Id.* at 193–94 (quoting Hain v. Mullin, 436 F.3d 1168, 1175 (Ca. 2006) (en banc)) ("[T]he work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application. . . . Harbison's case underscores why it is 'entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.'").

237. KUSHNER ET AL., *supra* note 110, at 664–65.

convicted crimes.[238] Individuals who maintain their innocence may not be released because of their refusal to show remorse for these crimes.[239] For example, a recent bill passed in the Oklahoma House of Representatives would limit what the Pardon and Parole Board can consider; under this law, the Board could not grant clemency based on claims of innocence to individuals sentenced to death.[240] This conundrum places innocent prisoners in an impossible situation: either lie by accepting responsibility and plead for mercy, or maintain their innocence at the expense of their freedom.

III. Solutions

The decline in the Great Writ's effectiveness in freeing the innocent and the difficulties posed by state post-conviction procedures make it clear that the crisis of wrongful convictions in the United States will not be solved by piecemeal reforms. While some of the solutions posed by practitioners and researchers in this field may help defendants represented by counsel—lowering procedural hurdles, eliminating statutes of limitations, and slightly loosening legal standards of proof—these proposals do nothing to address the other barriers that innocent, *pro se* prisoners face.[241] These reforms do not give *pro se* prisoners investigative resources or tools, nor do they provide them with the education that will allow them to properly communicate their appeals to the courts. Furthermore, they fail to acknowledge that *pro se* defendants are trying to prove their innocence and navigate a court system while living the daily traumas associated with long-term incarceration.[242]

Meanwhile, the problem of wrongful convictions continues to grow in the face of inadequate reforms. One study estimates that nearly 0.5% to 1% of those convicted are innocent, while other studies place that estimate between 5% and 15%.[243] Very conservatively, that means tens

238. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 513–30 (2008).

239. *See, e.g.*, Tom Robbins, *He Says He's No Murderer. That's Why He's Still in Prison.*, N.Y. TIMES (Dec. 4, 2021), https://www.nytimes.com/2021/12/02/nyregion/joseph-gordon-parole-murder.html [perma.cc/B6G5-2NP4] (discussing the case of Joseph Gordon, who was denied parole five times, in part, for maintaining his innocence).

240. Tyler Boydston, *Bill to Reform Oklahoma Pardon and Parole Board Passes Committee*, ABC 7 NEWS (Mar. 2, 2022), https://www.kswo.com/2022/03/02/bill-reform-oklahoma-pardon-parole-board-passes-committee/ [perma.cc/B6BA-CFQD].

241. Hartung, *supra* note 3, at 89–91 (describing how piecemeal litigation of innocence claims prevents relief).

242. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [perma.cc/MXG3-TSD2].

243. Hartung, *supra* note 3, at 72.

of thousands of people have been falsely convicted in the United States.[244] However, since 1989, the National Registry for Exonerations has only identified 3,355 exonerations.[245] This discrepancy demonstrates the failure of our judicial system in righting wrongful convictions. Declining clemency rates further show that executive officers cannot be trusted to fill in these gaps left by the judiciary.[246]

Both federal and state courts' failure to exonerate the wrongfully convicted demonstrates the need for a larger-scale solution. Such a solution would almost necessarily require political action and systemic reforms. This final Part discusses potential solutions and actions that can be taken by legislatures to finally—and fully—address the crisis of wrongful convictions.

A. Guaranteeing a Right to Effective Assistance of Post-Conviction Counsel

The most obvious solution to help *pro se* defendants in proving their innocence is providing them with effective counsel for their post-conviction proceedings. Providing counsel would significantly help with defendants' ability to investigate their cases, navigate post-conviction options for relief, and help them connect with media outlets and community groups that can raise awareness about their case.[247] In fact, providing counsel would lessen many of the investigative barriers discussed earlier in this Article, because counsel would be able to reinterview witnesses, even victims, and chase down new leads from outside prison walls. Such a right to counsel has indeed been contemplated by courts and legislatures before.[248]

However, providing post-conviction counsel as a right to all defendants may financially burden states or compromise our legal system's interest in the finality of convictions.[249] But as discussed

244. *How Many Innocent People are in Prison?*, INNOCENCE PROJECT (Dec. 12, 2011), https://innocenceproject.org/how-many-innocent-people-are-in-prison/ [perma.cc/FSQ4-C7BW].

245. Cabral, *supra* note 4.

246. Austin Sarat, *Can Finality Be More Important Than Justice Even If It Means Executing the Innocent?*, JUSTIA: VERDICT (May 31, 2022), https://verdict.justia.com/2022/05/31/can-finality-be-more-important-than-justice-even-if-it-means-executing-the-innocent [perma.cc/92XV-472P].

247. Givelber, *supra* note 48, at 1409.

248. The Supreme Court has recognized the possibility of a right to post-conviction counsel when a constitutional claim can only be raised in collateral proceedings. *See* Martinez v. Ryan, 566 U.S. 1 (2012); Trevino v. Thaler, 569 U.S. 413, 413–14 (2013). Furthermore, most states with the death penalty provide counsel as a right to capital defendants in at least some of their appeals. *See* Givelber, *supra* note 48, at 1396.

249. *See* Sarat, *supra* note 246 (discussing how the Supreme Court's ruling in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), prioritized finality over justice).

previously, *pro se* defendants are virtually unable to conduct any adequate investigation into their cases, face high evidentiary and constitutional standards in post-conviction proceedings, and are unlikely to succeed on appeal without the assistance of counsel.[250] Thus, an emphasis on finality may preserve courts' and states' resources, but it does not achieve justice, provide faith in our legal system, or create closure for victims and their loved ones. Providing counsel to defendants during post-conviction proceedings would more likely ensure that their appeals are timely and presented in the proper format to the court, which may reduce successive and inadequate petitions by *pro se* defendants.

While the number of appeals may increase if a right to post-conviction counsel is recognized, these appeals would also likely be more complete and targeted, as formerly *pro se* defendants would now have the benefits of full investigations and the legal expertise of their counsel in narrowing down which claims should be presented to the court.[251] Such an improvement in the quality of appeals may actually promote finality by giving courts access to a meaningful and thorough examination of a defendant's claims, rather than the piecemeal claims that a *pro se* defendant would be able to present without counsel.[252]

As discussed, though, an innocent defendant's journey through the legal system is not always a favorable one. While having the assistance of counsel will enormously benefit *pro se* defendants, it does not guarantee them relief. For example, from December 2021 until December 2022, only 6.6% of criminal appeals across all the federal appellate circuits resulted in a reversal of the conviction—including both represented and unrepresented defendants.[253]

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250. *See supra* Section II.A; Givelber, *supra* note 48, at 1409 ("The [Supreme] Court has never suggested that a prisoner will do as well representing himself as he would if represented by competent counsel . . . .").

251. *Cf.* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (describing the importance of legal "counsel at every step in the proceedings" and how crucial legal expertise is to being successful at court); *Martinez*, 566 U.S. at 11–12 ("Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . . To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.").

252. *See* Hartung, *supra* note 3, at 90–91 (describing how *pro se* prisoners often must make their habeas corpus claims via multiple successive petitions, and courts view these petitions in isolation instead of seeing the full picture of a defendant's claims); *cf.* Medwed, *supra* note 12, at 695–99 (proposing that simplifying state procedures for claims of newly discovered evidence could help both innocent petitioners and the state, and would eliminate the need for multiple successive petitions from inmates).

253. *Table B-5–U.S. Courts of Appeals Statistical Tables For the Federal Judiciary (December 31, 2022)*, U.S. COURTS, https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2022/12/31 [https://perma.cc/7PTU-NGHD0.

B. Adequately Funding Public Defense—Before and After Trial

The chronic underfunding of public defense systems is no secret, but a well-funded public defense system could save innocent defendants both before and after conviction.[254] Public defense systems receive their funding in a variety of ways; some are entirely county- or state-funded, and others receive portions of their funding from both sources.[255] Studies show that county-based funding can lead to disparities in quality of representation, and state-based funding has stagnated in recent years.[256]

This underfunding has led public defense systems to be overworked and understaffed; "only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads."[257] This burden on public defenders has created a culture in which failing to thoroughly investigate cases and encouraging clients to plead guilty—rather than a culture of zealous advocacy in litigation—is normalized.[258] Furthermore, public defender offices also struggle with a dearth of support staff, such as paralegals and investigators, who usually assist in reinvestigating cases, interviewing witnesses, and collecting important records and documents.[259] The lack of funding also causes public defenders to be undertrained,[260] which may prevent these attorneys from learning about new investigatory techniques, changes in forensic science, and methods of proving a client's innocence.

It is worth noting that these same resource-related issues do not impact prosecutor's offices in the same way. In many jurisdictions across the country, prosecutors make substantially more money than their public defender counterparts do, despite having similar years of experience.[261] Prosecutor's offices usually have more support staff than

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254. *See, e.g.*, Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [perma.cc/6LTB-ZD3W] (describing how public defender programs have been underfunded and targeted for budget cuts nationwide since the 1980s, yet stronger indigent defense systems would lead to fewer wrongful convictions and more exonerations).

255. *See* BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 6–7 (2019), https://www.brennancenter.org/our-work/research-reports/fair-fight [perma.cc/9JXY-ULDV] (footnote omitted) (discussing the resource disparity facing public defense offices across the country).

256. *Id.*

257. *Id.* at 1.

258. *Id.* at 3–4.

259. *Id.* at 9.

260. *Id.* at 3.

261. *Id.* at 8–9 (noting that public defenders with less than three years of experience in the Fourth Judicial District in Florida annually earn $10,000 less than their prosecutor counterparts with the same experience, and junior defenders in Colorado's First Judicial District make $15,000 less).

public defender offices, including full-time investigators.[262] This resource disparity undermines the fundamentals of our adversarial system; it deprives defendants of the opportunity for a fair trial and appellate process "since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[263]

One factor that leads to wrongful convictions is inadequate defense. A large-scale empirical research project compared cases of wrongful convictions where individuals were later exonerated with "near miss" cases in which factually innocent defendants were nearly convicted of a crime they did not commit.[264] This study showed a statistically significant increase in likelihood of wrongful conviction when defense counsel did not present a strong defense, including if the attorney lacked the funds for experts and other resources at trial.[265] While this study did not find a statistical difference between private counsel and public defenders or court-appointed counsel, it did find a difference in wrongful conviction rate dependent on whether an individual's defense had adequate funding.[266]

Increasing funding and resources for public defense may reduce wrongful convictions. As recently as 2019, there has been proposed federal legislation that would expand public defense funding to states that "improve data collection, set reasonable workload limits based on statewide data, and institute pay parity between public defenders and prosecutors."[267]

Increasing funding will also allow for more post-conviction representation. As discussed previously, one argument against guaranteeing the right to effective post-conviction counsel to all defendants involves the increased resources it would require.[268] However, increasing funding for public defense systems overall could allow for more post-conviction representation of defendants who would otherwise have to bring their appeals *pro se*.

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262. *Id.* at 9.

263. Strickland v. Washington, 466 U.S. 668, 685 (1984) (citations omitted).

264. *See* Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Innocent Defendants: Divergent Case Outcomes and What They Teach Us*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 73, 73–74 (Marvin Zalman & Julia L. Carrano, eds., 2014).

265. *Id.* at 77, 83.

266. *Id.* at 83–84.

267. Furst, *supra* note 255, at 10 (discussing the Equal Defense Act, proposed by then-Senator Kamala Harris in 2019, which has yet to be enacted).

268. *See supra* note 248 and accompanying text.

Furthermore, an increase in funding for post-conviction public defense would help alleviate burdened innocence projects.[269] Innocence organizations often face low budgets, which can significantly impact their success in freeing wrongfully convicted individuals.[270] The costs of litigating a defendant's claims usually falls on the defendant and the innocence organization representing them, and exonerations are costly endeavors.[271] The funding that innocence organizations receive also comes with restrictions that go beyond caseload allowances; for example, some innocence organizations can only handle cases with DNA, while others only represent defendants in non-DNA cases.[272] Depending on *pro se* defendants' geographical location, finding an innocence organization with the funding and ability to take their case may be virtually impossible.[273]

Finally, increasing public defense funding will not only reduce wrongful convictions at the trial court level and increase exonerations for the wrongfully convicted, but may also potentially save states and taxpayers millions of dollars in litigation and settlements. According to a 2018 study, state and municipal governments at that time had paid more than $2.2 billion in compensation due to wrongful convictions;[274] this amount did not include money spent by governments in litigating criminal appeals by those innocent defendants.[275] This money could surely be better spent by funding public defense, which would both prevent wrongful convictions and help correct them prior to spending years litigating post-conviction claims.

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269. Innocence projects are non-government organizations who represent wrongfully convicted persons and litigate on their behalf. *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333 (2011) (providing information on the development and structure of innocence projects). These organizations are limited in funding and resources and can only take on certain cases. *E.g.*, *id.* at 382–84.

270. *Id.* at 371–73.

271. *Id.* at 372 n.234 (noting that the average exoneration cost is $333,239 and that non-DNA cases are more expensive to litigate than DNA exonerations).

272. *E.g.*, *id.* at 363 ("[T]he Innocence Project only accepts cases in which the prisoner could be freed through DNA evidence.").

273. *See Explore the Numbers: Innocence Project's Impact*, INNOCENCE PROJECT, https://innocenceproject.org/exonerations-data/ [perma.cc/6JDM-ZU2G] (stating that the Innocence Project has only achieved successes in thirty-two U.S. states and the District of Columbia); *see also Network Member Organization Locator and Directory*, THE INNOCENCE NETWORK, https://innocencenetwork.org/directory [https://perma.cc/74SS-5R2L] (identifying innocence project organizations in thirty-five U.S. states, and indicating that the majority of these states only have one innocent project).

274. NAT'L REGISTRY OF EXONERATIONS, MILESTONE: EXONERATED DEFENDANTS SPENT 20,000 YEARS IN PRISON, 4, 10–11 (2018) (citing Jeffrey S. Gutman & Lingxiao Sun, *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongly Convicted*, 11 NE. L. REV. 694 (2019)).

275. *See id.* at 4–5.

C. Conviction Integrity Units and Independent Innocence Commissions

For *pro se* defendants in particular, though, a more cost-effective solution that could provide more timely relief is expanding the use of conviction integrity units (CIUs). These units, which operate as divisions within prosecutorial offices, seek to "prevent, identify, and remedy false convictions."[276] These units are often tasked with reinvestigating cases and are made up of both attorneys and investigators.[277] CIUs have had some success in overturning large numbers of wrongful convictions.[278] For example, within three years, the CIU in Wayne County, Michigan, achieved the release of thirty men who should never have been convicted.[279]

What makes these units so successful in obtaining relief is that they are led by the very people with the discretion to continue fighting appeals—prosecutors themselves. During the appellate process, prosecutors can simply choose to dismiss charges once a defendant has succeeded on appeal; they can also join defense attorneys before the court in asking for a defendant's exoneration.[280] These units also have access to prosecutors' and law enforcement's internal files and evidence.[281] Considering that an estimated 50% of wrongful convictions involve official misconduct, including in some cases the withholding of material evidence from defense attorneys,[282] unfettered access to these files may make the crucial difference in proving some individual's innocence. For *pro se* defendants, having a CIU investigate their case could

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276. *Conviction Integrity Units*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx [perma.cc/C2YA-AGTT] (June 14, 2022).

277. *Id.*; Steve Friess, *Inside the Wayne County Prosecutor's Unit That's Exonerated 30 Innocent Convicts in 3 Years*, HOUR DETROIT (Oct. 14, 2021), https://www.hourdetroit.com/political-topics/inside-the-wayne-county-prosecutors-unit-thats-exonerated-30-innocent-convicts-%E2%80%A8in-3-years/ [perma.cc/RX4M-GK5F].

278. *See Conviction Integrity Units*, *supra* note 277 (listing each CIU in the United States and providing links to information on their reported exonerations).

279. Friess, *supra* note 277.

280. For example, in Adnan Syed's case, the State moved to vacate his conviction. Alex Mann & Lee O. Sanderlin, *Baltimore Prosecutors Move to Vacate Adnan Syed Conviction in 1999 Murder Case Brought to National Fame in 'Serial' Podcast*, BALT. SUN (Sept. 14, 2022), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-prosecutors-move-to-vacate-adnan-syed-sentence-20220914-uinmd6pa45cqbfj4fwyvac2tb4-story.html [perma.cc/JY6G-YKFK].

281. Josie Duffy Rice, *Do Conviction Integrity Units Work?*, THE APPEAL (Mar. 22, 2018), https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/ [perma.cc/2YAM-U58E].

282. Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/ [perma.cc/VYN3-J8FT].

correct the deficiencies caused by the defendant's inability to conduct their own investigation; a CIU would have the complete, original investigatory file, as well as the resources to correct inadequacies in that original investigation.

Having the support of a CIU and its prosecutorial office would be particularly helpful to *pro se* defendants facing more difficult evidentiary standards, such as in those jurisdictions that require new evidence that could not have been discovered at the time of trial.[283] Due to the time passed since trial, the failures of their trial counsel, and the impossibility of investigating their own cases while incarcerated,[284] these defendants may simply be unable prove their innocence or obtain relief without the assistance of a CIU.[285] There may be no evidence in their case left to find that would satisfy the court. Additionally, even if these defendants were provided with effective post-conviction counsel, they would still face a heavy burden in court when trying to litigate their innocence. They would still need to potentially prove an underlying constitutional claim, or if filing in state court, may face a biased judge or equally strict evidentiary requirements.[286] Having the support of a CIU, combined with a prosecutorial office's authority, may make the pivotal difference in these defendants obtaining relief.

However, many localities seemingly use CIUs as political "window dressing," establishing units that never exonerate a single wrongfully convicted individual.[287] For example, the National Registry for Exonerations has identified fifty-three CIUs across the country with *zero* exonerations.[288] Critics have pointed out that other CIUs may simply choose the most obvious wrongful convictions—or those that have already been investigated by other attorneys, organizations, or

283. *See generally* Brooks et al., *supra* note 12 (describing legal standards for claims involving new evidence and difficulties in litigating these types of cases).

284. *See supra* Section II.A.

285. *Cf.* Mallory Emma Garvin, In the Interest of Justice: The Gold Standard for Conviction Integrity Units 9 (2023) (unpublished article) (on file with Seton Hall Law), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2313&context=student_scholarship [https://perma.cc/H3TE-PHA9] (describing how the Philadelphia CIU launched a partnership with a nonprofit law office to represent *pro se* applicants after discovering the systemic prosecutorial and police abuses that had occurred in cases handled by the Philadelphia District Attorney's office).

286. *See* Medwed, *supra* note 12, at 664–66, 699–715.

287. THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, at 15 (2018), https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf [perma.cc/RC2T-5AMY].

288. *Conviction Integrity Units*, *supra* note 276; *see also* Rice, *supra* note 281 (finding that of thirty-three CIUs examined in 2018, twelve had never exonerated a single person, and five others had only exonerated one person).

journalists—to pursue.[289] Furthermore, CIUs are often not adequately insulated from the political pressures within their jurisdictions.[290] For example, in 2022, Virginia's new attorney general, Jason Miyares, fired everyone in the office's CIU, effectively ending the office's work on its wrongful conviction cases.[291] In the same year in Ohio, five members of the Cuyahoga County Prosecutor Office's CIU resigned, stating that the unit was "mere window dressing, with no real substantive impact."[292]

Therefore, in order to be truly effective, established CIUs must strive to be as unbiased towards prosecution as possible. Some scholars have recommended that these units be as separate from the prosecutorial office as possible.[293] The most successful CIUs across the country have done just that by selecting individuals who had not previously prosecuted in the same jurisdiction. For example, Philadelphia District Attorney Larry Krasner created Philadelphia's CIU in 2018.[294] The unit was created to be independent, reporting directly to Krasner,[295] who served as a public defender then as a civil rights attorney for nearly thirty years before becoming Philadelphia's District Attorney.[296] Krasner recruited Patricia Cummings to lead the unit; before coming to Philadelphia,

289. Rice, *supra* note 281; Christopher Ketcham, *Above the Law: On the Prospects of Prosecutorial Reform*, 23 COUNTERPUNCH, no. 4, 2016, at 12, 16, https://fij.org/fij_website/wp-content/uploads/2016/09/Ketcham_-prosecutorial-reform.pdf [perma.cc/K9NQ-X525]; THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 15.

290. *See* Rice, *supra* note 281 ("The truth is that CIUs' biggest asset is also their biggest obstacle. On the one hand, these units have incomparable access to district attorneys' internal evidence, and have better access to other law enforcement agencies. But because CIUs are part of the DA's office, they are often incentivized to protect their own."); THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 15 ("The variability in the performance of CIUs reflects the fact that they are internal organizational choices of the elected prosecutors who create them.").

291. C.J. Ciaramella, *New Virginia Attorney General Fires Entire Conviction Integrity Unit*, REASON (Jan. 21, 2022), https://reason.com/2022/01/21/new-virginia-attorney-general-fires-entire-conviction-integrity-unit/ [perma.cc/PYU2-BVAV].

292. Cory Shaffer, *Outside Members of Cuyahoga County Prosecutor's Conviction Integrity Unit Resign Over Years of Inactivity*, CLEVELAND.COM (Nov. 21, 2022), https://www.cleveland.com/court-justice/2022/11/outside-members-of-cuyahoga-county-prosecutors-conviction-integrity-unit-resign-over-years-of-inactivity.html [perma.cc/9WY3-48XK].

293. *See, e.g.*, Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 710–12 (2017) (advocating for the creation of independent institutions to investigate wrongful convictions).

294. PHILA. DIST. ATTY'S OFF., OVERTURNING CONVICTIONS—AND AN ERA: CONVICTION INTEGRITY UNIT REPORT JANUARY 2018–JUNE 2021, at 6, https://github.com/phillydao/phillydao-public-data/blob/main/docs/reports/Philadelphia%20CIU%20Report%202018%20-%202021.pdf [https://perma.cc/CU8T-BF4D].

295. *Id.*

296. *Meet Larry*, LARRY KRASNER FOR DIST. ATT'Y, https://krasnerforda.com/meet-larry [perma.cc/66DC-ZB9Y].

Cummings ran the Dallas County CIU.[297] This team of Krasner and Cummings shows the importance of mitigating bias in CIUs: neither of them had prosecuted cases in Philadelphia, and therefore, should have less of a political or personal interest in upholding the cases they received to review. Since 2018, the unit has exonerated twenty-nine individuals[298] and helped gain at least twenty-three commutations.[299]

The CIU in Wayne County, Michigan, took a similar approach. CIU Director Valerie Newman chose to only hire attorneys for the unit who had never served as Wayne County Prosecutors.[300] Newman herself was chosen to lead the unit because of her reputation as one of Michigan's "most ferocious wrongful conviction crusaders."[301] In its first three years, the CIU exonerated thirty individuals.[302]

Choosing prosecutors who have never served within the same jurisdiction as their CIU may make the difference between a unit that exists only in name and a truly effective unit that frees the wrongfully convicted. This careful selection of an "outsider" may also protect the unit—and its applicants—from political pressures and bias.[303]

Furthermore, in order to effectively serve *pro se* individuals, the application process for assistance from CIUs must be simplified, with incarcerated individuals in mind.[304] *Pro se* individuals should not be

297. Garvin, *supra* note 285, at 8.

298. *Public Data Dashboard: Exonerations*, PHILA. DIST. ATTY'S OFF., https://data.philadao.com/Exonerations.html [https://perma.cc/89LS-RG8L].

299. PHILA. DIST. ATTY'S OFF., *supra* note 294, at 9.

300. Friess, *supra* note 277.

301. *Id.*

302. *Id.*

303. *See* Rice, *supra* note 281.

304. *Cf.* Garvin, *supra* note 285, at 13 ("Some [CIUs] provide digital forms, others have easily accessible applications online, and still, others require an applicant to write a letter to the office requesting an application. On this point, it is important to note that there is also a significant difference among CIUs as to how accessible their application is for the public to find. Additionally, there is a difference in how the applications are constructed, some being more complex or more difficult to understand than others." (footnote omitted)). Incarcerated individuals may lack access to the internet and email, which means that CIU applications may need to be in paper format. *See* Diana Kruzman, *In U.S. Prisons, Tablets Open Window to the Outside World*, REUTERS (July 18, 2018), https://www.reuters.com/article/us-usa-prisons-computers/in-u-s-prisons-tablets-open-window-to-the-outside-world-idUSKBN1K813D [perma.cc/3PP3-D2QA] (explaining that even though some incarcerated individuals may have access to tablets, they are not connected to the internet and only allow exchanges with approved individuals); *cf.* Abel, *supra* note 136 (describing the inadequacies of prison law libraries). They may also lack the funds needed to send mail. *See, e.g.*, *General Mail & Email*, OHIO DEP'T OF REHAB. & CORR., https://drc.ohio.gov/visitation/general-mail-and-email/general-mail-and-email [https://perma.cc/LM77-XW2R] (stating that prisoners only can send one free letter per month). To address these issues, CIUs should create simple application forms, no longer than a few pages, that are available at all prisons within their region. CIUs may also want to explore ways of receiving these applications at

expected to provide ample evidence of their innocence in these applications. The onus should instead be placed on the CIU to investigate these cases post-application to determine eligibility for exoneration. If an application is rejected, a CIU should also be required to inform the applicant of the reasons why, including recommendations for improving their application, if possible. Such measures would help *pro se* applicants improve subsequent applications, if needed, or at least explain the alleged deficiencies.

To avoid the inherent conflicts of placing a CIU within a prosecutorial office, legislatures can create independent innocence commissions outside of prosecutorial offices to handle the reinvestigation of potential wrongful convictions.[305] By creating an independent commission, the legislature can remove the possibility of harmful bias that plagues some CIUs[306] and also include perspectives of a variety of professionals within the criminal justice system.[307] These commissions may be more likely to recognize systemic errors within a locality's justice system and be able to recommend reforms and policies to prevent wrongful convictions in the future.[308] However, few states have established independent innocence commissions that reinvestigate cases; by 2017, only North Carolina had established such a commission.[309]

By locating these commissions outside of prosecutor offices, however, a legislature runs the risk of enabling prosecutors and law enforcement to withhold evidence. For example, in the early 2010s, the Nassau County District Attorney, Kathleen Rice, began reinvestigating the

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no cost to the incarcerated individual. CIUs also need to ensure that incarcerated individuals who need assistance in writing and filling out the forms have access to such resources.

305. *See* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE, no. 2, Sept.–Oct. 2002, at 98, 98–105 (2002) (proposing the creation of innocence commissions and detailing the essential elements of such a commission).

306. *See supra* notes 289–292 and accompanying text.

307. Scheck & Neufeld, *supra* note 305, at 105 ("Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public.").

308. *See id.* ("Innocence commissions should be seen as a capstone reform because they have the capacity, through the recurring perusal of wrongful convictions, to provide a consistent, powerful impetus to remedy systemic defects that bring about wrongful convictions.").

309. Scheck, *supra* note 293, at 711 ("But so far, only one state, North Carolina, has made a serious effort at setting up an institution that reinvestigates cases to determine if they are wrongful convictions; most other 'innocence commissions' have been reports by bar associations or state legislatures reviewing known exonerations as a basis for policy reform."); *see A Neutral, Fact-Finding State Agency Charged with Investigating Post-Conviction Claims of Innocence*, THE N.C. INNOCENCE INQUIRY COMM'N, https://innocencecommission-nc.gov/ [https://perma.cc/G4YN-T6LV].

case of Jesse Friedman.[310] Friedman, along with his father, had been convicted of sexually abusing numerous children while they participated in computer classes at the Friedman home.[311] Documentarian Andrew Jarecki profiled the case in his 2003 documentary, "Capturing the Friedmans."[312] Friedman was released on parole in 2001; in 2010, the United States Court of Appeals for the Second Circuit issued a scathing opinion, stating that Friedman may have been wrongfully convicted.[313] In response to this court decision, Kathleen Rice created a four-person panel of advisors—including Barry Scheck, founder of the Innocence Project—to oversee the review of Friedman's case.[314] The final report eventually concluded that Friedman's conviction was justified.[315] However, Scheck later supported Friedman's motion to overturn his conviction, stating that evidence was withheld from the advisory panel, including prosecution files, police reports, and other documents.[316] Scheck also said that the panel was given limited access to Friedman himself.[317]

While the panel in the Friedman case was not an independently formed body, the issues with its review show the concerns that such commissions may face. Even in a high-profile case that is widely covered by journalists and recommended for review by a federal judge, prosecutors may still withhold evidence to preserve convictions. Therefore, innocence commissions must be given full access to both police and prosecutorial evidence storage facilities, as well as their files, to avoid these types of issues.

These commissions must also be sufficiently insulated from local politics to be successful. As noted previously, wrongful convictions can result in state and local governments having to pay substantial compensation to exonerated individuals.[318] This expense may provide an incentive to avoid exonerations to avoid both negative press and the significant financial burden of paying these individuals. *Pro se* defendants—who lack counsel, resources, and perhaps other supporters

310. Peter Applebome, *Reinvestigating the Friedmans*, N.Y. TIMES (June 15, 2013), https://www.nytimes.com/2013/06/16/nyregion/reinvestigating-the-friedmans.html [perma.cc/HTU7-BMCW].

311. *Id.*

312. *Id.*

313. *Id.*; Friedman v. Rehal, 618 F.3d 142, 159–60 (2d Cir. 2010) ("The record here suggests 'a reasonable likelihood' that Jesse Friedman was wrongfully convicted.").

314. Scott Foundas, *'Capturing the Friedmans' Subject Seeks to Overturn 1988 Conviction*, CHI. TRIB. (June 24, 2014), https://www.chicagotribune.com/entertainment/ct-xpm-2014-06-24-sns-201406241855reedbusivarietyn1201245697-20140624-story.html [perma.cc/3YGK-VA26].

315. *Id.*

316. *Id.*

317. *Id.*

318. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 274, at 4.

who can advocate on their behalf—may be particularly at risk to these types of abuses.

In February 2022, San Francisco District Attorney Chesa Boudin partnered with State Assemblymember Marc Levine to introduce a bill that would establish Innocence Commission Pilot Programs in California.[319] These programs would include panels of experts, chosen by the district attorneys in three counties, that would review wrongful conviction claims.[320] This legislation aims to build upon the San Francisco District Attorney's Innocence Commission,[321] which reviews wrongful conviction claims by incarcerated persons within San Francisco.[322]

The San Francisco Innocence Commission includes a six-member team of experts who volunteer to review these cases, including a retired judge, a medical expert, and a public defender.[323] The Commission has the power to issue subpoenas and the power to compel production of documents and testimony to help investigate cases.[324] After reviewing the case and conducting reinvestigation if necessary, the Commission votes whether or not to vacate the conviction.[325] If the majority votes to vacate, the Commission prepares a memorandum that serves as the basis to overturn the conviction.[326] However, the district attorney retains the final decision-making power, though they are supposed to give "great weight" to the Commission's determination.[327] Having this ultimate authority in the district attorney may not properly insulate the work of the Commission, as a district attorney may face political pressure as a result of being in an elected position.

However, Boudin and Levine's proposed bill—Assembly Bill 2706—requires that district attorney's offices track specific metrics and

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319. Vanguard Administrator, *DA Boudin Partners with Assemblymember Levine to Introduce New Approach to Addressing Wrongful Convictions*, THE DAVIS VANGUARD (Mar. 3, 2022), https://www.davisvanguard.org/2022/03/da-boudin-partners-with-assembly member-levine-to-introduce-new-approach-to-addressing-wrongful-conviction/ [perma.cc/996C-8LNX]; *see* A.B. 2706, 2021–2022 Assemb., Reg. Sess. (Cal. 2022). Months later, Chesa Boudin was removed from office through a recall process, despite no evidence tying his reform efforts to a rise in crime rates. Sam Levin, *Where Did It Go Wrong for Chesa Boudin, San Francisco's Ousted Progressive DA?*, GUARDIAN (June 9, 2022), https://www.theguardian.com/us-news/2022/jun/08/chesa-boudin-san-francisco-recall-analysis [perma.cc/7HN5-SMV2].

320. Vanguard Administrator, *supra* note 319.

321. *Id.*

322. *Policy: The Innocence Commission*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/innocence-commission/ [perma.cc/EC5K-BPMU].

323. *Id.*

324. Vanguard Administrator, *supra* note 319.

325. *Policy: The Innocence Commission*, *supra* note 322.

326. *Id.*

327. *Id.*

report them quarterly to the Attorney General's Office.[328] This transparency may prevent these commissions from becoming "window dressing" that does not result in any exonerations or meaningful review.[329] Yet the bill also stresses that the district attorney retains discretion over whether to file the Commission's findings with the court, and that the court must afford the district attorney's decision "great deference."[330] Furthermore, the members of the panels of experts are appointed by the district attorney,[331] which may allow a district attorney acting in bad faith to appoint members more likely to uphold convictions.

In order to make these commissions more impartial and insulated from local politics, it may be more beneficial for a district attorney to have a single vote within the commission. Their vote could have no more weight than any other member, and the members of the commission could be chosen through more impartial means. For example, Barry Scheck and Peter Neufeld—founders of the Innocence Project—have suggested that the membership of such a commission could be selected in a variety of ways: through legislative enactment, executive order, appointment by a state's chief judicial officer, or through the formation of an interdisciplinary group by a non-profit organization.[332] If the district attorney was included within this structure, the commission would still be politically accountable to the public because the public would be able to directly vote for at least one member of the commission—the district attorney—as well as their state judges who will review the commission's recommendations. In whatever manner its membership is chosen, the commission's final recommendation should be binding on the district attorney to ensure that the commission is effective.

With both CIUs and innocence commissions, the question of whether and to what extent these bodies' decisions are binding on courts routinely arises.[333] For example, Philadelphia's CIU "can only make recommendations as supported by law and fact to the judge, who is the final decisionmaker."[334] This CIU has received criticism from judges when

328. Vanguard Administrator, *supra* note 319.

329. *See id.*

330. *Id.*

331. *Id.*

332. Scheck & Neufeld, *supra* note 305 (proposing a model for innocence commissions that is similar to the National Transportation Safety Board, which investigates transportation accidents and operates independently from the Federal Aviation Administration, where members are appointed by the President with the advice and consent of the Senate).

333. *See, e.g.*, *id.* at 104 ("The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public.").

334. PHILA. DIST. ATTY'S OFF., *supra* note 294, at 15.

it recommends that convictions be vacated.[335] In Missouri, the state supreme court initially refused to hear the case of Kevin Strickland, despite the fact that county and federal prosecutors, Kansas City Mayor Quinton Lucas, members of the team that originally convicted Strickland, and the Midwest Innocence Project all believed in his innocence.[336] After significant public pressure, Strickland was exonerated after a three-day evidentiary hearing in November 2021.[337] Similar issues occurred in the case of Lamar Johnson, when a Missouri judge denied a petition for a new trial that had been made at the prosecutor's request and was based on a CIU's findings that the prosecutor's office engaged in serious misconduct.[338] When creating CIUs and innocence commissions, legislatures should make the exoneration recommendations of these bodies binding upon the courts or afford them significant deference in order to ensure the release of wrongfully convicted individuals.

Conclusion

The issues with federal habeas corpus and state post-conviction proceedings are many. Simply put, these proceedings fail to adequately protect innocent, *pro se* defendants who are particularly vulnerable to wrongful convictions and ill-equipped to prove their innocence once incarcerated. Furthermore, these mechanisms for post-conviction review—based on the extreme disparity between estimated numbers of innocent prisoners and official exonerations—are clearly failing to solve the crisis of wrongful convictions.[339]

To fully address wrongful convictions within our justice system, we must go beyond habeas reform and judicial appeals. Such a solution will

335. *Id.* at 15–17.

336. *Missouri Supreme Court Declines to Hear Kevin Strickland Case; Jackson County Prosecutor Vows to Pursue Justice*, KMBC NEWS (June 2, 2021), https://www.kmbc.com/article/missouri-supreme-court-declines-to-hear-kevin-strickland-case-jackson-county-prosecutor-jean-peters-baker-vows-to-pursue-justice/36607780# [https://perma.cc/5ECV-DHTK]; *see also* Luke Nozicka, *Kansas City Man is Innocent in 1978 Murders and Should be Released, Prosecutors Say*, KAN. CITY STAR (Jan. 11, 2022), https://www.kansascity.com/news/local/crime/article249595653.html [perma.cc/PQS8-TKLV].

337. Editorial Board, *Opinion: This Innocent Man Spent 43 Years in Prison. He Will Get Zip From the State That Fought His Release.*, WASH. POST (Dec. 3, 2021), https://www.washingtonpost.com/opinions/2021/12/03/kevin-strickland-innocent-released-will-get-nothing/ [perma.cc/G8UZ-4TLH]. The delay in Strickland's exoneration was also due to a state law that prohibited local prosecutors from correcting wrongful convictions; Strickland's case was the first of its kind brought under the new Missouri law. *Id.*

338. Meagan Flynn, *Prosecutors Say He's Been Wrongfully in Prison for 24 Years. But a Judge Won't Allow a New Trial.*, WASH. POST (Aug. 27, 2019), https://www.washingtonpost.com/nation/2019/08/27/wrongly-imprisoned-years-st-louis-lamar-johnson/ [perma.cc/VP5F-CY8C].

339. *See supra* text accompanying note 13.

require an overhaul of our system, a bolstering of public defense, and the guarantee of review of potential wrongful convictions. Furthermore, any review of convictions must be accessible to *pro se* individuals, who may face barriers due to incarceration that prevent them from communicating effectively with outside organizations and from investigating their cases. Together, these reforms may help save innocent, *pro se* defendants from spending decades incarcerated for crimes they did not commit; more importantly, they may prevent these types of convictions from occurring in the first place.