

MISSING THE FOREST FOR THE TREES: FEDERAL HABEAS CORPUS AND THE PIECEMEAL PROBLEM IN ACTUAL INNOCENCE CASES

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INTRODUCTION

The DNA exoneration data stemming from the Innocence Movement exposes a harsh reality in our criminal justice system: existing post-conviction review procedures fail to accurately identify and remedy wrongful convictions of the innocent. While the layers of review available to prisoners are seemingly exhaustive, in fact, the actually innocent prisoner is confronted with little more than a façade of protection. This façade exists on direct appeal, where the court is focused on remedying procedural violations rather than engaging in fact-finding, and at the state habeas stage, where cognitive bias and deference to the trial court militate toward upholding criminal convictions. Finally, at the federal habeas stage, the procedural restrictions set out in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) often foreclose viable claims of innocence as well. In particular, the federal courts review second or successive habeas petitions in a piecemeal fashion, if they do so at all. In adopting this “piecemeal approach,” the courts often miss the forest for the trees, allowing innocent prisoners to remain in custody.

This Article is inspired by Alfred Trenkler (Trenkler), whose story provides an illustration of the piecemeal problem. Trenkler has been incarcerated in federal prison for twenty years for a crime he did not commit. Since his trial in 1993, the evidence originally supporting Trenkler’s murder conviction has been roundly discredited, piece by piece. Virtually all of the

circumstantial trial evidence has been undermined by new and more reliable information. In the process, numerous federal district and appellate courts have reviewed Trenkler's conviction, at times acknowledging fault with the trial evidence. Each court has either examined the evidence presented at trial, or reviewed new evidence that has since come to light. For example, the law enforcement database used at trial to support a *modus operandi* theory for the crime has been deemed to be unreliable hearsay. The co-defendant, who originally inculpated Trenkler, has since recanted his statements and claimed to have been threatened by government attorneys. New evidence of the co-defendant's long history of mental illness has also come to light. The jailhouse snitch, who testified to hearing Trenkler confess while in custody, received a dramatically reduced sentence following his testimony, and has since made a career as a government witness. Fingerprint evidence, not disclosed at trial, also exculpates Trenkler.

While this new evidence has come to light bit by bit, strict post-conviction statute of limitations periods have demanded immediate filings. Additionally, since his conviction in 1993, Trenkler has been largely unrepresented by counsel and has pursued post-conviction relief *pro se*. Each claim has been raised individually, either on direct appeal, or as part of a motion for new trial or a separate habeas petition. The courts have effectively reviewed each new claim in isolation, and no court has had the benefit of assessing all the new evidence in the aggregate. Thus, there has been no opportunity to view the evidentiary landscape as a whole and recognize that virtually every piece of evidence originally supporting Trenkler's conviction is no longer viable. In short, the courts have failed to see the forest for the trees. Trenkler sits in federal prison despite the absence of any credible evidence that he actually committed the crime.

This is true in spite of the express language in 28 U.S.C. § 2244(b)(2) of AEDPA, dictating that courts should view the "evidence as a whole" when reviewing successive habeas petitions.¹ In a recent article in the *National Law Journal*, Barry Scheck and several co-authors identified the problem of appellate and habeas courts reviewing post-conviction exculpatory evidence piece by piece in isolation, rather than considering the impact of the new evidence "as a whole."² However, since this 2011 article, there has been no further discussion of this "piecemeal problem" in the wrongful conviction

1. 28 U.S.C. § 2244(b)(2) (2012) (providing that a successive habeas petition will stand if "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, 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" (emphasis added)).

2. Phillip G. Cormier, Andrew Good, Barry Scheck & Harvey Silverglate, *Federal Habeas Corpus and Actual Innocence*, NAT'L L.J., May 16, 2011, at 34, 34 (discussing two murder cases—the federal murder prosecution of Jeffrey MacDonald and the state murder conviction of Gregory Taylor—as contrasting examples of how the courts' tendency to view new evidence in isolation undermines the cause of justice).

scholarship.

This Article addresses the problem presented by the Trenkler narrative above and referenced in the Scheck article. In short, our system of post-conviction review fails to adequately rectify wrongful convictions. Although the protection of the innocent is not express in the Constitution, legal scholars have argued that this notion “animates” the Bill of Rights and is indelibly intertwined with our system of criminal procedure.³ In denying post-conviction relief, a reviewing court will often point to the number of appeals and post-conviction petitions that a prisoner has already filed.⁴ However, the rise of the Innocence Movement and the proliferation of exonerations in the past two decades support the argument that each stage of the review process fails to successfully identify and grant relief to the factually innocent.⁵ Furthermore, even where convicted prisoners are able to petition the federal courts for habeas review, less than 0.4% of petitioners are granted relief of any kind.⁶

Parts I and II of this Article review each phase of the post-conviction procedures available to a prisoner, from direct appeal through federal habeas corpus. Part II focuses particular attention on federal habeas corpus procedures in the wake of AEDPA and the impact on factually innocent prisoners. Part III discusses how AEDPA was enacted to minimize the backlog of federal habeas petitions, but has nonetheless served to exacerbate the problems facing the innocent prisoner seeking relief. Part IV discusses the additional problems that arise when the hurdles created by AEDPA are viewed in light of the absence of a prisoner’s right to counsel in the post-conviction process. It is an overwhelming task for an incarcerated individual without legal training to compile a habeas corpus petition.⁷ Thus, it is not surprising that many claims

3. E.g., Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 140 (2012) (arguing that innocence protection is “axiomatic and elementary” in constitutional criminal procedure).

4. See Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 919 (2001) (discussing Governor George W. Bush’s refusal to grant reprieve to death row inmate Gary Graham, in particular, his claim that Graham’s case had been reviewed “more than 20 times by state and federal courts and by 33 judges” (footnote omitted)); see also David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1029 (2010) (noting that in spite of a “perception that criminal convictions may be endlessly appealed and challenged collaterally, the reality is that . . . [upon] conviction, there are very few ways for criminals to make fact-based challenges to the verdict”).

5. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 130 (2008) (“Analysis of data regarding known innocent convicts, from their trials through their appeals and DNA exoneration, does not provide reasons to be optimistic that our system effectively prevents serious factual miscarriages at trial, detects them during appeals or post-conviction proceedings, or remedies them through DNA testing.”); see also Wolitz, *supra* note 4.

6. Joseph Hoffman & Nancy King, Op-Ed., *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at 8, available at www.nytimes.com/2011/04/17/opinion/17hoffman.html (noting that out of 17,000 petitions filed each year, only a “tiny fraction” of prisoners are granted relief).

7. See, e.g., Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives*

are raised in a piecemeal fashion. Part V analyzes the “piecemeal problem” in our system of federal habeas review and, using the Trenkler case as an illustration, advocates how it can be remedied by the courts’ broader interpretation of AEDPA’s “evidence as a whole” language.

I. STATE POST-CONVICTION PROCEDURES

The first avenue of relief for a convicted prisoner raising a claim of actual innocence is direct appeal.⁸ However, claims raised on direct appeal are limited to procedural errors occurring at the trial level.⁹ The review for this type of error is, by definition, limited to the trial record, and as such, necessarily excludes claims requiring consideration of new evidence.¹⁰ The appeal process is followed by collateral attack of the conviction in the state courts, including motions for new trial and petitions for habeas corpus.¹¹ At this step of the process, for the first time, a prisoner may raise claims involving newly discovered evidence, and the courts are not restricted to reviewing the trial record alone.¹² However, each of these avenues of relief at the state level presents substantial barriers for the actually innocent prisoner.¹³

A. Direct Appeal

Theoretically, the criminal appeals process should protect against and

and the Antiterrorism and Effective Death Penalty Act of 1996, 30 AM. J. CRIM. L. 171, 173 (2003) (characterizing federal habeas litigation as a “complex journey” and referencing six threshold requirements for relief); Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2129 (2002) (discussing the difficulty facing pro se litigants seeking to compile a federal habeas petition while incarcerated).

8. BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 1:1 (2013) (“While the Supreme Court has never held that the states must provide for direct review of state criminal judgments, all states do permit appeal in the run of cases.” (footnote omitted)).

9. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2009) (noting that appellate courts typically have “no mechanism that ensures litigants a right to introduce new evidence of innocence during the direct appeal process”).

10. *Id.* (“Appellate courts do not hear new evidence, and limit their review to the evidence in the record—that is, to the evidence introduced in the trial court proceedings.”).

11. MEANS, *supra* note 8, § 1:3 (discussing nature and scope of state habeas corpus proceedings); Findley, *supra* note 9, at 605.

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, 664-65 (2005) (discussing state post-conviction procedure generally and characterizing newly discovered evidence claims as “an integral part of the state court landscape for criminal defendants”).

13. Throughout this Article, the terms “factually innocent” and “actually innocent” are used interchangeably to refer to cases where the charged party either did not commit the crime in question, or no crime was committed at all. This category does not include the scenario where a conviction was obtained in violation of the Constitution, i.e., based on illegally obtained evidence or ineffective counsel.

correct wrongful convictions.¹⁴ However, while every criminal defendant who has been convicted of a crime has a right to a direct appeal,¹⁵ the appellate process has historically been primarily focused on remedying procedural transgressions at the trial level, rather than on addressing the guilt or innocence of the convicted.¹⁶ The appellate courts are more concerned with whether the underlying trial procedure, rather than the result, was correct, and as such, factual innocence is typically not a viable basis of appeal.¹⁷ This is true, in part, because the appellate courts are not meant to gauge the credibility of trial witnesses, and must typically view the evidence in the light most favorable to the prosecution.¹⁸ Thus, the trial itself—rather than the appellate process—is meant to be the primary venue for challenging guilt and promoting factual innocence.¹⁹ Further, even in the rare circumstances where courts do find error in the trial record on direct appeal, the appellate courts often characterize these transgressions as “harmless” and thus, not worthy of reversal.²⁰

Further, the exoneration data recently compiled by Professor Brandon Garrett suggests that appellate courts are failing in their function to correct wrongful convictions.²¹ Professor Garrett has reviewed and analyzed the first 200 DNA exonerations in the United States to determine why courts routinely

14. Findley, *supra* note 9, at 592 (“Providing a failsafe against erroneous judgments about factual guilt is thus a uniquely important core function of the appellate process in criminal cases.”).

15. See WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 1256 (3d ed. 2000) (noting that “[i]n the federal system and in most states, statutes or state constitutional provisions guarantee defendants in all felony cases a right to appellate review”).

16. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 917 (2011) (commenting that the “[t]ruth is simply not a central . . . concern on appeal”); see also Garrett, *supra* note 5, at 94 (noting that “current doctrine excuses constitutional error on grounds of guilt, yet does not provide innocence claims that convicts can assert”).

17. Findley, *supra* note 9, at 601–02 (asserting that factual innocence is not a viable claim on appeal and noting that courts are concerned that the process, rather than the outcome, be “error-free”); see also Wolitz, *supra* note 4, at 1037 (noting that the right of appeal is ingrained in our system, but appellate courts have “few mechanisms available” for fact-finding).

18. See BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 183 (2011) (noting that appellate courts “must typically accept the testimony of the witnesses as true rather than reconsider the case based on a cold record”).

19. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1021 (2011) (“It’s only a slight exaggeration to say that fact finding in American courts is a one-act play entitled *Trial*.”).

20. See GARRETT, *supra* note 18, at 201 (noting that thirty percent of the DNA exoneration cases involved written opinions finding “harmless error” at trial).

21. Garrett, *supra* note 5, at 130; see also Findley, *supra* note 9, at 592 (“[J]udging by the recent evidence, especially the empirical evidence from cases in which postconviction DNA testing has proved that an innocent person was wrongly convicted, the appellate process in criminal cases is largely a failure on this most important score.”).

fail to correct the errors causing so many criminal defendants to be convicted at trial in spite of their undisputed factual innocence.²² While Professor Garrett's findings are extensive, most notable for purposes of this discussion is the fact that just fourteen percent of the factually innocent defendants who were ultimately exonerated by DNA evidence initially won a reversal on appeal.²³

This figure is roughly equal to a control group of defendants who won reversal on appeal under generally similar circumstances.²⁴ This "matched comparison group" was comprised of cases involving defendants charged with the same type of violent crimes, in the same jurisdictions, and occurring in the same timeframe as in the exoneration group.²⁵ These findings indicate that, on direct appeal, courts overwhelmingly failed to recognize valid claims of innocence and instead affirmed these convictions eighty-six percent of the time.²⁶

B. Motion for New Trial

A defendant may also challenge a conviction in a criminal case via a motion for new trial. Unlike the appellate process, a motion for new trial allows the petitioner to argue error beyond the trial record.²⁷ This procedure is available in every state as an avenue to raise a claim of newly discovered evidence supporting factual innocence.²⁸ Additionally, a petitioner may introduce new evidence in support of a constitutional violation such as ineffective assistance of counsel or juror misconduct.²⁹

A motion for new trial based on newly discovered evidence is often filed

22. Garrett, *supra* note 5, at 58-59 (describing scope of article as "present[ing] the results of an empirical study that examines how our criminal system handled, from start to finish, the cases of the first 200 persons exonerated by postconviction DNA testing in the United States" and noting that the study "looks in depth at the reasons why these people were wrongfully convicted, the claims they asserted and rulings they received during their appeals and postconviction proceedings"); *see also* GARRETT, *supra* note 18 (including a more expansive discussion of the first 250 DNA exonerations).

23. Garrett, *supra* note 5, at 98 (discussing the article's "central finding" that "appellate or postconviction courts reversed 14% of exonerees' convictions, or 9% if one excludes capital cases").

24. *Id.* at 102-03 (noting comparable reversal rate among study's "matched comparison group" not involving exoneration cases).

25. *Id.* at 102.

26. *Id.* at 106, 125-26 (noting that study's findings "bolster scholarship contending that our criminal procedure rights skew the way lawyers litigate toward procedure and away from substance").

27. Medwed, *supra* note 12, at 665 (discussing motions for new trial as a vehicle for raising claims of newly discovered evidence).

28. *Id.* at 665-66 (noting that "every state provides for a motion for a new trial on the basis of newly discovered evidence").

29. *See id.* at 665.

with the original trial judge.³⁰ This practice arguably undermines the premise that a motion for new trial presents an opportunity for meaningful review of a criminal conviction. Further, it creates the potential for bias.³¹ Specifically, legal scholars have posited that cognitive bias operates to subconsciously prejudice judges toward upholding their prior decisions.³² In the context of a claim of actual innocence, this bias may manifest itself in a variety of ways. For example, as Professor Daniel Medwed has suggested, when faced with new evidence of innocence, a judge may “unconsciously dismiss the alleged newfound information as irrelevant or otherwise characterize it as not outcome-determinative,” in order to make findings consistent with the trial court result.³³ Further, in states where judges are elected, the pressure to be tough on crime can also influence the courts’ decisions.³⁴ There is also a tendency to defer to the jury’s decision, perhaps in order to give the impression of accuracy and to promote confidence in the criminal justice system.³⁵ Finally, in some states, there is no right to appeal a motion for new trial, but even where there is, the standard of review requiring abuse of discretion is often regarded as so high that it effectively precludes relief to a defendant claiming actual innocence.³⁶

Astonishingly, not a single DNA exoneree in Professor Garrett’s study was successful in raising a post-conviction claim based on new evidence of actual innocence; every request for a new trial on this basis was denied.³⁷ Thus, while

30. *Id.* at 659-60 (commenting that the original trial judge assigned to state habeas review is “a person who may have a vested interest in the outcome”).

31. *See id.*

32. For a more complete discussion of the impact of cognitive bias in this context, see Medwed, *supra* note 12, at 699-704 (reviewing scholarship on behavioral decision making and cognitive bias as applied to the judicial context); see also Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 89-90 (2008) (discussing cognitive bias in the judicial context); Findley, *supra* note 9, at 605-06 (discussing cognitive bias in the judicial context and noting that such “biases are likely reflected in the many cases in which appellate courts have expressed confidence that the defendants before them were guilty, or that the evidence of guilt was ‘overwhelming,’ even where DNA later proved that the defendants were in fact innocent”); Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 UTAH L. REV. 99, 108, 125, 130 (2012) (noting that “judicial cognitive biases . . . [dictate] that the same judges who presided over the original trials . . . [are not] suited to be the final arbiters of a recantation’s trustworthiness”).

33. Medwed, *supra* note 12, at 703 (discussing implications of behavioral decision-making theory in the judicial context).

34. *E.g.*, Findley, *supra* note 9, at 606-07 (noting empirical evidence supporting the idea that political “pressures [on elected state court judges] to be ‘tough on crime’ do have a significant impact on judges”).

35. *Id.* at 607 (noting the tendency of state court judges to defer to the “mystical truth-divining power of the jury”).

36. *See* Medwed, *supra* note 12, at 680 (discussing the highly deferential nature of the abuse of discretion standard applied in appellate review of a denial of a motion for new trial).

37. GARRETT, *supra* note 18, at 185.

a motion for new trial allows expansion of the trial record and is theoretically an apt venue for claims of actual innocence, in reality such motions are rarely granted.

C. State Habeas Corpus Review

Once a prisoner has exhausted all direct appeals and has directly attacked the conviction via motion for new trial, the avenues of relief available have been characterized as “extraordinary and extremely narrow.”³⁸ While a direct appeal is typically not the appropriate venue for a claim of actual innocence, other post-conviction collateral attacks provide an avenue to raise new evidence of innocence—at least in theory.³⁹ Most states now provide for some type of procedure for collateral post-conviction attack, such as state habeas corpus or *coram nobis*.⁴⁰ These procedures are either based in common law or, more frequently, codified in statute or court rule.⁴¹

However, while these procedures for state post-conviction collateral attack are in place in most jurisdictions, their effectiveness in identifying meritorious claims of actual innocence is up for debate. Studies have shown that state habeas proceedings do not effectively remedy constitutional errors occurring at the trial level.⁴² For example, a Texas study determined that state courts’ written findings were lifted directly from the prosecution’s briefs in 83.7% of habeas corpus petitions.⁴³

Additionally, state post-conviction procedures, including habeas corpus and *coram nobis*, have been criticized as duplicitous and unduly complex.⁴⁴ Particularly in jurisdictions where these measures exist in addition to motion for new trial procedures, the multiple layers of relief available can result in

38. Wolitz, *supra* note 4, at 1037 (discussing the narrow applicability of post-conviction relief for convicted prisoners who have exhausted their direct appeals).

39. Kathleen Callahan, *In Limbo: In re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 643 n.95 (2011) (identifying just eight states that allow for freestanding substantive claims of innocence in state habeas corpus proceedings).

40. Medwed, *supra* note 12, at 681 (discussing “current modes of collateral relief” in the state post-conviction context).

41. *Id.* (noting the “shift from common law systems of state post-conviction relief in favor of statute- and rule-based regimes”).

42. *See, e.g.*, Jake Sussman, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 366 (2001) (noting that error rates in state capital cases are extremely high, yet frequently go uncorrected by state courts in post-conviction proceedings).

43. Williams, *supra* note 4, at 929-31 (citing to statistics regarding Texas state appellate courts’ treatment of state habeas petitions).

44. *See* Medwed, *supra* note 12, at 695-97 (“While the presence of multiple remedies at the state court level may seem desirable or at least better than the alternatives, a single option or no remedy at all, the interrelationship between these devices within any given jurisdiction can be perplexing.”).

conflicting standards and can ultimately create confusion among the litigants.⁴⁵

At the state level, each stage of review of a criminal conviction fails to effectively address the plight of a prisoner claiming innocence. While the innocent prisoner is presented with a façade of protection in the form of direct appeal and collateral attack of the conviction via motion for new trial and state habeas review, nothing lies beneath the surface. On direct appeal, the courts focus on procedural errors and a defendant's actual innocence is generally regarded as outside the scope of this review.⁴⁶ Further, state collateral proceedings, which are at least theoretically designed to address new evidence of innocence, operate under norms that heavily gravitate toward upholding the conviction.⁴⁷ Thus, at the state level, the factually innocent prisoner is left with the cold comfort of a plethora of review procedures, but no meaningful assessment of guilt or innocence after the trial.

II. FEDERAL HABEAS CORPUS AND AEDPA

Once the state direct-appeal and post-conviction procedures discussed above have been exhausted, a prisoner also has the right to federal habeas corpus review.⁴⁸ However, while federal habeas corpus proceedings theoretically provide an additional layer of protection against ongoing incarceration of the innocent, these petitions are virtually never granted.⁴⁹ Further, the landscape of federal habeas procedure has been so altered by the enactment of AEDPA that the remaining protections available to the actually innocent prisoner are essentially nonexistent. The role of actual innocence claims in the context of federal habeas corpus procedure continues to be debated. The Supreme Court has so far ruled that a freestanding claim of actual innocence does not amount to a constitutional violation, and thus, is not a viable basis for habeas corpus relief.⁵⁰ However, a claim of actual innocence

45. *Id.* at 696 (discussing Tennessee state post-conviction procedures and noting conflict between requirements for introducing new evidence via motion for new trial and via post-conviction relief).

46. Gross, *supra* note 19, at 1021 (noting that although a criminal defendant has the right to an appeal upon conviction, the "appeal only provides a review of the record of the trial, and that review is for procedural error rather than factual accuracy").

47. See Williams, *supra* note 4, at 920 (noting the failure among state courts to provide meaningful review, especially in capital cases).

48. MEANS, *supra* note 8, § 4:1 ("[F]ederal habeas corpus ... provides a post-conviction remedy for prisoners collaterally attacking convictions obtained in state court.").

49. See Hoffman & King, *supra* note 6, at 8 (noting that out of 17,000 petitions filed annually, just sixty to seventy prisoners are granted relief).

50. Joshua Lott, *The End of Innocence? Federal Habeas Corpus Law After In Re Davis*, 27 GA. ST. U. L. REV. 443, 453 (2011) (noting that in the seminal federal habeas corpus case, *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court "held that a substantive claim of actual innocence based on newly discovered post-trial evidence is not cognizable").

accompanied by an alleged constitutional violation may be raised in a federal habeas petition.⁵¹

A. A Brief History of Federal Habeas Corpus

Habeas corpus has historically been referred to as the “Great Writ of Liberty”⁵² and is referenced in the Suspension Clause⁵³ of the United States Constitution. Its origins stem from a combination of common law and both constitutional and statutory law.⁵⁴ Habeas corpus has been characterized as a “celebrated” mode of relief with “a grand purpose” and has been called a “great constitutional privilege.”⁵⁵ Further, the Great Writ has been identified as “one of the most important and cherished procedural innovations in the shared legal histories of England and the United States.”⁵⁶

Originally used as a means of bringing incarcerated prisoners to court, the Writ of Habeas Corpus has evolved into a “complex set of procedural rules,”⁵⁷ designed to protect against unconstitutional incarceration.⁵⁸ It has historically served to “check the abuse of government power.”⁵⁹ With the passage of the Habeas Corpus Act of 1867, Congress altered the focus of habeas relief to address constitutional transgressions.⁶⁰ Subsequently, Congress further expanded the scope of habeas corpus in the Habeas Corpus Act of 1948.⁶¹ This new act allowed for habeas review of violations of both the Federal Constitution and federal law.⁶²

51. *Id.* (noting that “federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding”).

52. See Lyn Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 78-82 (2005), for a more complete history of the writ of habeas corpus.

53. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

54. NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY* 5 (2011) (noting that the “source of judicial authority to issue the writ . . . is . . . an unusual hybrid of common law, constitutional law, and statute”).

55. See Hack, *supra* note 7, at 173 (discussing the “exuberant” rhetoric attached to the Writ of Habeas Corpus).

56. KING & HOFFMANN, *supra* note 54, at 2.

57. See Lott, *supra* note 50, at 448 (noting that “the writ has expanded today into a complex set of procedural rules and is the primary method used to challenge the legality of one’s imprisonment”).

58. See KING & HOFFMANN, *supra* note 54, at 2-12 (discussing history of the Writ of Habeas Corpus in detail).

59. *Id.* at 3.

60. See Entzeroth, *supra* note 52, at 79-80 (discussing the history of federal habeas corpus in detail).

61. *Id.* at 81.

62. *Id.* (noting that the “1948 habeas statute provides review to prisoners detained by a

During the latter part of the twentieth century, a convergence of judicial trends and societal changes set the stage for an explosion in the number of federal habeas petitions filed each year. This abrupt increase in filings was the impetus to the radical changes to federal habeas corpus law on the horizon. First, in the 1950s and 1960s, the Warren Court presided over the “due process revolution,” deciding a series of landmark cases that significantly expanded the meaning of “liberty” interests, and thus, the constitutional claims available to state prisoners seeking federal habeas relief.⁶³ For the first time, the Court expanded its interpretation of a defendant’s rights under the Due Process Clause of the Fourteenth Amendment to include the right to exclusion of wrongfully seized evidence, the right to counsel in criminal proceedings, and the right to receive warnings prior to custodial police interrogations.⁶⁴ Additionally, the Warren Court recognized early release and good-time credit calculations as constitutionally based liberty interests.⁶⁵

In response to the changes in federal habeas litigation, Judge Henry Friendly published an influential article in 1970, arguing that the Great Writ had strayed too far from its original purpose and that federal habeas corpus review should focus exclusively on claims of actual innocence.⁶⁶ The underlying premise of Judge Friendly’s argument seemed to be that the number of federal habeas petitions filed each year had reached unmanageable levels, and a focus on actual innocence would drastically reduce these numbers while also focusing the courts’ limited resources on the most deserving petitioners.⁶⁷

While not expressly articulated, Judge Friendly’s view that actually innocent prisoners were few in number, if not virtually nonexistent, seemed to

state or federal government when such detention violates the federal constitution or federal law”).

63. KING & HOFFMANN, *supra* note 54, at 10 (“The Supreme Court, under the leadership of Chief Justice Earl Warren and Justice William J. Brennan, responded to recurring and serious injustices inflicted upon state criminal defendants—especially minorities and the poor—by interpreting the Due Process Clause of the Fourteenth Amendment to require the states to provide defendants with various new federal rights.”).

64. *Id.* at 10 n.43 (noting the expanded rights afforded to criminal defendants as a result of the Due Process Revolution under the Warren Court).

65. Nancy King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L. J. 1, 6-7 (2008) (discussing a series of Supreme Court decisions from the 1970s that recognized parole issues and good-time credit calculations as “liberty interests”).

66. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142-43 (1970) (arguing that “with few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional pleas with a colorable claim of innocence”).

67. *Id.* at 144 (arguing that the number of federal habeas petitions was overwhelming the courts, and as of 1970 “comprise[d] the largest single element in the civil caseload of district courts” and noting a similar explosion of state habeas petitions as well); *see also* Wolitz, *supra* note 4, at 1038 (noting that Judge Friendly’s proposal placed “greater emphasis on actual innocence over procedural violations,” thus resulting in more “attention on the most deserving petitioners”).

fuel his argument. Specifically, his argument stemmed from the judicial-economy perspective that restricting petitions to colorable claims of actual innocence would severely curtail the number of filings.⁶⁸ However, at the time he wrote this article, Judge Friendly could not have foreseen how the Innocence Movement would uncover hundreds of wrongfully convicted, actually innocent prisoners in the coming decades.⁶⁹

Close on the heels of the due process revolution and the subsequent rise in the number of federal habeas filings, the 1990s brought about a significant increase in U.S. prison populations, along with a similar increase in the length of sentences imposed.⁷⁰ In fact, state prison populations more than doubled from 1990 to 2007.⁷¹ These changes resulted in a further increase in the number of petitions filed each year.⁷²

B. The Passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

It was in this atmosphere, in the wake of an explosion in the annual numbers of federal habeas petitions filed, that Congress debated and ultimately enacted AEDPA in 1996.⁷³ AEDPA overhauled the procedures governing federal habeas corpus petitions.⁷⁴ Prior to this legislation, critics of federal habeas corpus review claimed that the system had become “too unwieldy, expensive and time-consuming.”⁷⁵ Thus, the often-cited goals of AEDPA were to reduce delay and administrative inefficiencies in processing federal habeas petitions, and to avoid redundancies in state and federal courts.⁷⁶ Congress

68. Friendly, *supra* note 66, at 148 (commenting that the “most serious single evil with today’s proliferation of . . . [federal habeas petitions] is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to represent the accused”).

69. *See id.* (characterizing federal habeas petitions as a “gigantic waste of effort” at the time the article was written); *see also* Sussman, *supra* note 42, at 370 n.116 (noting the Innocence Project’s claim that at least 108 persons have been exonerated by DNA evidence).

70. King & Sherry, *supra* note 65, at 13-15 (discussing changes in the state prison population from 1990-2004).

71. *Id.* at 15 (discussing Bureau of Justice Statistics data indicating that “state prison populations grew in absolute terms, jumping from 295,819 in 1980, to 684,544 in 1990, to 1,395,916 in 2007”).

72. *Id.*

73. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4-22 (1997) (discussing the background of, and debate leading up to, the passage of AEDPA).

74. *See id.* at 1.

75. Wolitz, *supra* note 4, at 1038 (discussing historical criticism of federal habeas corpus procedures).

76. Tushnet & Yackle, *supra* note 73, at 5-6 (identifying the three “perennial problems attributed to the habeas system” as: “1) the delays associated with federal habeas in the wake of state court consideration of prisoners’ federal claims; 2) the inefficiencies associated with prisoners’ failure to comply with state and federal procedural rules; and 3) the ostensible

attempted to address the perceived phenomenon of “abuse[] of the writ” and the substantial time accruing between conviction and execution of sentence, particularly in death penalty cases.⁷⁷ The new legislation ostensibly sought to balance the competing interests of finality and fairness, by limiting the seemingly endless review of criminal judgments while ensuring a just result for the convicted.⁷⁸

Congress also sought to combat the administrative “redundancies” involved in the pre-AEDPA federal habeas procedures.⁷⁹ In particular, the federal courts’ *de novo* review of most state habeas decisions was considered to be a waste of judicial resources, and Congress thus sought to provide for greater deference to the state courts in the interest of judicial economy.⁸⁰

The enactment of AEDPA had a profound impact on habeas corpus jurisprudence. However, upon signing the bill into law, President Clinton focused primarily on the statute’s anti-terrorism measures rather than its provisions impacting post-conviction procedure.⁸¹ AEDPA was debated in the wake of the Oklahoma City bombings, and pressure on President Clinton to avoid appearing “soft on crime” arguably influenced him in supporting the bill.⁸²

Lawmakers perceived that federal courts were besieged by state prisoners filing frivolous habeas claims, and they believed that the courts were on the verge of becoming effectively impotent.⁸³ Further underlying the passage of

redundancy of federal adjudication of claims previously rejected in state court”).

77. Krystal Moore, *Is Saving an Innocent Man a “Fool’s Errand”? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197, 204 (2011) (commenting that prior to AEDPA, existing procedures offered “the incentive and opportunity for delay” in filing and processing federal habeas petitions).

78. *Id.* at 204 (noting that “[c]omplaints of delay and wasted judicial resources marked the debate that led to passage of . . . AEDPA”).

79. *See id.* (“Additional problems included the fact that state court interpretations or application of federal law were not binding in subsequent federal habeas proceedings. Federal courts reviewed *de novo* state court decisions on questions of law and mixed questions of law and fact.”).

80. *Id.* (“Congress enacted the AEDPA to curb abuses of the writ by giving deference to state courts.” (citation omitted)).

81. Tushnet & Yackle, *supra* note 73, at 21 (commenting that President Clinton “vigorously supported the anti-terrorism provisions of the AEDPA, and was at best indifferent to the inclusion of habeas corpus revisions in the statute”). *But see* Sussman, *supra* note 42, at 358 n.73 (noting President Clinton’s comments regarding AEDPA’s purpose to eliminate unnecessary delay in capital cases).

82. Williams, *supra* note 4, at 923 (discussing passage of AEDPA generally and the political motives behind President Clinton’s support).

83. *See* Kyle Reynolds, “*Second or Successive*” *Habeas Petitions and Late-Ripening Claims after Panetti v Quarterman*, 74 U. CHI. L. REV. 1475, 1478-79 (2007) (discussing political climate at the time AEDPA was enacted, with national security at the forefront of the congressional agenda, along with concerns about federal courts “besieged by” habeas petitions).

AEDPA was Congress's apparent disdain for the federal courts' willingness to grant habeas relief, particularly in death penalty cases.⁸⁴ Although at the time AEDPA was being debated, the overall success rate of federal habeas petitions was less than 1%, 60 to 70% of the successful petitions arose out of death penalty cases.⁸⁵

C. AEDPA and the Innocence Movement

When Congress passed AEDPA, it could not have foreseen the profound impact of the Innocence Movement in the decades to follow.⁸⁶ Led by the Innocence Project and a network of similar organizations around the country, this movement brought hundreds of exonerations to the forefront. It has also served to undermine confidence in the American criminal justice system, previously thought to be virtually error-free and a model for the world.⁸⁷ Additionally, this movement brought about numerous significant reforms in the criminal justice system.⁸⁸ While Congress sought to address the unrestricted filing of "frivolous" federal habeas petitions by obviously guilty prisoners,⁸⁹ the fact that significant numbers of these petitioners were wrongfully convicted and

84. Entzeroth, *supra* note 52, at 88 (noting that "[a] subtext of AEDPA appears to have been lawmakers' displeasure with the ability, and perceived willingness, of federal courts to act independently and actually grant writs of habeas corpus to state and federal prisoners, and particularly prisoners on death row").

85. Christopher Smith, *Federal Habeas Corpus Reform: The State's Perspective*, 18 JUST. SYS. J. 1, 2 (1995) (citing a 1994 study and noting that "more than ten thousand habeas corpus petitions absorb the time and resources of U.S. district courts each year, even though fewer than 1 percent of such petitions are successful").

86. JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 16 (2008) (noting that "[t]he renewed interest in wrongful convictions was catapulted forward by the introduction of DNA testing in the late 1990s"); see GARRETT, *supra* note 18, at 218-21 (commenting that the development of mitochondrial and Y-STR DNA testing did not occur until the late 1990s, further expanding the number of cases amenable to DNA testing).

87. See GARRETT, *supra* note 18, at 6 ("DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system's accuracy. This sea change came about because of the hard work of visionary lawyers, journalists and students . . . [from the Innocence Project]."); see also Stephanie Roberts Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, 22 B.U. PUB. INT. L.J. 129, 136 (2013) ("The pioneering work of the Innocence Project and other Innocence Network members, and its impact on the criminal justice system, cannot be overstated.").

88. See generally Robert Norris et al., "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 ALB. L. REV. 1301 (2011) (discussing the legislative and policy reforms in the criminal justice system in the fifty states in the wake of the Innocence Movement).

89. See Reynolds, *supra* note 83, at 1479 (discussing the purpose of AEDPA "to restrict the filing of frivolous habeas petitions that are disruptive or judicial finality and parasitic upon official time").

factually innocent was not yet widely known⁹⁰ and did not seem to enter the debate. In fact, as of 1996, when AEDPA was passed, fewer than thirty prisoners had been definitively exonerated by DNA evidence.⁹¹ That number has since multiplied tenfold, to over 300.⁹² This figure does not include the hundreds more non-DNA and other group exonerations, such as the Ramparts scandal in Los Angeles or the Boston Crime Lab scandal involving pervasive misconduct by chemist Annie Dookhan.⁹³

1. The Age of Innocence

Today, thanks in large part to the forensic use of DNA technology, the American criminal justice system has entered “the age of innocence.”⁹⁴ There is now virtually universal recognition that wrongful convictions occur far more frequently than was historically imagined and certainly more often than is morally acceptable.⁹⁵ While there is considerable debate among legal scholars as to the scope of the actual innocence problem in the United States, most are in agreement that the number of known exonerations to date represents the mere “tip of the iceberg.”⁹⁶ This understanding is based in part on the premise that

90. See Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 106 (2011) (characterizing DNA exonerations as a “fairly recent phenomenon”).

91. See *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know> (last visited Nov. 13, 2013).

92. *Id.*

93. Gross, *supra* note 19, at 1018 (discussing “mass exonerations” involving police scandals where law enforcement planted evidence or crime labs mishandled it); Sally Jacobs, *Annie Dookhan Pursued Renown Along a Path of Lies*, BOSTON GLOBE (Feb. 3, 2013), <http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33iRwXatSvMCL/story.html> (discussing Annie Dookhan’s role in the Boston drug lab scandal and her confession to altering test results and mishandling evidence in thousands of criminal cases).

94. Medwed, *supra* note 12, at 656 (characterizing the last fifteen years as the “true ‘Age of Innocence,’” citing the impact of DNA evidence in exposing wrongful convictions and leading to legal reform of criminal justice procedures) (citation omitted). See also Hartung, *supra* note 87, at 130 (using “Age of Innocence” reference in the same context).

95. See, e.g., Wolitz, *supra* note 4, at 1028-29 (noting that “the problem of innocence [in the American criminal justice system] will not go away” and calling the Innocence Movement “the most dramatic story in American criminal law over the past two decades”). See also Findley, *supra* note 16, at 918 (characterizing U.S. wrongful conviction rate as “clear and disturbing”); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1035 (2012) (“DNA exonerations reveal that wrongful convictions of actually innocent defendants occur, and, most likely, continue to occur with disturbing frequency.”). But see Smith, *supra* note 3, at 143-44 (discussing debate regarding true rate of wrongful convictions in American criminal justice system).

96. See, e.g., GARRETT, *supra* note 18, at 11 (noting that the 250 known DNA exonerations which are the subject of his book reflect “just the tip of an iceberg”); Norris et al., *supra* note 88, at 1302 (identifying known exonerations as “mere tip of the iceberg” given that most involved DNA evidence and a trial, in contrast to overwhelming majority of criminal cases where no DNA evidence exists and the defendant did not go to trial); Smith,

although the overwhelming majority of exonerations have been based on DNA evidence, DNA cases represent a very small percentage of criminal cases overall.⁹⁷ DNA cases tend to involve charges of rape and murder, where biological evidence is most prevalent.⁹⁸ It is much more difficult to establish innocence in non-DNA cases because of the subjective nature of the evidence.⁹⁹ Furthermore, even in those cases where biological evidence was in fact obtained, and in theory could be tested in order to establish the defendant's innocence, such evidence is often lost or destroyed by the time it is sought in the post-conviction process.¹⁰⁰

Furthermore, the exonerations occurring since the dawn of the Innocence Movement have almost exclusively stemmed from convictions after jury trial, rather than guilty pleas.¹⁰¹ The focus on jury trial convictions is logical given that these convictions typically result in longer prison sentences, and Innocence Projects have historically been more willing to devote their limited resources to exonerating incarcerated individuals, rather than those who have already served their sentences.¹⁰² Moreover, while over ninety-five percent of all convicted criminal defendants pleaded guilty,¹⁰³ very few exonerations come from this pool. Aside from the reduced sentences typically involved in guilty pleas, defendants who plead guilty also often relinquish many appellate and post-conviction rights and thus face greater procedural hurdles in seeking relief.¹⁰⁴

supra note 3, at 143 (discussing the “substantial number of innocent women and men [who] are residing within United States prison walls” and identifying the known exonerations as merely the “tip of the iceberg” (footnote omitted)); Ware, *supra* note 95, at 1038 (“[T]he number of innocent defendants wrongly convicted cannot be quantified. That number is unknown and probably unknowable.” (footnote omitted)).

97. Medwed, *supra* note 12, at 656-57 (discussing the central role of DNA evidence in exoneration cases).

98. Gross, *supra* note 19, at 1019 (commenting that the exonerations to date “consist almost entirely of a subset of the most serious false convictions for rape and murder”).

99. Medwed, *supra* note 12, at 657-58 (“In . . . non-DNA cases, prisoners must find alternative means to support their innocence claims, frequently, ‘newly discovered evidence’ not susceptible to a test tube, such as confessions by the actual perpetrator, statements by previously unknown witnesses, and/or recantations by trial participants. . . . [N]on-DNA cases are difficult for defendants to overturn . . . given the subjectivity involved in assessing most forms of new evidence and the absence of a method to prove innocence to a scientific certainty.” (footnotes omitted)).

100. *Id.* at 656-57 (estimating that approximately eighty to ninety percent of criminal cases do not have DNA evidence, and noting that in many cases originally involving biological evidence, such evidence has been lost or otherwise rendered useless over time).

101. Gross, *supra* note 19, at 1019 (commenting that the exonerations to date “consist almost entirely of a subset of the most serious false convictions for rape and murder . . . [and] they underrepresent guilty pleas”).

102. *Id.* at 1022 (“All actors in the process, from governors to innocence projects to the media to the courts themselves, concentrate their time and attention on those cases with the most extreme outcomes: death sentences, life imprisonment, and other extreme sentences.”).

103. *Id.* at 1013 (noting that “about 95% of all defendants who are convicted of felonies” pleaded guilty rather than going to trial).

104. *Id.* at 1022 (“Innocent defendants who plea bargain . . . are far less likely to be

2. Rate of Wrongful Conviction of the Innocent

In light of these factors, projecting wrongful conviction rates poses a significant challenge. Legal scholars have attempted to extrapolate the numbers of known exonerations based on various characteristics. On one end of the spectrum, Professor Michael Risinger estimates the true rate of conviction of the innocent could be as high as 5% of overall criminal convictions.¹⁰⁵ This figure is bolstered by a 2012 study conducted by the Urban Institute, setting the rate of wrongful conviction of the innocent at as high as 15%.¹⁰⁶ At the other extreme, the more conservative view shared by Supreme Court Justice Antonin Scalia and prosecutor Joshua Marquis set the wrongful conviction rate much lower at .027%.¹⁰⁷ Another recent study conservatively estimates the rate of “actual innocence” convictions as between .5 and 1% and notes that even at this modest rate, 5000 to 10,000 factually innocent defendants are wrongly convicted of felonies each year.¹⁰⁸

Whatever the exact rate of conviction of the innocent, new data and analysis of the known exonerations to date have led legal scholars to new realizations. In particular, post-conviction judicial procedure, from direct appeal to state and federal habeas corpus, has failed to identify and remedy wrongful convictions far too frequently.¹⁰⁹ Professor Keith Findley, Co-Director of the Wisconsin Innocence Project, has argued that the “failure of the

exonerated . . . [T]hey have a harder procedural row to hoe. One of the rights they waive by pleading guilty is the right to a direct appeal; and many statutes and procedural rules that deal with alternative modes of review—from state habeas corpus to post-conviction DNA testing—limit or foreclose access by defendants who pled guilty.”)

105. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (discussing results of review of wrongful capital rape-murder conviction data from the 1980s to extrapolate rate of wrongful conviction of the innocent at 5%).

106. See JOHN ROMAN ET AL., URBAN INST., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 1-6 (2012), available at <http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf> (discussing results of Urban Institute Post-Conviction DNA Testing and Wrongful Conviction study, involving review of 634 Virginia sexual assault and homicide cases from 1973-87, where available biological evidence was tested revealing a wrongful conviction rate of factually innocent defendants as high as 15%).

107. See Smith, *supra* note 3, at 143-44 (discussing in depth the debate regarding the wrongful conviction rate in the United States).

108. Marvin Zalman et al., *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72, 72 (2008) (estimating rate of wrongful conviction at .5-1% based on qualitative estimates of errors in death penalty cases, and noting the correlating number of wrongful convictions in felony cases as 5000 to 10,000 annually).

109. See Tim Bakken & Lewis M. Steel, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825, 829 (2011) (describing the plight of the wrongful conviction of innocents as “dire”); see also Callahan, *supra* note 39, at 642 (noting that “recent DNA exonerations have pulled the issue into the spotlight and shifted national consensus toward favoring the provision of legal avenues of relief to the wrongfully convicted” (citation omitted)).

American adversarial system to ensure reliable outcomes and to protect the innocent is . . . beyond dispute.”¹¹⁰ He has further noted that in light of the proliferation of exonerations in the last two decades, the “perception of accuracy [in our criminal justice system] is becoming increasingly difficult to maintain.”¹¹¹

3. Brandon Garrett’s Exoneration Data Study

Further, as discussed in Part I above, in his book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Professor Brandon Garrett presents his comprehensive study of the first 250 DNA exonerations in the United States.¹¹² His study reveals that appellate courts overwhelmingly dismissed claims of innocence where the defendant’s factual innocence has subsequently been established beyond dispute.¹¹³ In fact, just thirteen percent of direct appeal and post-conviction claims in the exoneration cases won reversal: a number comparable to the reversal rate in rape and murder cases overall.¹¹⁴ Remarkably, Professor Garrett notes that very few petitioners raised claims of actual innocence either on direct appeal or in the post-conviction process, and those who did “had no better success raising claims asking for a new trial on the basis of evidence of their innocence.”¹¹⁵ In fact, of the 250 exoneration cases featured in the study, every express claim of innocence was rejected in the judicial process.¹¹⁶ The study goes on to identify the most common factors giving rise to wrongful convictions as coerced confessions, mistaken eye-witness identifications, faulty forensic evidence and informant testimony.¹¹⁷

4. Recalibrating the Balance of Post-Conviction Policy Interests

The ubiquitous nature of conviction of the innocent arguably makes the need for reform in our criminal justice system—from pretrial investigation to trial, direct appeal, and collateral post-conviction procedures—even more

110. Findley, *supra* note 16, at 918 (further characterizing wrongful conviction rate as “clear and disturbing”).

111. Findley, *supra* note 9, at 608.

112. GARRETT, *supra* note 18, at 5-13 (describing the scope and purpose of the study as an examination of the 250 known exonerations to help identify the primary substantive and procedural causes of wrongful convictions).

113. *Id.* at 184 (noting that just thirteen percent of exoneree cases resulted in reversal in spite of the universal factual innocence of the petitioners).

114. *Id.* (noting that the 13% reversal rate in the exoneree cases was “no different from the reversal rates of other rape and murder trials”) (citation omitted).

115. *Id.* at 184-85.

116. *Id.* at 185 (noting that all appellate and post-conviction innocence claims from the exoneration cases “were rejected”).

117. *Id.* at 185-94 (discussing the most common factors present in the exoneration cases).

pressing.¹¹⁸ While significant reforms have occurred at the pretrial and trial phase in the last decade,¹¹⁹ very few comparable reforms have been implemented in the post-conviction context. Now that the existence of errors in our system is beyond dispute, the need to recalibrate the balance between the competing interests at play in post-conviction jurisprudence is more apparent. For example, the desire for finality must be weighed against the countervailing mandate to promote fairness by identifying and remedying convictions of the innocent.¹²⁰ At the time AEDPA was debated and enacted, the balance perhaps justifiably tipped toward finality. After all, convictions of the innocent were an anomaly at best, and abuses of the writ were widespread.¹²¹ However, in light of the universally acknowledged innocence problem in the American criminal justice system today, a recalibration is warranted.

Notably, since the rise of the Innocence Movement in the mid-1990s, legal scholars have successfully brought about reforms in the context of pretrial investigation procedure. Relying on exoneration statistics indicating that eyewitness misidentifications, coerced confessions, and forensic evidence are the primary causes of wrongful convictions, legal scholars have advocated for reforms.¹²² Indeed, this body of scholarship has had a notable effect on criminal procedure, resulting in significant policy changes in pretrial procedure.¹²³ For example, as a result of this scholarship, state and local police departments in various jurisdictions have begun to implement significant policy changes relating to police interrogations and eyewitness identification procedures.¹²⁴

118. See, e.g., D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 874 (2011) (noting a recent “conclusion by a significant number of informed observers of the criminal justice system that conviction of the innocent is common enough to call for substantial systemic reforms to address the phenomenon”).

119. See Norris et al., *supra* note 88, at 1303-20 (discussing various reforms of pretrial procedure in response to the Innocence Movement).

120. See, e.g., Wolitz, *supra* note 4, at 1028-40 (noting the “enduring resistance of our judicial system to recognizing post-conviction claims based on factual innocence” and discussing judicial interest in finality versus fairness).

121. See *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know> (last visited Nov. 12, 2013) (identifying less than fifty DNA exonerations as of 1996, when AEDPA was enacted).

122. See, e.g., Bakken & Steel, *supra* note 109, at 830 (arguing that an “assembly-line” approach to criminal prosecutions does not allow for careful investigation and identification of the factually innocent); see also Norris et al., *supra* note 88, at 1303-20 (discussing results of detailed survey of reforms of pretrial procedure in response to the Innocence Movement); Wolitz, *supra* note 4, at 1036 (arguing that the adversarial model makes trial a game, with the outcome dependent on who is the more skilled lawyer, rather than what is true or “right”).

123. See Norris, et al., *supra* note 88, at 1303-19 (presenting results of detailed survey of reforms of pretrial procedure in response to the Innocence Movement, including policy changes regarding recording of police interrogations and manner in which police present suspect to witnesses in eyewitness identification procedures).

124. See *id.*

Similarly, the Innocence Movement is arguably responsible for some significant changes in state post-conviction procedure as well. For example, many states have extended the statute of limitations period for new trial motions based on newly discovered evidence in the last two decades.¹²⁵ Further, every state, with the exception of Oklahoma, has now passed DNA access laws requiring law enforcement to preserve biological evidence in criminal cases and allowing convicted prisoners access to such evidence upon a showing of relevance.¹²⁶

However, no comparable set of reforms has occurred in the federal post-conviction context in the wake of the Innocence Movement. In fact, while AEDPA passed in 1996 and was responsible for overhauling federal habeas corpus procedure, this critical piece of legislation was debated and enacted without the benefit of the exoneration data available today. In short, the post-conviction procedure currently available to prisoners was established without knowledge of the significant numbers of innocent prisoners who have been wrongfully convicted.

III. CRITICISMS OF AEDPA AND ARGUMENTS FOR REFORM

Rather than addressing the flaws in the criminal justice system exposed by the Innocence Movement discussed above, AEDPA seems to have exacerbated them. In fact, AEDPA has been widely criticized for erecting additional barriers to factually innocent prisoners seeking post-conviction relief.¹²⁷ Those prisoners seeking relief using non-DNA evidence have been identified as the most adversely affected by this legislation.¹²⁸ Far from achieving a balance between finality and fairness, as Congress ostensibly sought to do, AEDPA has arguably achieved finality without regard to fairness.¹²⁹ Thus, AEDPA has

125. Medwed, *supra* note 12, at 682-83 (noting that limitations periods for collateral attack on convictions in state courts based on newly discovered evidence vary by state and range from sixty days to ten years).

126. See David M. Siegel & Gregory L. Massing, *A New Tool for Determining Factual Innocence: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act*, 56 Bos. B.J. 28, 29 (2012) (discussing Massachusetts as among the last of the states to pass a DNA access law in 2012).

127. See, e.g., Entzeroth, *supra* note 52, at 87 (“[T]he AEDPA . . . created significant restrictions on a federal prisoner’s ability to actually move a federal court for . . . relief.”); Williams, *supra* note 4, at 920 (arguing that AEDPA has made it “more difficult for claims of innocence to be heard by federal courts”).

128. See, e.g., Armbrust, *supra* note 32, at 78 (identifying “significant roadblocks for any defendant with newly discovered non-DNA evidence of innocence”); Williams, *supra* note 4, at 925 (identifying the “group most disadvantaged by the federal courts’ inability to hear claims of innocence [under AEDPA]” as prisoners seeking post-conviction relief based on newly discovered non-DNA evidence).

129. See, e.g., Lott, *supra* note 50, at 457 (identifying AEDPA criticism that “societal values such as dignity, fairness, and equality are secondary considerations [under AEDPA’s provisions]”).

effectively rendered federal habeas corpus procedure a façade that appears to facilitate review of actual innocence claims without actually doing so.¹³⁰

AEDPA has been widely criticized by legal scholars, political commentators,¹³¹ and even some jurists¹³² since its passage in 1996. It has been called “draconian”¹³³ and has been characterized as a “symbolic statute” which does little more than save face for legislators by providing them with something concrete to show their constituents.¹³⁴ Professors Mark Tushnet and Larry Yackle have criticized AEDPA along these lines as politically motivated legislation, illustrating Congress’ lack of attention to detail and failure to meaningfully assess the statute’s consequences.¹³⁵

A. AEDPA Provisions Deemed to Be Unduly Restrictive to Prisoners Claiming Actual Innocence

Many of AEDPA’s provisions have been characterized as unduly restrictive to prisoners seeking post-conviction relief based on newly discovered evidence of actual innocence. For example, the bar on successive claims, the one-year statute of limitations, and the high standard of deference to the state courts all operate to weigh particularly heavily against actually innocent petitioners.

1. Successive Petitions

AEDPA substantially altered how federal courts address second and successive habeas petitions. Under 28 U.S.C. § 2244(b)(1), successive claims,

130. Williams, *supra* note 4, at 942 (noting that certain provisions of AEDPA “create[] the illusion that the federal courts are willing to consider successor petitions in cases of innocence, while ensuring at the same time that no inmate will be able to satisfy its stringent demands”).

131. See, e.g., Tushnet & Yackle, *supra* note 73, at 2-5 (identifying AEDPA as an example of a “symbolic statute” where members of Congress “want to claim credit for doing something about a problem to which they have been calling public attention”); Williams, *supra* note 4, at 923 (discussing the “alarm[]” caused by the passage of AEDPA); Nat Hentoff, *Clinton Screws the Bill of Rights: The Worst Civil Liberties President Since Nixon*, VILLAGE VOICE, Nov. 5, 1996, at 12 (arguing that AEDPA contains “the most draconian restrictions on habeas corpus since Lincoln suspended the Great Writ . . . during the Civil War”).

132. See, e.g., Scott Graham, *High Court Gives Ninth Circuit a Habeas Head-Scratcher*, RECORDER (July 8, 2013), available at <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202609933324&slreturn=20131004123832> (discussing the Ninth Circuit’s recent public criticism of the Supreme Court’s interpretation of AEDPA’s seemingly irrational demands).

133. Hentoff, *supra* note 131, at 12 (referring to AEDPA as “draconian” and unduly restrictive of prisoner’s rights).

134. Tushnet & Yackle, *supra* note 73, at 2-3.

135. See *id.* at 3-4 (discussing AEDPA as a classic example of a “symbolic statute”).

i.e., those raised in previous petitions, are universally prohibited.¹³⁶ Similarly, § 2244(b)(2) bars abusive claims, or those that have not been raised in previous petitions.¹³⁷ However, this provision allows for two narrow exceptions to this rule. Section 2244(b)(2) provides that a new claim not previously raised is not automatically dismissed if: 1) the claim relies on a new constitutional rule which applies retroactively or 2) the claim relies on newly discovered evidence which was not discoverable with due diligence.¹³⁸ Given that the Supreme Court has not recognized the wrongful conviction of an actually innocent defendant as a constitutional violation, a freestanding claim of innocence is apparently not sufficient under § 2244(b)(2).¹³⁹

AEDPA's provisions also set up the procedural framework for raising second or successive petitions. Section 2244(b)(3) requires that any successive petition must first be presented to a panel of appellate court judges in order to determine whether the petitioner has made a prima facie case under the provisions of § 2244(b).¹⁴⁰ This gatekeeping provision involves an extremely

136. 28 U.S.C. § 2244(b)(1) (2012) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed." See also Kovarsky, *supra* note 90, at 80-81 (discussing AEDPA provisions relating to successive petitions).

137. 28 U.S.C. § 2244(b)(2) provides:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, 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.

§ 2244(b)(2).

138. *Id.*; see also Kovarsky, *supra* note 90, at 91 (discussing exceptions to AEDPA's general bar on abusive petitions).

139. See, e.g., Lott, *supra* note 50, at 453 (noting that in *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court held that "a substantive claim of actual innocence based on newly-discovered post-trial evidence is not cognizable; federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding.").

140. 28 U.S.C. § 2244(b)(3) provides in full:

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or

high burden for the petitioner and has been criticized for its potential to allow dismissal of petitions raising actual innocence claims that were not ripe at the time of the original petition.¹⁴¹ While these provisions of AEDPA ostensibly allow for successive petitions raising claims of actual innocence, in reality such claims can virtually never prevail.¹⁴²

2. Degree of Deference to State Courts

In addition to limiting the type of petitions that can be filed in federal courts, the provisions of AEDPA have also operated to significantly alter the degree of deference that federal courts must afford to state court rulings.¹⁴³ In particular, § 2254(d)(1) provides that federal courts must deny relief to state court petitioners unless the state court acted unreasonably in reaching its conclusion.¹⁴⁴ It is not enough that a federal court find the state court's decision to have been erroneous; instead, the state court's interpretation of federal law must be objectively unreasonable.¹⁴⁵ Thus, effectively, the state courts have become final arbiters of federal constitutional law, as opposed to the federal courts, which are presumably in a better position to play this role.¹⁴⁶ This arrangement has caused tension between state and federal courts presiding over habeas litigation.¹⁴⁷ Additionally, critics have argued that this extreme

for a writ of certiorari.
§ 2244(b)(3).

141. Reynolds, *supra* note 83, at 1475 (noting that “AEDPA’s ‘gatekeeping’ provisions . . . have the potential to foreclose review of meritorious constitutional claims”); Williams, *supra* note 4, at 942 (commenting that 28 U.S.C. § 2244(b)(2) “creates barriers that even an innocent individual is not likely to overcome”).

142. Williams, *supra* note 4, at 942 (“By enacting Section 2244(b)(2), Congress has created the illusion that the federal courts are willing to consider successor petitions in cases of innocence, while ensuring at the same time that no inmate will be able to satisfy its stringent demands.”).

143. See Moore, *supra* note 77, at 205 (“[AEDPA] adjust[s] the weight accorded to prior state court rulings.”).

144. 28 U.S.C. § 2254(d)(1) (2012) reads:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.

§ 2254(d)(1).

145. Moore, *supra* note 77, at 206 (“[E]ven if a federal court concludes that the state court applied clearly established federal law incorrectly, it is insufficient for the federal court to grant relief.”).

146. Cf. Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 439 (2012) (“The current deferential standard of review reflects the concern that federal courts, if entrusted with the power of *de novo* review of federal constitutional claims, will too frequently and improperly overturn state convictions on federal law grounds.”).

147. Moore, *supra* note 77, at 207 (“[I]nstead of reducing conflicts between the state

deference to state courts under AEDPA sends up “red flags” and produces irrational results.¹⁴⁸ Finally, this emphasis on deference to trial courts’ judgments seems to trump other societal interests present in habeas litigation, such as fundamental fairness and justice in the outcomes of criminal prosecutions.¹⁴⁹

Given that AEDPA was enacted, in part, to address concerns that federal courts were too willing to grant federal habeas relief, particularly in capital cases, it is not surprising that its impact includes limiting review by federal courts.¹⁵⁰ However, this limitation of federal court review is arguably unwarranted and requires reconsideration.

3. Burden of Proof Required for Innocence Claims

AEDPA has substantially increased the burden placed on prisoners bringing habeas petitions based on actual innocence in other ways as well. Prior to the enactment of AEDPA, the Supreme Court held in *Schlup v. Delo* that a claim of actual innocence should be considered under the fundamental miscarriage of justice exception to the procedural default doctrine in federal habeas litigation.¹⁵¹ Significantly, the standard set out in *Schlup* required that a petitioner establish actual innocence by a mere preponderance of the evidence.¹⁵²

AEDPA operated to substantially alter the *Schlup* standard established by the Supreme Court by imposing a higher burden on federal habeas petitioners claiming innocence.¹⁵³ Whereas the Supreme Court had merely required a showing that new evidence was “more likely than not” to raise reasonable doubt regarding the prisoner’s guilt, under AEDPA, a petitioner seeking relief

and federal courts, section 2254(d)(1) actually exacerbates tension between the state and federal courts.”).

148. See, e.g., *id.* at 213 (discussing *In re Davis (Davis V)*, 557 U.S. 952 (2009), as an illustration of the irrational application of this high standard and noting that a “district court . . . may not grant relief to a prisoner [even] if—in the court’s independent judgment—the state court erroneously or incorrectly applied clearly established federal law.”).

149. Lott, *supra* note 50, at 456-57 (characterizing justice and fairness as “secondary considerations” under AEDPA).

150. Johnson, *supra* note 146, at 438-39 (“A sense that federal habeas courts too often or too easily have overturned state court convictions led to the passage, in 1996, of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).”).

151. 513 U.S. 298, 326-27 (1995); see also Lott, *supra* note 50, at 454-55 (discussing the *Schlup* holding and its impact on actual innocence claims in federal habeas petitions).

152. Lott, *supra* note 50, at 455 (“The *Schlup* test balances the innocence evidence against the reliability of the state’s verdict to determine ‘whether it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.’” (citation omitted)).

153. *Id.* at 455-56 (commenting that AEDPA’s provisions were “[i]n direct contrast to *Schlup*’s probable standard” and instead required proof of innocence by “clear and convincing evidence”).

now must establish actual innocence by “clear and convincing evidence.”¹⁵⁴ This new “clear and convincing” standard has been criticized as unduly high, thus resulting in a virtual foreclosure of relief for petitioners raising claims of innocence.¹⁵⁵

4. One-Year Statute of Limitations

Additionally, the passage of AEDPA demonstrated a departure from decades of federal common law, by establishing for the first time a one-year statute of limitations for filing federal habeas petitions.¹⁵⁶ Section 2244(d)(1) provides that a “1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”¹⁵⁷ This section goes on to specify that the limitations period begins to run on the date of final judgment or other relevant change in the law, whichever comes later, and tolls with the interim filing of a state habeas petition.¹⁵⁸ There is no express language in the statute indicating that Congress intended to include an exception for actual innocence.¹⁵⁹ However, the Supreme Court has recognized that, at least in theory, a cognizable claim of factual innocence can overcome procedural bars.¹⁶⁰

The statute of limitations provision is particularly offensive to some legal scholars and observers of the criminal justice system because it appears to be unsupported by any clear policy justification.¹⁶¹ For example, although AEDPA was ostensibly passed in order to curb abuses in the filing of federal habeas petitions, there is no support for the notion that prisoners intentionally delayed

154. *Id.* (discussing the contrast between actual innocence standards under *Schlup* and AEDPA).

155. Zheng, *supra* note 7, at 2139-40 (arguing that courts should apply the old *Schlup* probability standard, rather than AEDPA’s “clear and convincing” standard, when assessing claims of actual innocence); *see also* Moore, *supra* note 77, at 213 (“The unreasonable standard required by section 2254(d)(1) is a rigid standard that bars relief for potentially innocent men.”).

156. 28 U.S.C. § 2244(d)(1)-(2) (2012); *see also* Zheng, *supra* note 7, at 2103-07 (discussing AEDPA’s statute of limitations provision as a radical departure from historical federal habeas jurisprudence).

157. 28 U.S.C. § 2244(d)(1).

158. 28 U.S.C. § 2244(d)(1)-(2).

159. Sussman, *supra* note 42, at 351 (noting the clear absence of an actual innocence exception to AEDPA’s statute of limitations provision).

160. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995) (recognizing actual innocence as a gateway through which a petitioner may pass a procedural bar); *cf. House v. Bell*, 547 U.S. 518, 539 (2006) (suggesting actual innocence as a catalyst to equitable tolling of AEDPA’s statute of limitations in limited circumstances).

161. *See, e.g.,* Sussman, *supra* note 42, at 360 (“Reading the legislative history surrounding AEDPA’s passage, one gets the sense that the idea of an innocent prisoner failing to file a federal habeas corpus petition within the limitations period was simply unthinkable.”); Zheng, *supra* note 7, at 2131 (noting that AEDPA’s one-year statute of limitations “neither curbs abuse nor addresses the problem of delay”).

their filings prior to the passage of AEDPA.¹⁶² Nor is there a persuasive argument that convicted prisoners, or their counsel, would have any motivation to do so. To the contrary, it would be irrational for capital litigants or their counsel to intentionally withhold a petition until execution is imminent.¹⁶³ Similarly, non-capital petitioners would gain nothing from intentional delay, which could only operate to extend the prisoner's sentence.¹⁶⁴

Further, the statute of limitations provision is especially burdensome to pro se litigants, who must endeavor to conduct legal research, initiate additional investigation, locate and gain access to new evidence, and compile and draft the petition itself, all from behind bars.¹⁶⁵ It is difficult to fathom how Congress failed to appreciate the complexity of compiling a federal habeas petition.¹⁶⁶ Perhaps lawmakers merely lacked experience in, or knowledge of, post-conviction litigation. However, allowing an untrained, and often uneducated,¹⁶⁷ prisoner just one year to perform this task has been widely recognized as unreasonable.¹⁶⁸ Even where a prisoner is educated, he or she may not have sufficient access to a law library.¹⁶⁹ Further, prisoners are often transferred from facility to facility without advanced notice, which can result in significant delay in notification of state court proceedings.¹⁷⁰ Thus, a prisoner may not learn of the denial of a state habeas petition until months after the fact. This provision arguably has a virtually preclusive effect on pro se litigants seeking

162. Zheng, *supra* note 7, at 2131 (noting the absence of indication that federal habeas petitioners intentionally delay their claims and arguing that there is no motivation to do so).

163. *Id.* (asserting that death row inmates have no motivation to delay filing of federal habeas petition).

164. *Id.* (noting that a non-capital habeas litigant “has nothing to gain but everything to lose by delaying the filing of his federal claim: If his claim is denied, he serves the same length of time in prison whether the filing was delayed or not . . . if he succeeds in establishing his constitutional claim, the delay in filing would have brought him no benefit but a longer period of unnecessary imprisonment.”).

165. *Id.* at 2129 (discussing the difficulty facing pro se litigants seeking to compile a federal habeas petition while incarcerated).

166. Sussman, *supra* note 42, at 360 (surmising that perhaps lawmakers underestimated the amount of time and expertise necessary to compile a federal habeas petition).

167. Zheng, *supra* note 7, at 2129 (citing to U.S. Department of Justice, Bureau of Justice Statistics figures from 1994 establishing that “47% of the adult inmates in the United States had less than a high school education”).

168. *See, e.g., id.* (“One year is insufficient time for a confined inmate to prepare and file a meaningful habeas corpus petition that would escape the fatal traps of the exhaustion doctrine, the procedural-default doctrine, and the second and successive petitions doctrines.”).

169. *See id.* at 2129 (noting a case in which the prison library a pro se prisoner had access to did not have any books regarding habeas corpus procedure).

170. *See id.* at 2130 (explaining that “inmates are often transferred from one prison to another and may not be able to learn about a state court’s final denial [of a habeas petition] until much later”).

to raise claims of innocence in the federal habeas context.¹⁷¹

In spite of the statute's harsh and seemingly absolute limitations period, federal courts have interpreted this provision as procedural, and thus, subject to equitable tolling under extraordinary circumstances.¹⁷² However, historically courts have interpreted the "extraordinary circumstances" clause narrowly and have repeatedly declined to equitably toll the statute, for example, where the petitioner has asserted ignorance of the law, lack of legal training or representation of counsel, incapacitating illness, or illiteracy.¹⁷³

Finally, AEDPA's statute of limitations period has been criticized for creating tension with the exhaustion doctrine. Specifically, these two provisions seem to make contradictory demands on habeas litigants, with the limitation period requiring early filing, and the exhaustion doctrine mandating postponement, of identical claims.¹⁷⁴

B. Arguments for Reform of AEDPA and Post-Conviction Procedure

Since its passage in 1996, legal scholars and journalists have called for large-scale reform of AEDPA. These arguments focus primarily on the adverse effect of AEDPA's significant restrictions on prisoners claiming actual innocence. For example, some have touted the establishment of Innocence Commissions, and other freestanding, extra-judicial entities, to supplant state and federal habeas litigation where a colorable claim of innocence is raised. Others have argued for procedural changes to the provisions of AEDPA itself.

1. Proposals for Procedural Changes to AEDPA

As discussed in Part III.A above, in the last two decades, legal scholars have attacked several of AEDPA's provisions. For example, some have identified provisions with an unduly adverse impact on prisoners raising claims of innocence and have proposed modifications to the statute to help rectify this problem.¹⁷⁵ In several articles, authors have suggested the adoption of an

171. *Id.* at 2128 (arguing that the "one-year statute of limitations on the filing of federal habeas corpus petitions . . . effectively precludes the filing of most federal habeas petitions . . . [and] blatantly ignores the realities of postconviction collateral litigation").

172. *Id.* at 2133 (noting that federal courts have consistently characterized AEDPA's statute of limitations provision as a "procedural rather than a jurisdictional bar . . . subject to equitable tolling in extraordinary circumstances").

173. Sussman, *supra* note 42, at 362-63 (noting that while courts have recognized equitable tolling, "extraordinary circumstances" has been interpreted quite narrowly).

174. Tushnet & Yackle, *supra* note 73, at 29 (noting that AEDPA's "filing deadline encourages prisoners to file early, while the exhaustion doctrine demands that they postpone federal habeas petitions until state court opportunities for litigation have been tried").

175. *See, e.g.*, Hack, *supra* note 7, at 173 (characterizing federal habeas litigation as a "complex journey" and referencing six threshold requirements for relief).

“actual innocence” exception to AEDPA’s one-year statute of limitations.¹⁷⁶ These articles note the lack of policy support for a strict filing deadline and argue that this provision operates to foreclose habeas relief to the factually innocent.¹⁷⁷ Legal scholars have argued that foregoing this strict filing requirement for prisoners claiming actual innocence would operate to facilitate post-conviction relief for the most deserving petitioners.¹⁷⁸

Professor Daniel Medwed has proposed a similar change in the state habeas corpus context, arguing that statute of limitations restrictions should not apply to petitions that are based on newly discovered evidence.¹⁷⁹ Given that post-conviction claims of innocence are almost always accompanied by new evidence, Professor Medwed’s proposal would serve to benefit, at least in part, petitioners claiming actual innocence.¹⁸⁰

AEDPA’s premise that state courts are adequate arbiters of federal constitutional law, thus warranting a high degree of deference from reviewing federal courts, has been challenged as well. For example, in an article published on the heels of the enactment of AEDPA, Kenneth Williams, a prominent death penalty practitioner, proposed that AEDPA be amended to allow federal *de novo* review in cases involving claims of prosecutorial misconduct and ineffective assistance of counsel.¹⁸¹ In his article, he argues that, particularly in death penalty cases, deference to state courts on federal constitutional issues is problematic for a number of reasons. Such deference impedes the organic development of uniform federal constitutional law while unnecessarily usurping power from the federal courts.¹⁸² Allowing *de novo* review in this context, he argues, would not put an undue burden on federal courts and would result in a more just outcome for petitioners.¹⁸³

176. See, e.g., Sussman, *supra* note 42; Zheng, *supra* note 7. Both articles discuss the plight of the prisoner raising actual innocence claims via AEDPA federal habeas procedure and argue that the statute of limitations should not apply in this context.

177. Sussman, *supra* note 42, at 347, 350; Zheng, *supra* note 7, at 2103.

178. See, e.g., Sussman, *supra* note 42, at 349-50 (proposing that “federal habeas corpus courts recognize an actual-innocence or ‘miscarriage of justice’ exception to the statute of limitations” and arguing that claims of innocence are “always relevant and deserving of protection under federal habeas corpus”).

179. Medwed, *supra* note 12, at 690 (“I would recommend . . . discarding statutes of limitations on new evidence claims would reduce the risk of procedural default caused solely by lapse of time.”).

180. See *id.* (arguing that dispensing with the statute of limitations for state habeas petitions involving new evidence would “concomitantly increase the chance that viable innocence claims will be heard in open court”).

181. Williams, *supra* note 4, at 920 (arguing that AEDPA should “be amended to permit federal courts to review *de novo* claims of prosecutorial misconduct and ineffective assistance of counsel in capital cases”).

182. See *id.* at 920 (arguing, using Texas as an example, that state courts should not be vested with the power to interpret federal constitutional law without meaningful review by federal courts).

183. *Id.* at 944 (asserting that amending AEDPA to allow *de novo* review of claims of prosecutorial misconduct and ineffective assistance of counsel would satisfy “the inmates’

2. Innocence Commissions

In addition to the proposed revisions to AEDPA discussed above, some legal scholars have argued in favor of Innocence Commissions in the last decade as well. These commissions have developed in some states as a means of providing an extra layer of protection to factually innocent prisoners in the post-conviction context.¹⁸⁴ Inherent in the need for Innocence Commissions is the realization that state and federal habeas proceedings do not adequately protect factually innocent prisoners from wrongful convictions. There has been significant discussion of these organizations in the legal scholarship.¹⁸⁵ Although not directly related to AEDPA, the need for this type of commission stems from the proliferation of exonerations since the mid-1990s.¹⁸⁶ Given AEDPA's profound failure to address the needs of wrongfully convicted prisoners, Innocence Commissions have begun to arise as a make-shift effort to fill the apparent holes in the criminal justice system.¹⁸⁷

For example, Professor David Wolitz has written an article discussing the North Carolina Innocence Inquiry Commission (NCIIC), an independent state agency established in 2006 which is modeled after a similar British organization.¹⁸⁸ The statutory mandate of the NCIIC is "to investigate and determine credible claims of factual innocence."¹⁸⁹ Innocence Commissions and other similar entities have since been established in six states.¹⁹⁰ Criticism of these organizations has primarily focused on the traditional notions of finality and allocation of limited judicial resources.¹⁹¹ Specifically, critics have argued that extra-judicial innocence commissions are costly and unnecessary bodies, which essentially duplicate the work already undertaken by the state

need for accuracy and justice").

184. See Wolitz, *supra* note 4, at 1046.

185. See, e.g., GOULD, *supra* note 86, at 16 (discussing the founding and operation of the Virginia Innocence Commission); Norris et al., *supra* note 88, at 1350 (noting that "[m]any social scientists, legal scholars, and social justice advocates have called for the formation of innocence commissions in one form or another"); Wolitz, *supra* note 4, at 1046 (discussing North Carolina Innocence Inquiry Commission and referencing scholarship in support of Innocence Commission concept).

186. Wolitz, *supra* note 4, at 1042, 1045-46 (discussing key developments that led to increasing exonerations).

187. *Id.* at 1036 (noting that "the history of criminal appeals and post-conviction review" illustrates "features of our criminal justice system mak[ing] innocence-based claims difficult to recognize").

188. *Id.* at 1032 (discussing the formation of the North Carolina Innocence Inquiry Commission).

189. N.C. GEN. STAT. § 15A-1461 (2013).

190. Wolitz, *supra* note 4, at 1046 (listing six states where Innocence Commissions exist as of 2010: California, Connecticut, Illinois, North Carolina, Pennsylvania, and Wisconsin).

191. *Id.* at 1033-35 (noting that critics of Innocence Commissions focus on redundancy and argue that trial and appellate courts already perform truth-determining function).

and federal courts.¹⁹²

While not technically an “innocence commission,” the Conviction Integrity Unit (CIU) is a similar entity that has been established in Texas.¹⁹³ The CIU was set up as a department within the Dallas County District Attorney’s Office, rather than as an independent agency, and focuses on just one county. It nonetheless has a similar mission as the more traditional Innocence Commissions and has demonstrated remarkable success.¹⁹⁴ The mission of the CIU is to twofold: first, to identify and exonerate factually innocent prisoners who were wrongfully convicted in Dallas County and, second, to address problems in the criminal justice system giving rise to these wrongful convictions.¹⁹⁵ Since its creation in 2007, the CIU has been responsible for identifying and exonerating seventeen wrongly convicted individuals, bringing the total number of exonerations from Dallas County to twenty-six, the highest number in any county in the United States.¹⁹⁶

Perhaps in response to the Dallas CIU’s astonishing success, a small number of state and local prosecutors have taken steps to establish a comparable department within their offices.¹⁹⁷ However, the vast majority of prosecuting agencies have not set up CIUs in their offices. The resistance to such an effort within a District Attorney’s office is arguably attributable, in part, to the prevalent prosecution culture of resistance to post-conviction claims of innocence.¹⁹⁸ Mike Ware, founding member and Director of the CIU in

192. *See id.* at 1033-36.

193. *See Ware, supra* note 95, at 1034 (discussing the establishment of the Conviction Integrity Unit at the Dallas County District Attorney’s Office).

194. *See id.* at 1034, 1041-50.

195. *Id.* at 1034 (“Among other things, the CIU would investigate post-conviction claims of actual innocence, identify the valid claims, and take appropriate corrective action. The CIU would then follow up with an investigation to determine, if possible, what went wrong.”).

196. *Id.* at 1041 (noting that “[s]ince . . . [the inception of the CIU in 2007] there have been thirteen DNA exonerations . . . as well as four non-DNA exonerations” in addition to the nine exonerations pre-dating the existence of the CIU).

197. Conviction Integrity Units (CIUs) modeled on the department in the Dallas District Attorney’s Office have been established in Brooklyn, Manhattan, and Chicago. *See Conviction Integrity Unit to Review 50 Brooklyn Murder Cases*, INNOCENCE PROJECT (May 13, 2013, 1:30 PM), http://www.innocenceproject.org/Content/Conviction_Integrity_Unit_to_Review_50_Brooklyn_Murder_Cases.php; *Cook County State’s Attorney’s Office Opens Conviction Integrity Unit*, INNOCENCE PROJECT (Feb. 3, 2012, 12:45 PM), http://www.innocenceproject.org/Content/Cook_County_States_Attorneys_Office_Opens_Conviction_Integrity_Unit.php; *Manhattan District Attorney Creates Wrongful Convictions Unit*, INNOCENCE PROJECT (Mar. 5, 2010, 2:30 PM), http://www.innocenceproject.org/Content/Manhattan_District_Attorney_Creates_Wrongful_Convictions_Unit.php.

198. GARRETT, *supra* note 18, at 227 (discussing prosecution resistance to DNA testing in exoneration cases within the study); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 127 (2012) (“This imbalance between the frivolous and the legitimate [post-conviction claims of innocence]

Dallas County, has noted that the historical tendency of prosecutors to stonewall in the face of requests for post-conviction DNA testing could be explained as follows: “The best way to avoid an embarrassing exoneration is to block the process that could eventually lead to one.”¹⁹⁹ Although the CIU is an anomaly, its stunning results in just a few short years suggest that other prosecuting agencies should consider similar methods.

3. Pretrial “Innocence Tracks”

Another more radical proposal has arisen in response to the uphill battle facing innocent prisoners seeking post-conviction relief. Although not yet implemented in any jurisdiction, several legal scholars have proposed the establishment of an optional “innocence track” or “innocence bureau” which would present an alternative to the traditional trial track, involving direct appeal and post-conviction review.²⁰⁰ While the specifics of this model vary among the various legal scholars who have proposed it, the approach is fundamentally premised on the notion that criminal defendants could opt into a pretrial “innocence track” in exchange for relinquishing fundamental constitutional protections such as the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial.²⁰¹ Presumably, this option would result in helping separate the proverbial wheat from the chaff, in order to identify the truly innocent defendants.

However, this approach gives rise to some practical concerns worth mentioning. For example, the criminal defense bar is likely to resist such a two-track system, where each defendant would be put in the position of having to declare his or her innocence, publically, prior to trial. This approach would have the de facto effect of dividing criminal defendants into two definitive camps: those who admit their guilt and those who do not. Thus, in effect, each defendant who does not opt for the innocence track would be openly declaring guilt. Such a declaration would fly in the face of the presumption of innocence, the Fifth Amendment right to remain silent, and other constitutional

makes it easy for prosecutors to feel contempt for innocence claims overall. It also creates a disincentive to review each claim thoroughly.”).

199. *Ware*, *supra* note 95, at 1040.

200. *See, e.g.*, Findley, *supra* note 16, at 920-23 (discussing “innocence procedures” proposed by legal scholars including Tim Bakken, Lewis Steel and Michael and Lesley Risinger); Risinger & Risinger, *supra* note 118, at 893-94 (advancing a proposal allowing for a defendant to “elect between two tracks[—the factual innocence track and the traditional track—]which would determine both the structure of further pretrial proceedings and the rules by which the trial itself would be conducted”).

201. *See* Risinger & Risinger, *supra* note 118, at 894 (“The ‘factual innocence’ track would require the defendant to make a limited waiver of the privilege against self-incrimination, in that the defendant would commit himself to testify at trial, and also make himself available for a formal pretrial deposition in front of, and to be conducted primarily by, the judge.”).

protections.

IV. RIGHT TO COUNSEL IN THE POST-CONVICTION CONTEXT

Although habeas corpus is constitutionally mandated, prisoners seeking state or federal habeas corpus relief generally have no constitutional or statutory right to counsel.²⁰² Thus, state and federal habeas petitions are overwhelmingly filed *pro se*.²⁰³

This phenomenon exacerbates the problem facing prisoners seeking to raise claims of innocence in the post-conviction process. Fundamentally, as discussed in Parts IV.A and IV.B below, unrepresented prisoners are unable to meaningfully raise effective post-conviction innocence claims.²⁰⁴ Further, acting without counsel while incarcerated, these prisoners—particularly those who are factually innocent—are understandably motivated to present new evidence of innocence as it becomes available. However, new evidence of innocence may take years, or even decades, to emerge, and as such, this process often results in claims being raised in a piecemeal fashion.

A. State Habeas Proceedings

The Supreme Court has expressly declined to recognize a right to counsel in state habeas proceedings, characterizing state habeas proceedings as civil in nature, rather than criminal.²⁰⁵ The Court has held that the Sixth Amendment right to counsel extends beyond trial to the first direct appeal only.²⁰⁶ However,

202. Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1143 (2005) (“Despite the explicit constitutional foundation for habeas corpus, there is no federal constitutional right to the assistance of counsel in habeas corpus proceedings.”).

203. Kovarsky, *supra* note 90, at 90. Legal scholars have argued that habeas litigation involves quasi-criminal proceedings, which directly address liberty issues for incarcerated individuals, and thus, appointment of counsel is justified, but this rationale has not been adopted by the courts. See Thomas, *supra* note 202, at 1140 (asserting that “a writ of habeas corpus is a major remedy for prisoners, and it may be the first time some prisoners are able to raise legitimate claims”).

204. See *supra* note 203 and accompanying text; *infra* notes 205-217 and accompanying text (discussing challenges facing prisoners seeking to file state and federal habeas petitions *pro se*).

205. See, e.g., *Murray v. Giarratano*, 429 U.S. 1, 13 (1989) (Ginsburg, J., concurring) (arguing no right to counsel in habeas litigation based on civil nature of proceedings); *Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987); Thomas, *supra* note 202, at 1143 (“Refusing to acknowledge the quasi-criminal nature of the habeas corpus proceeding, the U.S. Supreme Court has held that because a petition for a writ of habeas corpus is a civil proceeding, there is no absolute or automatic right to an attorney.”).

206. See *Finley*, 481 U.S. at 555-58 (emphasizing civil nature of state habeas proceedings in holding no right to counsel); RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 12.3[a] (LexisNexis 6th ed. 2011)

state courts have taken a broad array of approaches in addressing this issue. Some states give courts discretion to appoint counsel in state habeas proceedings.²⁰⁷ For example, some high-volume death penalty states such as Texas, Virginia, and Florida mandate the appointment of counsel once a death sentence has been imposed.²⁰⁸ Alternatively, some states recognize a right to counsel in certain post-conviction contexts, such as a motion for new trial, through court rule.²⁰⁹ Mississippi also presents an exception to the general rule and recognizes a state constitutional right to counsel in all state habeas corpus cases.²¹⁰

B. Federal Habeas Proceedings

Neither the Supreme Court nor Congress has established or otherwise recognized a right to counsel in federal habeas corpus proceedings.²¹¹ In the federal context, the right to counsel attaches only where the defendant has been sentenced to death.²¹² Although a criminally confined prisoner facing the death penalty has a right to counsel in federal habeas proceedings under 18 U.S.C. § 3599(a)(2), no express comparable right exists for non-capital prisoners seeking federal habeas relief.²¹³ Under AEDPA's provisions, appointment of counsel is mandated in only select circumstances. Under § 2254(h), appointment of counsel is merely discretionary for indigent prisoners.²¹⁴ For example, counsel may be appointed in the "interests of justice" such as where an evidentiary hearing has been granted.²¹⁵ However, the reality is that federal

(commenting that 18 U.S.C. § 3599 "mandates the appointment of counsel for all indigent capital prisoners seeking habeas corpus . . . relief" but noting that appointment of counsel in non-capital federal habeas cases is discretionary); Callahan, *supra* note 39, at 654 (discussing the Supreme Court's holding that "state post-convictions proceedings are not constitutionally mandated" and thus are not subject to constitutional requirements).

207. See Thomas, *supra* note 202, app. a at 1169-80 (comparing right to counsel provisions in habeas corpus proceedings in each of the fifty states).

208. *Id.* at 1155-56 (noting that "some of the states that most fervently support the death penalty, such as Texas, Virginia, and Florida, mandate that counsel be provided immediately after a defendant is sentenced to death").

209. *Id.* at 1146 (listing Colorado, Idaho and Kentucky as three states imposing right to counsel in state habeas proceedings through court rule).

210. *Id.* at 1140 (noting that the state of Mississippi's willingness to recognize a constitutional right to counsel in state habeas proceedings "exemplifies the one exception to judicial hesitation to extend the right of counsel to the habeas corpus context").

211. *Habeas Relief for State Prisoners*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 931, 963 (2011) ("The Sixth Amendment right to counsel does not apply to habeas proceedings. However, while preparing a habeas petition, a state prisoner is constitutionally entitled to some form of legal assistance, such as access to adequate law libraries or the aid of persons trained in the law.").

212. See Kovarsky, *supra* note 90, at 89.

213. *Habeas Relief for State Prisoners*, *supra* note 211, at 963-64.

214. 28 U.S.C. § 2254(h) (2012).

215. Kovarsky, *supra* note 90, at 89 (noting that "[u]nder 18 U.S.C. § 3006A, the

habeas petitions are overwhelmingly filed pro se.²¹⁶

Since the passage of AEDPA, the need for the assistance of knowledgeable and experienced legal counsel has become even more critical. Given that federal habeas litigation has become so cumbersome and complex,²¹⁷ it is unreasonable to expect a prisoner without a law degree to effectively compile a federal habeas petition.²¹⁸ Legal scholars have argued that appointment of counsel is necessary to adequately navigate the complex landscape of federal habeas litigation.²¹⁹ For example, Professor Dan Givelber has argued that the right to counsel should be extended to the post-conviction context, at least insofar as claims such as ineffective assistance of counsel and prosecutorial misconduct are raised.²²⁰ Given that these issues rely on information beyond the four corners of the trial transcript, and thus cannot be effectively raised on direct appeal, Professor Givelber argues that it is only fair to provide the assistance of counsel at this critical stage of the proceedings.²²¹ In spite of these arguments, no such right has been recognized for non-capital prisoners seeking federal habeas relief.

V. THE “PIECEMEAL PROBLEM”: AN ILLUSTRATION AND A SOLUTION

As discussed in Parts I to IV above, a prisoner seeking to raise claims of innocence following a criminal conviction is theoretically entitled to a multi-layered post-conviction review but ultimately encounters barriers at every step of the process. Following a direct appeal, and attack on the conviction via motion for new trial, the defendant has the right to state and federal habeas review. However, as discussed in Part IV above, a defendant filing a federal

‘interests of justice’ can entitle a prisoner to appointment of counsel in district court habeas proceedings”).

216. *Id.* at 90 (referencing data establishing that from 1998 to 2007, on average, just 2.1% of non-capital prisoners seeking habeas relief were represented by counsel).

217. *See, e.g.,* Thomas, *supra* note 202, at 1150 (“[T]he complexity of habeas and the interrelation between state and federal habeas reveal the need for even greater assistance of counsel for the indigent petitioner.”).

218. *See Hoffman & King, supra* note 6, at WK8 (“Because more than 90 percent of all non-capital habeas petitions are filed by prisoners acting as their own lawyers, the petitions are often difficult to decipher in the first place.”).

219. *See, e.g.,* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1399, 1409 (1999) (arguing that the Supreme Court should recognize due process rights beyond the trial context, and that the right to counsel should extend to some post-conviction proceedings); Zheng, *supra* note 7, at 2128-29 (arguing that unfairness of AEDPA’s one-year statute of limitations is exacerbated by lack of right to counsel in federal habeas proceedings).

220. Givelber, *supra* note 219, at 1399, 1409.

221. *Id.* at 1409-10 (noting that where issues such as ineffective assistance of counsel and prosecutorial misconduct are raised, “collateral review is the first place a prisoner can present a challenge to his conviction”); *see also* Hoffman & King, *supra* note 6, at WK8 (commenting that many federal habeas petitions are filed pro se, and thus “are often difficult [for the courts] to decipher”).

habeas petition must navigate the complexities of AEDPA and must generally do so pro se.²²² Without the training and expertise of assigned counsel, the actually innocent prisoner faces the uphill battle of piecing together proof of innocence while in prison. In this posture, such efforts are profoundly limited. Each attempt to access new information—whether it be to re-interview witnesses, locate physical evidence for DNA testing, or gain access to documents not produced at trial—is likely to be delayed, if not altogether foreclosed, to a prisoner with severely limited access to the outside world.

Thus, it is no surprise that when a pro se prisoner seeks federal habeas corpus review, the process is likely to occur via multiple successive petitions, each raising a new ground for relief.²²³ The prisoner has limited access to information and faces a one-year limitations period in filing the petition and thus, must take action with whatever information is available.²²⁴ This is true although it is likely that new information may present itself once the petition has been filed. Such is the nature of post-conviction litigation. Trial witnesses can be difficult to locate. Gaining access to physical evidence is challenging, and seeking forensic testing can take months or years. Indeed, some exonerations have occurred based on a chance encounter with a fellow inmate who has critical information about the petitioner’s case.²²⁵ The timing of such an encounter is wholly outside the petitioner’s control.

This reality likely explains why prisoners are often in the position of filing successive habeas petitions.²²⁶ It is not a tactic, or an abuse of the system, but rather a necessity for a person acting alone to pursue a legal remedy while incarcerated. Further, AEDPA’s strict filing requirements dictate that new information must be acted upon with expediency, if at all.

Federal habeas courts typically address this phenomenon by reviewing each new habeas petition in isolation, if indeed the claim passes procedural muster and is heard on the merits at all. The number of petitions heard on the merits is limited given that each new petition must overcome the many procedural hurdles in its path, such as the strict limitations period, the

222. See *supra* notes 208-210, 217 and accompanying text (discussing challenges facing petitioners filing federal habeas petitions pro se and the exceptions of states that provide a right to counsel in recognition of those challenges).

223. See, e.g., Reynolds, *supra* note 83, at 1475 (“Some valid . . . claims . . . do not become ripe until after the prisoner has been convicted and sentenced, and perhaps after one habeas petition has been presented and denied on the merits.”).

224. See *supra* Part III.A.4 (discussing AEDPA’s one-year filing limitations period and its impact on post-conviction claims of actual innocence).

225. See, e.g., *Know the Cases: Ronald Cotton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ronald_Cotton.php (last visited Nov. 30, 2013) (discussing Ronald Cotton, who was convicted of rape in 1984 and was subsequently exonerated in 1995 after a fellow inmate admitted to committing crimes).

226. Entzeroth, *supra* note 52, at 88 (“The need to file a second or successive motion may arise when a prisoner discovers new facts, or when the law changes significantly after the first motion.”).

exhaustion doctrine, and the bar on second and successive petitions.²²⁷ In reviewing each petition standing on its own, a court is unlikely to see the aggregate impact of the collective claims raised in each successive petition. In this way, a court will often fail to recognize a landscape pointing to actual innocence, even when one exists. Thus, many courts fail to see the forest for the trees, and the “piecemeal approach” they adopt results in keeping innocent prisoners behind bars.

A. An Illustration of the Piecemeal Problem: The Alfred Trenkler Case

Alfred Trenkler is a victim of the “piecemeal approach” discussed above.²²⁸ He has been incarcerated in federal prison for twenty years for a crime he did not commit. Since his conviction in 1993 of various charges relating to an explosion in Roslindale, Massachusetts, he has fallen victim to virtually every pitfall and hurdle inherent in the direct appeal and post-conviction process. The Trenkler case illuminates how the many layers of post-conviction review available to a prisoner are but a façade, which too often fail to identify valid claims of innocence. At first blush, Trenkler appears to have been the beneficiary of an exhaustive review process. Indeed, he has pursued every procedural avenue available to him since his conviction twenty years ago.

In denying Trenkler’s claims of relief, some courts have made a point of mentioning these seemingly endless layers of review.²²⁹ While not explicitly accusing Trenkler of abusing the system of post-conviction review, the suggestion is implicit in the appellate court opinions relative to his case. For example, in a First Circuit decision published in 2008, Judge Selya’s opinion begins by emphasizing Trenkler’s ten-year “kaleidoscopic array of post-conviction proceedings.”²³⁰ Before denying his *coram nobis* challenge to his sentence, Judge Selya described Trenkler’s lengthy post-conviction litigation history in detail.²³¹

However, in spite of the seemingly exhaustive judicial review of Trenkler’s conviction, a closer examination of the process reveals that each court failed to recognize Trenkler’s viable claims of innocence. Some courts looked at the new claim in isolation, rather than in the context of the court’s previous

227. See *supra* Part III.A (discussing various provisions of AEDPA which adversely impact prisoners seeking relief based on actual innocence).

228. The factual background and procedural history of the Trenkler case are extraordinarily complex. For purposes of this Article, the facts and procedural history have been simplified to highlight the issues relevant to the piecemeal problem which is the subject of this Article. For a more detailed discussion of the history of the case against Alfred Trenkler, see *Lives of Alfred W. Trenkler, Thomas L. Shay and Thomas A. Shay and Case Chronology*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/case_chronology.html (last visited Nov. 30, 2013).

229. See, e.g., *Trenkler v. United States*, 536 F.3d 85, 89-90 (1st Cir. 2008).

230. *Id.* at 89.

231. *Id.* at 89-91.

substantive decisions.²³² Other courts never reached the merits of Trenkler's claims, instead denying relief on procedural grounds such as statute of limitations issues.²³³ Thus, each reviewing court—with the exception of one dissenting judge—has side-stepped Trenkler's viable claims of actual innocence.

During the two decades that Trenkler has been incarcerated, new evidence of his innocence has come to light, piece by piece, over time. Through independent investigation, along with a request for documents under the Freedom of Information Act (FOIA), Trenkler has accumulated new documents and witness statements which effectively unravel the government's case against him.²³⁴ Although at each stage of the process Trenkler has raised viable claims in support of his actual innocence, each claim has been viewed in isolation and, as such, has been deemed to be insufficient to reverse his conviction or to warrant a new trial. His efforts have been thwarted by the courts' piecemeal approach, along with AEDPA's considerable procedural restrictions.

Trenkler now sits in federal custody even though every major piece of evidence used against him at trial has since been discredited. The scientific evidence, which was the linchpin of the government's case, has been deemed to be unreliable.²³⁵ Statements of a co-defendant and a "jailhouse snitch" have been undermined by recantations.²³⁶ Evidence strongly suggesting an agreement between the snitch and the government has come out.²³⁷ Exculpatory fingerprint evidence, never disclosed at trial, has surfaced as a result of a FOIA request.²³⁸ Trenkler's case is discussed below in some detail, in order to provide an understanding of the original evidence presented against him and how it has been systematically discredited, piece by piece, in the appellate and post-conviction process.²³⁹ Trenkler was ultimately convicted based on evidence that has since been characterized as "weak" and

232. See, e.g., *United States v. Trenkler*, No. 97-1239, 1998 WL 10265, at *1 (1st Cir. Jan. 6, 1998) (considering Trenkler's claims of juror misconduct and new evidence independently, rather than cumulatively or in the context of the court's prior decisions).

233. See *Trenkler*, 536 F.3d at 96-97.

234. See *Facts Showing the Complete Innocence of Alfred Trenkler, and Total Non-Involvement with the "Roslindale Bomb,"* ALFRED TRENKLER INNOCENT COMMITTEE, <http://www.alfredtrenklerinnocent.org/documents/FACTS091123showingthenoninvolvementofAlfredTrenklerwiththeShayBomb.doc> (last visited Nov. 30, 2013).

235. *United States v. Trenkler*, 61 F.3d 45, 59 (1st Cir. 1995).

236. *Facts Showing the Complete Innocence of Alfred Trenkler, and Total Non-Involvement with the "Roslindale Bomb,"* ALFRED TRENKLER INNOCENT COMMITTEE, ¶¶ 9-10, <http://www.alfredtrenklerinnocent.org/documents/FACTS091123showingthenoninvolvementofAlfredTrenklerwiththeShayBomb.doc> (last visited Nov. 30, 2013).

237. *Id.* ¶ 10.

238. *Id.* ¶ 7.

239. The facts presented below are taken directly from the First Circuit opinion, which affirmed Trenkler's conviction on direct appeal. *Trenkler*, 61 F.3d 45.

“circumstantial.”²⁴⁰ Five jurors from Trenkler’s trial have come forward, publically stating their belief in Trenkler’s innocence.²⁴¹ Additionally, based on doubts about Trenkler’s guilt, the Boston Police Department has expressed a willingness to re-investigate the case.²⁴² Nancy Gertner, a highly respected, now-retired, federal district court judge, who was involved in the original trial as counsel for Trenkler’s co-defendant, Thomas Shay, has taken up Trenkler’s cause as well.²⁴³ In spite of the public lack of confidence in Trenkler’s conviction from parties on all sides of the criminal justice system, he remains in federal custody, having exhausted all judicial avenues of relief. Trenkler’s plight exposes the façade of federal habeas protection.

1. Factual Background²⁴⁴

Trenkler was convicted in 1993 of various federal charges following an explosion that occurred in Roslindale, Massachusetts, resulting in the death of one police officer and the serious injury of another.²⁴⁵ The explosion occurred in 1991 and, not surprisingly, generated significant publicity.²⁴⁶ Although local, state, and federal law enforcement conducted a comprehensive investigation, Trenkler was not indicted until almost two years later, in 1993.²⁴⁷

On the day of the explosion, police were called to the home of Thomas Shay, Sr. (Shay Sr.) to investigate a suspicious object in Shay Sr.’s driveway, which had apparently become dislodged from under his car.²⁴⁸ The object turned out to be an explosive device, which detonated while two members of the Boston Police Department Bomb Squad were in close proximity conducting

240. *Id.* at 62-63 (Torruella, J., dissenting) (characterizing evidence presented against Trenkler at trial as “weak” and “circumstantial” and noting that the evidence of guilt was far from “overwhelming” as required for a finding of harmless error).

241. Peter Gelzimis, *Cops Earn Salute for Seeking Truth, Justice*, BOSTON HERALD, Nov. 22, 2009, at 5.

242. *Id.*

243. Transcript of Record at 20-1, *United States v. Shay*, No. 92-10369-Z (D. Mass. July 26, 1993), available at <http://www.alfredtrenklerinnocent.org/documents/USvShay930726Day20Transcript.pdf>; E-mail from Nancy Gertner, Professor of Practice, Harvard Law Sch., to author (Dec. 3, 2013, 19:52 EST) (on file with author).

244. Trenkler’s trial lasted eighteen days and resulted in a transcript containing thousands of pages. The facts of the case are lengthy and complex, and are simplified for the purposes of the discussion in this Article. While every piece of evidence presented in the government’s case is not included here, the summary in the text below is meant to highlight the facts which the government relied on most heavily at trial. The complete trial transcript is available at the Alfred Trenkler Innocent Committee’s website. Transcript of Record, *United States v. Trenkler*, No. 92-10369-Z (D. Mass. Oct. 25, 1993), available at <http://alfredtrenklerinnocent.org/documents/AWTTrialCollectedTranscriptssearchable.pdf>.

245. *Trenkler*, 61 F.3d at 47.

246. *Id.* at 47.

247. *Id.* at 48.

248. *Id.* at 47-48.

an investigation.²⁴⁹ Suspicion began to focus on Shay Sr.'s son, Thomas Shay, Jr. (Shay Jr.), who made bizarre and incriminating statements suggesting that the bomb had been meant for him.²⁵⁰ He had a history of mental illness and made countless contradictory statements during the investigation.²⁵¹ Suspicion eventually shifted to Trenkler as well, after his name was located in an address book belonging to Shay Jr.²⁵² While no clear motive was ever established, the government alleged at trial that Trenkler and Shay Jr. were involved in a homosexual relationship and that Trenkler made the bomb at the behest of Shay Jr., who hoped to recover insurance money upon his father's death.²⁵³

The focus on Trenkler was solidified when law enforcement learned that he was an electrical engineer who was responsible for making an explosive device in Quincy, Massachusetts (the Quincy incident) in 1986.²⁵⁴ Five years earlier, Trenkler had constructed an explosive device for a friend, using a flash simulator, which was later likened to a "firecracker."²⁵⁵ The device was attached to a truck and when detonated, created a loud explosion.²⁵⁶ There was no significant property damage and no one was injured as a result of the explosion.²⁵⁷ Trenkler was never convicted of any crime related to this incident.²⁵⁸ He did not deny his involvement in the Quincy incident.²⁵⁹ However, it was undoubtedly the catalyst for Trenkler's arrest in the Roslindale bombing, and it became a focal point of the trial.²⁶⁰

Trenkler and Shay Jr. were indicted as co-defendants; Shay Jr. was tried separately and was convicted first.²⁶¹ After eighteen days of trial, Trenkler was convicted as well and was sentenced to life in prison.²⁶² The case against

249. *Id.*

250. *Id.* at 48; *United States v. Shay*, 57 F.3d 126, 128-29 (1st Cir. 1995).

251. *Shay*, 57 F.3d at 128-29.

252. *Trenkler*, 61 F.3d at 49.

253. *Id.* at 48-49. Although the claim that both Trenkler and Shay Jr. are homosexual is not expressly mentioned in the First Circuit's opinion on Trenkler's direct appeal, this fact was heavily emphasized at trial, and references to their sexual orientation are ubiquitous in the trial transcripts. See Transcript of Record at 6-124, *United States v. Trenkler*, No. 92-10369-Z (D. Mass. Oct. 25, 1993), available at <http://alfredtrenklerinnocent.org/documents/AWTTrialCollectedTranscriptssearchable.pdf>.

254. *Trenkler*, 61 F.3d at 48.

255. *Id.* at 48; *id.* at 67 (Torruella, J., dissenting).

256. *Id.* at 48 (majority opinion).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* See also *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995).

262. *Trenkler*, 61 F.3d at 51. His sentence was subsequently reduced by eighty-six years based on a change in the law which occurred after his conviction and sentencing. See *Lives of Alfred W. Trenkler, Thomas L. Shay and Thomas A. Shay and Case Chronology*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/case_chronology.html (last visited Nov. 30, 2013).

Trenkler was entirely circumstantial. There was no physical evidence connecting him to the crime nor were there eye-witnesses identifying Trenkler. Instead, the prosecution's case was based primarily on prior bad acts evidence relating to the Quincy incident, including details about the device used and evidence from a law enforcement database (EXIS) establishing that the devices were sufficiently similar to support a modus operandi theory of identity.²⁶³

Additionally, the government focused on statements made by Shay Jr. implicating Trenkler.²⁶⁴ Many of these statements were admitted at trial, although Shay Jr. invoked his Fifth Amendment right not to testify.²⁶⁵ Therefore Trenkler's trial counsel was unable to cross-examine Shay Jr. or to meaningfully attack his credibility. Further, the government's case was bolstered by the testimony of David Lindholm, a "jailhouse snitch" who claimed that Trenkler had admitted to making the bomb while the two were incarcerated together.²⁶⁶ Finally, an assortment of undocumented oral statements and written drawings allegedly made by Trenkler, but never preserved or recorded by the police, were presented to establish his guilt.²⁶⁷ The jury convicted Trenkler of all counts, including conspiracy and attempted malicious destruction of property by means of explosives.²⁶⁸

2. Direct Appeal

On direct appeal, Trenkler challenged the admissibility of several pieces of incriminating evidence presented against him at trial: 1) prior bad acts evidence regarding the Quincy incident, 2) evidence from the EXIS database intended to establish that Trenkler constructed the devices in the Quincy and Roslindale incidents, and 3) the admissibility of out-of-court statements made by Shay Jr. inculcating Trenkler in the crime.²⁶⁹ The First Circuit affirmed Trenkler's conviction and found no error with the admissibility of the Quincy incident evidence or the statements by Shay Jr.²⁷⁰ However, the court determined that the district court did in fact err in admitting evidence from the EXIS database to support the conclusion that Trenkler constructed the explosive devices in both

263. *Trenkler*, 61 F.3d at 48-51.

264. *Id.* at 49.

265. *Id.* at 61.

266. *Id.* Notably, Lindholm, widely known to be a professional snitch, recently testified for the Government in the Whitey Bulger trial in federal district court in Boston, Massachusetts. See Denise Lavoie, *Ex-Drug Dealer Says Bulger Tried to Extort \$1M*, ASSOCIATED PRESS (Boston), July 17, 2013, available at bigstory.ap.org/article/businessman-says-bulger-threatened-him-guns (describing Lindholm as a drug dealer who testified that Bulger allowed him to distribute eighty-five tons of marijuana in the summer of 1983, but demanded \$1 million in return).

267. *Trenkler*, 61 F.3d at 51.

268. *Id.*

269. *Id.* at 47.

270. *Id.* at 56, 61.

the Quincy incident and the Roslindale bombing.²⁷¹ Although the court concluded that this evidence was unreliable hearsay, it nonetheless determined that its admission constituted harmless error.²⁷²

The First Circuit issued its opinion in 1996. The weight and impact of the EXIS evidence was the focus of much of the appellate court decision.²⁷³ The EXIS database was assembled by law enforcement agencies, including the Bureau of Alcohol, Tobacco and Firearms (ATF), in order to catalogue various features of incidents involving explosives around the country.²⁷⁴ Using information from this database, the government sought to establish that unique characteristics of the explosive devices involved in the Quincy incident and the Roslindale bombing established a modus operandi between the two devices, supporting the conclusion that Trenkler was responsible for building both.²⁷⁵ Given that Trenkler did not dispute his involvement in the Quincy incident, this evidence operated effectively as an airtight identification of Trenkler as the architect of the Roslindale bomb. In fact, the ATF agent was permitted to testify at trial that out of 14,000 explosives incidents recorded in the EXIS database, only the Roslindale bomb and the Quincy device shared the eight designated characteristics testified to.²⁷⁶ In finding this information to be unreliable, the majority noted that it was unclear who inputted the information, and thus, the accuracy could not be verified.²⁷⁷

In finding the erroneous admission of the EXIS database evidence to be “harmless,” the First Circuit noted that there was “substantial evidence” remaining to support a finding of Trenkler’s guilt.²⁷⁸ In particular, the court focused “[p]rincipally” on the jailhouse snitch, David Lindholm, finding his testimony that Trenkler confessed to him while incarcerated to be “convincing[.]”²⁷⁹ The majority went on to note that there was no support in the record for a quid pro quo between Lindholm and the government.²⁸⁰

However, in spite of the majority’s findings, the impact that the EXIS database evidence likely had on the jury cannot be overstated. In a strongly-worded dissent, Judge Torruella opined that admitting such powerful and misleading testimony was not in fact harmless and that the evidence undoubtedly persuaded the jury to overlook the otherwise “weak circumstantial evidence of [the] defendant’s guilt” and find him guilty beyond a reasonable

271. *Id.* at 60.

272. *Id.*

273. *See generally id.* at 49-50, 57-61.

274. *Id.* at 49-50.

275. *Id.* at 48, 50.

276. *Id.* at 66 n.36 (Torruella, J., dissenting).

277. *Id.* at 58 (majority opinion).

278. *Id.* at 60.

279. *Id.*

280. *See id.* at 51.

doubt.²⁸¹ Torruella focused on the unreliable and misleading nature of the EXIS database evidence.²⁸² As presented to the jury, this evidence supported the damning conclusion that of 14,000 explosive-device incidents recorded in the database, only the Quincy incident and the Roslindale bombing contained all of the enumerated features.²⁸³ Even more insidious was the suggestion of a “scientific” conclusion that a computer determined that the identity of the perpetrator was the same in each incident.²⁸⁴ This evidence could, at best, be considered misleading given that the information regarding the Quincy incident was not even entered into the system until *after* the Roslindale bombing occurred and Trenkler became the prime suspect.²⁸⁵ Thus, the data entered into the system was subject to conclusion bias and manipulation.

Torruella alludes to a more “pernicious problem” as well.²⁸⁶ In his dissent, he further suggests that the EXIS results appeared to be “deliberately skewed,” given that the ATF agent who performed the data search seemed to focus only on those features in the Roslindale bomb which would result in a match with the Quincy incident while ignoring the remainder of the features which would undermine such a match.²⁸⁷ Most importantly, Torruella notes, the central ingredient in each device, i.e., the “explosive content,” was fundamentally different: while the Quincy device relied on a “firecracker-like” flash simulator, which is not designed to cause property damage or injury, the Roslindale bomb used dynamite to fuel its explosive power.²⁸⁸

Thus, with the court’s decision on direct appeal, the strongest piece of evidence used to convict Trenkler at trial was fundamentally discredited, leaving only a collection of weak, circumstantial evidence to support his conviction.

3. Post-Conviction Relief

While Trenkler succeeded on appeal in establishing that the trial court erred in admitting the EXIS database evidence at trial,²⁸⁹ this proved to be a hollow victory. As Trenkler continued to seek post-conviction relief following his conviction and unsuccessful appeal, other courts that subsequently heard Trenkler’s collateral attacks on his conviction have never meaningfully taken into account the First Circuit’s conclusion regarding the unreliability of the EXIS database evidence. The First Circuit determined that the EXIS database

281. *Id.* at 62 (Torruella, J., dissenting).

282. *Id.* at 62-69.

283. *Id.* at 62.

284. *Id.*

285. *Id.* at 65.

286. *Id.* at 64-65.

287. *Id.* at 66-67.

288. *Id.* at 67.

289. *Id.* at 57 (majority opinion).

evidence was erroneously admitted into evidence, as unreliable and misleading to the jury, and expressly pointed to the strength of the Lindholm testimony in upholding the conviction.²⁹⁰

Yet, as will be discussed below, when the validity of the Lindholm testimony subsequently came under attack, the court addressed this claim of post-conviction relief without regard to the First Circuit's original findings on direct appeal. In short, on direct appeal, the court discredited the government's most powerful piece of evidence. Presumably, in the context of subsequent collateral attacks on the conviction, the importance of each remaining piece of evidence would be recalibrated in light of this original finding. However, as discussed below, this was not the case. Each new collateral attack on the original conviction was raised and reviewed in isolation, without regard to what the court had decided on direct appeal.²⁹¹

a. Motion for a New Trial

Immediately following the decision on his direct appeal, in 1995, Trenkler moved for a new trial based on newly discovered evidence.²⁹² As is commonly required among federal and state courts, the motion was filed in the district court with the judge who presided over Trenkler's jury trial. Although Trenkler was represented by counsel for this motion, his attorney was subsequently convicted of multiple felony offenses and disbarred.²⁹³

The motion relied primarily on two pieces of newly discovered evidence. First, Trenkler had learned that David Lindholm, the jailhouse snitch who testified against him at trial, had received a substantial sentence reduction immediately following his testimony.²⁹⁴ Further, this sentence reduction occurred at the behest of an Assistant U.S. Attorney who pointed to Lindholm's cooperation in the Trenkler trial for support.²⁹⁵ This was significant given that,

290. *Id.* at 59-60 & n.21.

291. In addition to the post-conviction motions and habeas petitions detailed below, Trenkler sought other avenues of relief based on claims of juror misconduct and improper sentence. *See, e.g.*, Motion for Judicial Inquiry into Possible Juror Misconduct and For a New Trial, *United States v. Trenkler*, No. 92-10369-Z (D. Mass. Nov. 19, 1996) available at <http://www.alfredtrenklerinnocent.org/documents/961119TrenklerMotionforJudicialInquiryintoJurorMisconductandforaNewTrial.pdf>; Letter from Alfred W. Trenkler to Rya W. Zobel, U.S. District Judge (Dec. 1, 2005), available at http://www.alfredtrenklerinnocent.org/documents/051201AlfredTrenklerlettertoJudgeRyaZobelresentencing_000.pdf. However, this Article focuses on the substantive claims relevant to Trenkler's factual innocence of the crime.

292. *United States v. Trenkler*, No. 97-1239, 1998 WL 10265, at *1 (1st Cir. Jan 6, 1998).

293. *In re Morris M. Goldings*, No. BD-2001-005 (Mass. Sup. Jud. Ct. Apr. 17, 2002) (disbarring Goldings following 2002 convictions of federal charges relating to fraud and money laundering).

294. *Trenkler*, 1998 WL 10265, at *1.

295. Government's Motion for Reduction of Sentence, *United States v. Lindholm*, No.

at trial, Lindholm had vehemently denied the existence of an agreement regarding a reduction of his sentence in exchange for his testimony.²⁹⁶ Additionally, Trenkler raised the issue of Shay Jr.'s mental health. Although this information was not admitted at trial, Trenkler learned that Shay Jr. had been diagnosed with *pseudologia fantastica*, a mental illness involving delusional thoughts and pathological lying.²⁹⁷ Notably, Trenkler's counsel neglected to attach affidavits or other supporting documents for his claims, and the motion was denied in 1997.²⁹⁸

Based on the sentence reduction only, the court found insufficient evidence to support the claim that Lindholm had a deal with the government at the time of this testimony.²⁹⁹ Trenkler appealed, and the First Circuit upheld the denial of this motion.³⁰⁰ The court affirmed the district court's finding that there was insufficient evidence to support the claim of a Lindholm deal and that the evidence regarding Shay Jr.'s psychiatric diagnosis was not "newly discovered."³⁰¹ Specifically, the court determined that Trenkler's trial counsel was aware of Shay Jr.'s mental health history, but opted not to seek to introduce it.³⁰² The trial counsel claimed that such an effort would have been fruitless, given that the court had previously ruled Shay Jr.'s psychiatric history

90-10080-WD (D. Mass. July 19, 1994), *available at* <http://www.alfredtrenklerinnocent.org/documents/940719GovernmentmotionforreductionofsentenceforDavidLindholmapprovedbyJudgeWoodlock940903.pdf>.

296. *See* Transcript of Record at 17-95, *United States v. Trenkler*, No. 92-10369-Z (D. Mass. Nov. 22, 1993), *available at* <http://www.alfredtrenklerinnocent.org/documents/AWTTrialDay17ClosingArgumentsselectionsrelatingtoWilliamDavidLindholm.pdf>. In fact, Trenkler had also obtained an affidavit from a prisoner, stating that Lindholm had admitted to lying in Trenkler's case in order to secure a reduced sentence. Affidavit of John W. Bowden Concerning William David Lindholm (Apr. 22, 1998), *available at* http://www.alfredtrenklerinnocent.org/documents/980422JohnBowdenaffidavitreWilliamDavidLindholm_001.pdf. Trenkler also obtained a letter from Assistant U.S. Attorney, Paul Kelly, advocating a reduced sentence for Lindholm, following his helpful testimony in the Trenkler trial. *Government's Motion for Reduction of Sentence, United States v. Lindholm*, No. 90-10080-WD (D. Mass. July 19, 1994) *available at* <http://www.alfredtrenklerinnocent.org/documents/940719GovernmentmotionforreductionofsentenceforDavidLindholmapprovedbyJudgeWoodlock940903.pdf>. However, Trenkler's counsel neglected to append these documents to the motion.

297. *See Trenkler*, 1998 WL 10265, at *1. Evidence of Shay Jr.'s mental health history was excluded at Shay Jr.'s trial, and Trenkler's trial counsel later claimed that he never sought to introduce this evidence at Trenkler's trial because of the court's previous ruling. *Id.*

298. *See Alfred W. Trenkler, Thomas L. Shay and Thomas A. Shay and Case Chronology*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/case_chronology.html (last visited Nov. 30, 2013).

299. *See Trenkler*, 1998 WL 10265, at *3.

300. *Id.*

301. *Id.* at *4.

302. *Id.*

to be inadmissible in the Shay Jr. trial.³⁰³

b. 1999 Habeas Petition Under Section 2255

In 1999, Trenkler filed his first habeas petition under 28 U.S.C. § 2255 pro se.³⁰⁴ Section 2255 allows federal prisoners to seek post-conviction review of their incarceration or sentence.³⁰⁵ This petition raised a claim of ineffective assistance of trial counsel, based on trial counsel's failure to introduce expert testimony regarding Shay Jr.'s mental health at the time of trial.³⁰⁶ The petition was dismissed as untimely under AEDPA, and was never heard on the merits.³⁰⁷ Thus, in denying Trenkler's claim of post-conviction relief, the court did not acknowledge the fact that the existing evidence against Trenkler no longer included the EXIS database evidence.

c. 2007 Habeas Petition Under Section 2255

Trenkler filed a second federal habeas petition under section 2255 in 2007.³⁰⁸ This petition was also filed pro se.³⁰⁹ It was prepared, in part, in response to information Trenkler received as a result of a recent FOIA request.³¹⁰ Most significantly, Trenkler learned that exculpatory fingerprint reports involving prints lifted from under Shay Sr.'s vehicle that had never been disclosed during trial.³¹¹ The analysis of the fingerprints excluded

303. *Id.*

304. Petition for Writ of Habeas Corpus at 5, *Trenkler v. Pugh*, No. 3:02-CV-1736 (M.D. Pa. June 12, 2002), available at <http://www.alfredtrenklerinnocent.org/documents/021003TrenklerPetitionforHabeasCorpusoUSDCMiddleDistPA.pdf>.

305. Section 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (2012).

306. Petition for Writ of Habeas Corpus at 5, *Trenkler v. Pugh*, No. 3:02-CV-1736 (M.D. Pa. June 12, 2002), available at <http://www.alfredtrenklerinnocent.org/documents/021003TrenklerPetitionforHabeasCorpusoUSDCMiddleDistPA.pdf>.

307. *United States v. Trenkler*, 268 F.3d 16, 18 (1st Cir. 2001).

308. See *The Wrongful Conviction of Alfred Trenkler: Chronology of Events*, FREE ALFRED NOW, <http://www.freealfrednow.org/Chronology.html> (last visited Dec. 20, 2013).

309. *Id.*

310. While several claims were raised in this petition, the discussion will focus on those relevant to Trenkler's factual innocence.

311. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence 28 U.S.C. § 2255 By a Prisoner in Federal Custody at 4, attachment at 1, *Trenkler v. United States*, No. 09-1559 (June 10, 2010), available at

Trenkler as a match.³¹²

Additionally, this petition included an affidavit signed by Shay Jr. acknowledging that he had repeatedly lied to law enforcement about Trenkler's involvement in making the bomb.³¹³ Shay Jr. stated that government attorneys repeatedly claimed Trenkler had implicated Shay Jr.³¹⁴ The attorneys further advised him that unless Shay Jr. offered up some information, he would bear the responsibility for the crime alone.³¹⁵ Shay Jr. also explained that he did not testify against Trenkler at trial because members of the U.S. Attorney's Office had threatened additional charges if he did not maintain his original story regarding Trenkler's involvement.³¹⁶ In his affidavit, Shay Jr. further stated that he had told so many conflicting lies over the course of the investigation that he doubted his ability to keep them all straight and present the version of events that the government wanted to hear.³¹⁷ The petition was denied in 2009.³¹⁸

d. 2010 Application for Leave to File a Second or Successive Habeas Petition Under Section 2255

In 2010, Trenkler filed an application for leave to file a second or successive habeas petition under Section 2255.³¹⁹ In his application, Trenkler acknowledged having filed three prior collateral attacks on his conviction via federal habeas petition.³²⁰ He raised the following claims of newly discovered evidence in support of his application³²¹: 1) a fingerprint report, discovered via FOIA request and not disclosed at trial, containing analysis of twenty-four prints and establishing a negative match to Trenkler; 2) a letter from the Assistant U.S. Attorney who prosecuted Trenkler's case, supporting a reduction in Lindholm's sentence following his testimony at Trenkler's trial; 3) letters

<http://www.alfredtrenklerinnocent.org/documents/100610Alfred2255MotionbasedonFOIAdocs.pdf>.

312. *Id.*

313. *Id.* attachment at 17-19.

314. *Id.* attachment at 18-19.

315. *Id.*

316. *Id.* attachment at 21-22.

317. *Id.* attachment at 21.

318. *Id.* at 4.

319. In between the two habeas petitions referenced in the text above, Trenkler initiated an additional habeas petition in the Third Circuit, where he was incarcerated at the time. This petition focused on the propriety of his sentence. *Id.* at 3-4. Given that this petition did not raise claims of actual innocence, it is not discussed in detail in this Article.

320. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence 28 U.S.C. § 2255 By a Prisoner in Federal Custody at 3, *Trenkler v. United States*, No. 09-1559 (June 10, 2010), *available at* <http://www.alfredtrenklerinnocent.org/documents/100610Alfred2255MotionbasedonFOIAdocs.pdf>.

321. This summary focuses only on these claims raised relative to Trenkler's factual innocence.

from three jurors from Trenkler's trial, stating their belief in his innocence; and 4) a 2008 affidavit from co-defendant Shay Jr., asserting Trenkler's actual innocence.³²² This petition was summarily denied.

4. Status of Trenkler's Case

Today, Trenkler remains incarcerated in federal prison in Arizona.³²³ He has sought the help of the New England Innocence Project (NEIP), and as a result of the NEIP case review, he is now represented by Nancy Gertner, former federal judge for the District of Massachusetts.³²⁴ Judge Gertner represented Shay Jr. at trial prior to being appointed to the bench, and has never stopped believing that both Shay Jr. and Trenkler are innocent of these crimes.³²⁵ However, while the bulk of the evidence presented at Trenkler's trial—the EXIS database, the snitch testimony, and testimony of the co-defendant—has been discredited, Trenkler appears to have exhausted all judicial avenues of relief. Further, new information, including exonerating fingerprint evidence and letters from three jurors stating a belief in Trenkler's factual innocence, has never been meaningfully assessed by the courts.

If a single court would be willing to review the existence of the evidence in Trenkler's case “as a whole”—i.e., including both the evidence presented at trial, and all the evidence that has come to light since—it would be impossible to ignore his factual innocence. However, to date, no court has been willing to do so.

B. A Solution to the Piecemeal Problem: The *MacDonald* Approach

AEDPA's section 2244(b)(2) expressly provides that, in addressing successive petitions raising claims of factual innocence, courts should view the

322. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence 28 U.S.C. § 2255 By a Prisoner in Federal Custody at 5, attachment, *Trenkler v. United States*, No. 09-1559 (1st Cir. June 10, 2010), available at <http://www.alfredtrenklerinnocent.org/documents/100610Alfred2255MotionbasedonFOIAdocs.pdf>.

323. See *Alfred W. Trenkler, Thomas L. Shay and Thomas A. Shay and Case Chronology*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/case_chronology.html (last visited Nov. 30, 2013).

324. See Email from Nancy Gertner, Professor of Practice, Harvard Law Sch., to author (Dec. 3, 2013, 19:52 EST) (on file with author) (confirming Nancy Gertner's current representation of Trenkler); *Links to Related Websites*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/related_websites.html (last visited Nov. 30, 2013) (noting Trenkler's application to the Innocence Project).

325. See *Who's Who in the Roslindale Bomb Cases*, ALFRED TRENKLER INNOCENT COMMITTEE, http://www.alfredtrenklerinnocent.org/whos_who.html (last visited Nov. 30, 2013) (noting Nancy Gertner's representation of Shay Jr. and appointment as a federal judge).

evidence “as a whole.”³²⁶ Yet despite this clear mandate, very few federal courts have interpreted this provision literally. Since the passage of AEDPA, the Fourth Circuit is the only court to directly address the piecemeal problem discussed above by broadly interpreting the “evidence as a whole” language. In *United States v. MacDonald*, following two decades of successive federal habeas petitions filed one at a time as new evidence of the petitioner’s innocence emerged, the court ultimately ordered the district court below to conduct at plenary review of the evidence “as a whole”—thus including evidence raised and dismissed as insufficient to support a claim of innocence in prior petitions.³²⁷

1. Factual and Procedural Background

Jeffrey MacDonald was convicted of the 1970 murder of his pregnant wife and their two children.³²⁸ He was prosecuted federally, as the crime took place on a military base in North Carolina, and his case was ultimately appealed to the Fourth Circuit.³²⁹ Although the crime occurred in 1970, the investigation was lengthy, and the trial did not take place until almost a decade later.³³⁰ The facts of his case have been extensively reported in the media and became the basis for *Fatal Vision*, a book and subsequent movie adaptation.³³¹ The details of the crime are not relevant here. MacDonald appealed his conviction on several grounds and subsequently launched multiple collateral attacks via habeas corpus petitions under section 2255.³³²

In a series of successive petitions and pleas for a new trial, MacDonald raised claims of newly discovered evidence, *Brady* violations, and other constitutional transgressions, each of which was either denied on the merits or barred on procedural grounds.³³³ The passage of AEDPA in 1996, in the midst of MacDonald’s post-conviction efforts, caused further complications.³³⁴ Some of the new evidence that had come forward since MacDonald’s conviction included *Brady* information regarding a third party who admitted to involvement in the crime, but recanted after being threatened with prosecution.³³⁵ Additionally, physical evidence found at the crime scene,

326. 28 U.S.C. § 2255(b)(2)(B)(ii) (2012).

327. *United States v. MacDonald*, 641 F.3d 596, 614 (4th Cir. 2011).

328. *Id.* at 598.

329. *Id.*

330. *Id.* at 600.

331. *Id.* at 599; see also Gabriel Falcon, *After 35 Years, ‘Fatal Vision’ Author, Killer Meet Again*, CNN (Sept. 30, 2012, 12:46 PM), <http://www.cnn.com/2012/09/29/justice/mcginniss-macdonald-appeal>.

332. See *MacDonald*, 641 F.3d at 601-02, for a complete discussion of the post-conviction history of the *MacDonald* case.

333. *Id.* at 602-03.

334. *Id.* at 603.

335. *Id.* at 604.

suggesting the presence of a third party, was also not disclosed to the defense at trial.³³⁶

2. Expanding the Record: A New Interpretation of AEDPA's "Evidence as a Whole" Language

In 2006, MacDonald was granted authorization to file a second or successive 2255 motion with the district court.³³⁷ Thereafter, in presenting his 2255 petition to the district court, he moved to expand the record³³⁸ to include an attached list of material evidence, "including evidence excluded at trial," along with "evidence submitted with prior unsuccessful post-conviction motions" and other newly discovered evidence.³³⁹ The district court denied the request, characterizing it as improper "bootstrapping" and "piggybacking" onto proper post-conviction claims.³⁴⁰ The lower court further described MacDonald's numerous 2255 petitions as "untimely, successive and independent."³⁴¹

However, on appeal, the Fourth Circuit found that the district court erred in failing to expand the record and in interpreting the "evidence as a whole" language from section 2255 so narrowly.³⁴² The court reviewed pre-AEDPA Supreme Court case law to arrive at a broad interpretation of the "evidence as a whole" language in the statute.³⁴³ Specifically, the court borrowed language from the *Schlup v. Delo* opinion, finding that the "evidence as a whole" means "all the evidence, including that alleged to have been illegally admitted . . . [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial."³⁴⁴

336. *Id.* at 601-02.

337. *Id.* at 603.

338. Expanding the record is expressly allowed under Rule 7 of the Rules Governing Section 2255 Proceedings for the United States District Courts, which provides:

(a) In General. If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

(c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

RULES GOVERNING SECTION 2254 AND SECTION 2255 PROCEEDINGS R. 7 (2009).

339. *MacDonald*, 641 F.3d at 606.

340. *Id.*

341. *Id.*

342. *Id.* at 610.

343. *Id.* at 610-13.

344. *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)).

The court went on to refute the government's argument that such an expansive interpretation would effectively nullify the bar on second or successive petitions under AEDPA, noting that the spirit of the statute is not to preclude viable claims of innocence.³⁴⁵ Any other interpretation, the court reasoned, would effectively operate as a piecemeal approach, which prevents a reviewing court from realistically assessing evidence of innocence in the aggregate.³⁴⁶ Finally, in adopting an expansive interpretation of the "evidence as a whole" language, the Fourth Circuit noted that the expansion of the record remedy adopted here is only appropriate in those "rare" and "extraordinary" cases where a prisoner is able to meet the threshold application requirement based on newly discovered evidence of innocence under section 2255 (or section 2244 for state prisoners).³⁴⁷

Since the *MacDonald* court agreed to expand the record and ultimately granted *MacDonald*'s federal habeas petition in 2011, few other courts have been willing to adopt a similar approach.³⁴⁸ Instead, most have been more inclined to narrowly interpret the "evidence as a whole" provision as limited to only that evidence presented at trial, adjusted for evidence that would have been admitted, but for constitutional error.³⁴⁹ In doing so, courts have demonstrated an unwillingness to expand the review of criminal convictions, pointing to AEDPA's underlying goals of finality and comity.

3. Assessment of the *MacDonald* Approach

The *MacDonald* approach, discussed above, provides a reasonable balance between the government's interest in finality of criminal convictions, and the competing interests of factually innocent prisoners seeking fairness and accuracy in the review of their cases. Specifically it retains AEDPA's requirement that prisoners make a *prima facie* showing of factual innocence, while also recognizing the reality that for many prisoners, evidence of innocence is likely to emerge over time. Thus, this approach comes closer to achieving the newly-calibrated balance of policy interests necessary in light of the Innocence Movement exoneration data. An appreciation of the magnitude of the innocence problem in our criminal justice system warrants the shift in

345. *MacDonald*, 641 F.3d at 613.

346. *See id.* at 613-14.

347. *Id.* at 614-15.

348. *See, e.g.,* *Munchinski v. Wilson*, 807 F. Supp. 2d 242, 285-91 (W.D. Pa. 2011) (granting petition for federal habeas corpus and applying expansive interpretation of AEDPA's "evidence as a whole" provision for gateway innocence claims to mean that courts must examine evidence from trial, along with other newly discovered evidence, including that raised in prior unsuccessful habeas petitions), *aff'd*, 694 F.3d 308 (3d Cir. 2012).

349. *See, e.g.,* *Case v. Hatch*, 731 F.3d 1015, 1033 (10th Cir. 2013) (denying petition for federal habeas corpus and interpreting "evidence as a whole" provision narrowly to include only "evidence presented at trial"); *see also* *Nooner v. Hobbs*, 689 F.3d 921, 933 (8th Cir. 2012).

balance that the *MacDonald* approach adopts.

Further, this approach would theoretically only apply where a prisoner is able to make a prima facie showing of factual innocence, along with a constitutional violation, under the gatekeeping provisions of AEDPA's section 2244(b). Thus, allowing courts to expand the record in second or successive habeas petitions in this limited context would not result in excessive use of judicial resources. Although prisoners seeking to file second or successive federal habeas petitions have already benefitted from an exhaustive post-conviction review process, including a direct appeal, collateral attack on the conviction in state court, along with at least one federal habeas petition, it is now beyond dispute that such measures do not adequately identify and remedy wrongful convictions of the innocent.³⁵⁰

As discussed above, each phase of the post-conviction review process poses significant barriers to the factually innocent prisoner. And while the Innocence Movement has provided fodder for legal scholars and observers of the criminal justice system and has resulted in a broad array of reforms to pretrial investigation procedure, very few such reforms have been adopted in the post-conviction procedure context. Indeed, AEDPA was largely debated and enacted without the benefit of the DNA exoneration data that is widely known today. Thus, prisoners claiming actual innocence face a multitude of hurdles in pursuing their claims.

Federal courts reviewing habeas petitions have the opportunity to act as a meaningful final check on prisoners' claims of actual innocence. By adopting the *MacDonald* approach and interpreting AEDPA's "evidence as a whole" provision more broadly, courts are more likely to effectively identify and remedy valid claims of actual innocence. Specifically, in the context of federal habeas petitions raising claims of actual innocence, the courts should allow for review of an expanded record, including not merely the evidence presented at trial, but also the evidence which has come to light since trial, including the new evidence raised in the prisoner's prior unsuccessful habeas petitions. Otherwise, the courts' piecemeal review of the new evidence, which often slowly comes to light following a conviction, cannot possibly operate to meaningfully identify factual innocence.

4. Application to Trenkler

Had any of the courts reviewing Trenkler's conviction been willing to adopt the *MacDonald* approach, the aggregate effect of the newly discovered evidence would have made Trenkler's innocence impossible to ignore. Instead, the courts have only been willing to review his claims sequentially, in a piecemeal fashion, denying them one by one for substantive or procedural

350. See *supra* notes 112-117 and accompanying text (discussing findings of Professor Brandon Garrett's study of DNA exoneration data).

reasons.

At trial, the case against Trenkler was circumstantial. The evidence against him was designed to establish his motive for committing the crime and an ability to do so. Specifically, the prosecution sought to establish that Trenkler's expertise allowed him to construct the device in question and his alleged relationship with Shay Jr. provided the motive. However, since his trial in 1993, the government's evidence against Trenkler has been discredited on both fronts. The primary evidence supporting the government's modus operandi theory based on similarities between the Quincy incident and the Roslindale bombing has been struck down as unreliable hearsay. Further, the evidence of Trenkler's motive has since been undermined by Shay Jr.'s own statements.

In its denial of Trenkler's direct appeal, the First Circuit attempted to fill the hole in the prosecution evidence with a new emphasis on the jailhouse snitch testimony of David Lindholm. However, that evidence has since been roundly discredited as the nature of Lindholm's agreement with the government has been exposed. This dissolution of these three fundamental pieces of evidence leaves virtually nothing left to support Trenkler's conviction. Moreover, while no known evidence is available for biological testing, the fingerprint analysis which has surfaced since the trial excludes Trenkler and further supports his factual innocence. However, until a single court is willing to review all of this new information in the aggregate, no relief is available to Trenkler.

CONCLUSION

While legal scholars have successfully advocated for reforms in pretrial criminal procedure in the wake of the Innocence Movement, very few comparable reforms have been implemented in the post-conviction context. Instead, AEDPA was debated and enacted without the benefit of the DNA exoneration data available today. In essence, the legislation was premised on an underlying assumption that wrongful convictions were no more than an anomaly. Thus, although today's direct appeal and post-conviction procedures suggest a multi-layered, seemingly exhaustive review system, in fact, prisoners seeking relief based on claims of factual innocence confront a façade of protection without the benefit of meaningful substantive review.

This problem is exacerbated by AEDPA's restrictive procedural requirements, along with courts' tendency to address post-conviction claims in a piecemeal fashion. In order to more effectively identify and remedy viable claims of innocence in the post-conviction context, courts should be more willing to adopt the *MacDonald* approach. Specifically, when faced with a colorable claim of actual innocence, supported by a series of piecemeal claims raised individually, a court should expand the record in order to view the "evidence as a whole." This approach, while admittedly more taxing on judicial resources, would help identify factually innocent prisoners by assessing

challenges to the trial evidence, along with newly discovered evidence, in the aggregate. In this way, a court can see the forest *and* the trees, and factually innocent prisoners can more readily secure the liberty they deserve.