# SEARCHING FOR INJUSTICE: THE CHALLENGE OF POSTCONVICTION DISCOVERY, INVESTIGATION, AND LITIGATION

LAURIE L. LEVENSON*

## I. INTRODUCTION

Criminal law is at a crossroad. With 2.3 million Americans[1] in prison today, one of the biggest challenges for the criminal justice system is dealing with postconviction claims by prisoners.[2] Most of the focus of

* David W. Burcham Chair in Ethical Advocacy, Loyola Law School, Los Angeles. I am extremely grateful to Professor Dan Simon for inviting me to participate in this critical symposium and for his insightful comments on this Article. Many thanks also to my research assistants, Diana Cho, Aaron Elster, Payton Lyon, and Danielle Nisimov, for their assistance with this Article. Finally, I greatly appreciate the diligent staff of the *Southern California Law Review* for their work editing and producing this Article.

1. Alex Stamm, *Breaking the Addiction to Incarceration: Weekly Highlights (04 / 19 / 2013)*, ACLU BLOG RIGHTS (Apr. 19, 2013, 4:35 PM), http://www.aclu.org/blog/criminal-law-reform/breaking-addiction-incarceration-weekly-highlights-04192013.

2. *See* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 80 (2012) (arguing that because prosecutors are so focused on obtaining convictions and larger sentences, "the burden of investigating potential claims of innocence falls entirely on the shoulders of defense counsel"); David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 88–89 (1999) (arguing that defense lawyers have an ethical obligation to zealously advocate setting aside convictions of their clients, "even at the expense of their own professional reputation[s]," in the event that they must cooperate with other defense lawyers regarding their own ineffectiveness of counsel); Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 184–92 (2012) (arguing that there is a conflict of interest when prosecutors investigate and review their prior work during habeas or other postconviction proceedings). *See generally* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333 (2011) (arguing that the professional incentives to maintain convictions and the political consequences of overturning convictions cause prosecutors to strongly resist postconviction claims of innocence); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (arguing that institutional and political barriers deter the recognition of potentially valid innocence claims).

scholarship for criminal law is on preconviction issues. Many of the participants in the criminal justice system, including judges, prosecutors, and defense lawyers, view a criminal case as "final" once the defendant has been sentenced. Yet, it is increasingly clear that the trial, sentencing, and even appeal are just the first act in the long production of a criminal case. Defendants do not disappear once they are sentenced. The second half of their case is still to come as collateral attacks work their way through the criminal justice system.

On a macro level, the criminal justice system struggles with the tension between the desire for "finality" and the goal of ensuring, no matter how long it takes, that there has been an accurate and fair resolution of a case. As discussed in the first part of this Article, the criminal justice system makes finality a priority. For good reasons, prosecutors and courts want cases to be resolved. Rules are put into place to help ensure those resolutions are accurate and fair. Once a defendant is sentenced, there is a strong presumption that the fair and accurate result was reached.[3] Victims expect that they can, if possible, move on with their lives,[4] and law enforcement officials and prosecutors begin to address other cases. However, as we have learned from the recent exoneration movement, there is good reason to be concerned about the accuracy of convictions and the certainty that there has been a fair resolution of a case.[5] When mistakes are

3. Strickland v. Washington, 466 U.S. 668, 694 (1984) ("The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.").

4. Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 413–19 (2007).

5. *See* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 21 n.35 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (noting that there has been a rapid increase in the number of known exonerations, from eleven in 1989 to forty in 1999, followed by an uneven plateau since 2000 for a total of 873 exonerations from January 1989 to December 2012); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 230 (2012) (estimating the rate of wrongful convictions for all felonies to be between 0.005 and 0.01 percent based on observational studies of criminal justice practice). More recently, Samuel Gross reports that the exoneration rate is much higher, perhaps as high as 5 percent of all convictions and 2.3 percent to 3.3 percent in death sentences. *See* Samuel R. Gross, *How Many False Convictions Are There? How Many Exonerations Are There?*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 45, 56 (C. Ronald Huff & Martin Killias eds., 2013). There have been "at least [two thousand] exonerations in the United States since . . . 1989." *Id.* at 15. A report by the Urban Institute Justice Policy Center suggests that the rate of exonerations might be even higher. A study of postconviction DNA testing in Virginia revealed that 7.8 percent of those persons convicted of a serious crime were eliminated as the source of DNA in postconviction testing. JOHN ROMAN ET AL., URBAN INST. JUSTICE POLICY CTR., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 7 (2012).

detected, whether in the court's handling of the case or in matters that were undisclosed at the time of trial, the criminal justice system becomes immersed in the cumbersome world of postconviction litigation.[6]

There are three specific areas affected by this ongoing tension between finality and accuracy. First, there are significant impediments to postconviction investigations. Most defendants have little or no way of conducting postconviction investigations because they are incarcerated.[7] There is no right to counsel in habeas proceedings,[8] so petitioners who cannot afford counsel must rely on outside groups to volunteer their help with their cases. Moreover, there is precious little cooperation by both sides in postconviction investigation. As discussed in detail later, prosecution investigators often are the same investigators who are alleged to have committed misconduct during the underlying pretrial and trial stages.[9] Moreover, their general focus is on protecting the conviction, not challenging whether there were mistakes that led to the defendant's conviction.[10] Petitioners also approach their investigations from a strongly adversarial perspective. Their goal is to show how law enforcement and prosecutors may have cheated to get their convictions by failing to disclose exculpatory or impeachment information, as well as to document all of the failings of their original defense counsel. Witnesses can be pressured to recant and petitioners are reluctant to trust information obtained by the prosecution during the postconviction stage.

Postconviction discovery practices are also affected by the tension between finality and accuracy. There is generally no right to discovery at the postconviction stage.[11] Although there are current proposals to enact ethical rules requiring prosecutors to disclose postconviction *Brady*[12]

6. *See* GROSS & SHAFFER, *supra* note 5, at 40 (providing full report on the scope of postconviction challenges).

7. *See infra* note 68 and accompanying text.

8. *See* Pennsylvania v. Finley, 481 U.S. 551, 558 (1987) ("[A] constitutional right to appointed counsel . . . does not exist in state habeas proceedings."); *id.* at 555 ("[S]ince a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.").

9. Laurie L. Levenson, Essay, *Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) S225, S226 (2011).

10. *See* Medwed, *supra* note 2, at 134–48 (examining the incentives and barriers that prevent prosecutors from seeking to overturn convictions).

11. Except in death penalty cases, postconviction discovery is generally not mandated. *See infra* note 97 and accompanying text.

12. "*Brady* material" refers generally to exculpatory and impeachment evidence that the prosecution is required to disclose under the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), in which the Court held that a prosecutor's withholding of evidence material to guilt or

materials,[13] prosecutors are notoriously stingy in providing postconviction discovery until ordered to do so by a court.[14] Some state laws dictate postconviction discovery, but typically only in cases involving life without the possibility of parole or a death sentence.[15]

Finally, postconviction litigation itself reflects the cross-purposes that prosecutors and petitioners see themselves in once a conviction becomes final. Layers of procedural hurdles stand between a petitioner and his or her chance of having a court evaluate any postconviction claims on the

sentencing violates due process rights. *Brady*, 373 U.S. at 87.

13. *E.g.*, Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1122 app. at 1122–57 (2011) (printing the summer 2010 draft of the *ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function*); Little, *supra*, at 1118–21.

14. The rules for discovery in state habeas proceedings are generally summarized as follows:

> A postconviction relief petitioner does not have an automatic right to discovery. The decision to authorize discovery during postconviction relief is a matter left to the sound discretion of the district court. Unless discovery is necessary to protect a [post]conviction applicant's substantial rights, the court is not required to order discovery. The standard for allowing discovery is sometimes stated in terms of whether there is "good reason" or "good cause" to permit discovery. Where discovery is permitted, a trial court may place limitations on its sources and scope. Where a discovery request amounts to a fishing expedition undertaken in an attempt to create some doubt as to the petitioner's guilt, the request is properly denied. Likewise, prisoners cannot seek discovery at the postconviction stage if the requested evidence could have been obtained at trial.

39 AM. JUR. 2D *Habeas Corpus* § 185 (2013) (footnotes omitted). Whereas the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established some additional discovery rules for petitioners in federal courts, discovery may only be conducted upon leave of the court after detailing for the court the reasons for the request. 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE app. B1 at 2280 (6th ed. 2011).

15. *See, e.g.*, CAL. PENAL CODE § 1054.9 (West 2008) ("Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b)."). Most other states with similar laws invoke "may order" language, in contrast to the "shall order" language in the California statute. *See, e.g.*, MISS. CODE ANN. § 99-39-15 (2007) (outlining a permissible procedure requiring "leave" of the court); VT. STAT. ANN. tit. 13, § 5564 (Supp. 2012) ("Upon motion by the petitioner or the state, and after providing the nonmovant with reasonable opportunity to respond to the motion, the court may permit reasonable discovery and the right to depose witnesses."). However, there are a few states on the other end of the spectrum, such as North Carolina, that have enacted open file discovery statutes applicable to all criminal cases in superior court. N.C. GEN. STAT. § 15A-903(a)(1) (2011) ("Upon motion of the defendant, the court must order: . . . The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant."). It took a major prosecutorial scandal for the state to move toward an open discovery practice. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–73 (2008) (discussing the movement toward discovery reform in North Carolina).

merits.[16] Prosecutors fight tooth and nail to prevent a court from having an evidentiary hearing regarding a postconviction claim; judges usually are not inclined to use their limited resources to revisit old cases. Nearly 14 percent of habeas petitions in noncapital cases are summarily rejected on procedural grounds.[17] A more startling statistic is the percentage of capital

16. AEDPA, signed by President Bill Clinton on April 24, 1996, was designed to "streamline" capital appeals without "undercu[tting] meaningful Federal habeas corpus review." 2 HERTZ & LIEBMAN, *supra* note 14, app. D at 2370–71 (quoting Statement of the President of the United States upon Signing the Antiterrorism Bill). *See also id.* at 2369–72 (providing in full President Clinton's statement upon signing AEDPA). In practice, the act created a mountain of significant procedural hurdles to inmates seeking habeas relief. These include: (1) AEDPA establishes a one-year statute of limitations for the filing of a habeas corpus petition in federal court, with the period beginning on the date upon which the defendant's conviction becomes final upon the completion of direct appeal. 28 U.S.C. § 2244(d)(1) (2012). (2) AEDPA amends the rules governing the exhaustion of state remedies. All claims must be exhausted in state court before a petition is filed in federal court. If not, claims are normally dismissed for failure to exhaust. However, under AEDPA, if a petition contains unexhausted state claim(s), and the court determines the other exhausted claim(s) are without merit, the court may deny the petition on the merits rather than dismissing for failure to exhaust. *Id.* § 2254. (3) If a state court fairly adjudicated the legal merits of a federal claim with an adequate accompanying explanation, the federal court must accept the findings of the state court unless the state court's adjudication was "contrary" to "clearly established" federal law, or "involved an unreasonable application of clearly established" federal law. *Id.* § 2254(d)(1). (4) AEDPA alters the procedures for successive petitions. A defendant must now apply to a circuit panel for authorization to file a successive petition in district court. AEDPA bars a rehearing or certiorari review of the panel's determinations. AEDPA's new successive petition standards prohibit same claim petitions and limit new claim petitions to instances in which a legal rule applies retroactively or in which the facts on which the defendant relies were unavailable earlier. *Id.* § 2244.

Many commentators have expressed frustration with the numerous procedural hurdles raised by AEDPA. *See, e.g.*, Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 97 (2012) ("Much more so than in the pre-AEDPA era, state prisoners now face unique procedural barriers and one of the most uncharitable standards of review known to law."); Brooke N. Wallace, Comment, *Uniform Application of Habeas Corpus Jurisprudence: The Trouble with Applying Section 2244's Statute of Limitations Period*, 79 TEMP. L. REV. 703, 728 (2006) ("[M]odern habeas law [is] 'a labyrinth of counterfactuals and arcane procedural hurdles that few state petitioners manage to navigate.'" (quoting Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 615 (2004))).

Procedures in state postconviction proceedings vary from state to state. Generally, habeas relief is limited exclusively to claims of violations of federal or state constitutions, and is only available after complete exhaustion of state remedies. *See* 1 HERTZ & LIEBMAN, *supra* note 14, §§ 3.1–.5, at 117–232 (proving an overview of AEDPA habeas corpus review process).

17. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 48 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (averaging 42.2 percent of 368 capital cases and 13.3 percent of 1986 noncapital cases); *id.* at 46–48 (providing additional statistics on dismissals in capital and noncapital cases). The hurdles are particularly high for defendants to bring postconviction claims of ineffective assistance of counsel. *See also* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 8, 10–11 (2009) (explaining the many problems that make success on postconviction claims of ineffective assistance of counsel difficult).

cases dismissed on procedural grounds alone. Forty-two percent of all death penalty cases are also rejected because of procedural deficiencies.[18] Aware of these daunting odds, petitioners often engage in scorched earth tactics to raise every conceivable claim that could lead to habeas relief. Nonetheless, in contrast to how European countries and other inquisitorial systems approach postconviction litigation,[19] courts in the United States spend relatively little time reconsidering the accuracy of a conviction during postconviction habeas proceedings.

There are other ways to approach postconviction cases and the time is right to consider alternatives. As we near the crowded crossroads of criminal law, it is important to reevaluate the efficiency and efficacy of current postconviction practices, as well as to explore alternative approaches that will better ensure that innocent persons do not remain trapped in the criminal justice system. Most importantly, it is important to examine what we are trying to accomplish by postconviction review. If it is just a continuation of the adversarial process of trial, it may be less likely to uncover mistakes that tainted the original proceedings. However, if it is a collaborative effort between defense lawyers and prosecutors, it has the potential to expose failures in the criminal justice system. This Article seeks to do exactly that. Part II will set forth the overall tension between prosecutors and defendants in postconviction litigation and how current rules are driven by the goal of finality. Part III will then discuss how the tension between finality and accuracy is reflected in investigative, discovery, and litigation practices. Part IV will set forth proposals for reform. Finally, Part V will conclude.

Sometimes, things must get so bad that there is no choice but to try new options.[20] Given the current incarceration and exoneration rates, we

18. KING, CHEESMAN & OSTROM, *supra* note 17, at 48.

19. *See* Daniel H. Foote, *"The Door That Never Opens"?: Capital Punishment and Postconviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367, 499 (1993) (explaining that compared to American courts, Japanese courts place greater emphasis "o[n] the pure search for truth, . . . resulting in a more liberal judicial approach favoring the grant of retrials where the ultimate objective of discovering the truth would be served"); Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 109 (2009) ("Review of wrongful convictions in the United States is nowhere near as broad as it is in the United Kingdom."); Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 475 (2012) ("[T]he Finnish system [i]s relatively more exclusively focused on achieving accurate results, even at some cost in terms of efficiency.").

20. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 113–14 ("Our criminal procedure has long remained frozen in time. . . . By illuminating the worst errors that any criminal justice system can possibly make, these actions align the incentives of actors on all sides to prevent the systemic errors that cause wrongful convictions. In so

may be at that point. At this crossroad, it is time to use a new map to lead our way. As one noted scholar has stated, it is time to make prosecutors "minister[s] of justice."[21]

## II. THE NEVER-ENDING TENSION BETWEEN FINALITY AND ACCURACY

The criminal justice system is obsessed with finality.[22] While it professes to focus on obtaining fair and accurate results, the goal of finality is never far away. As Kyden Creekpaum noted, "Accuracy and finality are policy goals in tension with each other, and whose balance crucially informs overall legitimacy [in the criminal justice system]."[23] When prosecutors try cases, they generally expect that if they follow the rules for trial and successfully defend a conviction on appeal, the matter will be closed. They do not necessarily expect protracted postconviction litigation of a case. It is critical to their operation that cases be concluded and that the finality of juries' judgments be upheld.

There are legitimate reasons for finality to be a critical goal of criminal proceedings. First, prosecutors know that there are more cases to come. There is a seemingly endless flow of criminal cases for prosecutors to handle.[24] For example, since 2005, prosecutors have the resources to prosecute only approximately 2 percent of all drug-related crimes that authorities estimate are committed in the United States.[25] There simply are

doing, federal wrongful conviction cases provide a catalyst for remedies that promise to reshape our criminal justice system in the years to come.").

21. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009). *See also id.* at 37–38 (discussing how to achieve the minister of justice ideal).

22. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453 (1963) (noting that in focusing on the values of finality, "we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends"); David P. Kennedy, *The End of Finality*, MD. B.J., Nov.–Dec. 2004, at 24, 26 ("Finality exists when the result of a criminal case is no longer subject to legal challenge. Finality is said to be one of the desirable ends of the criminal law." (citing McCleskey v. Zant, 499 U.S. 467, 491 (1991))).

23. Kyden Creekpaum, Note, *What's Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179, 1203 (2007).

24. The caseload for prosecutors depends, of course, on the rate of crime and law enforcement efforts in their individual communities. However, there is a general recognition that prosecutors, like defense lawyers, have had a steady or growing docket of cases since the 1980s. For example, in Harris County, Texas, each prosecutor is expected to handle more than 1500 felonies per year and more than 500 felonies at a time. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266–74 (2011) (describing the large caseloads of prosecutors in large jurisdictions).

25. *See* Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and*

insufficient resources to spend countless years on investigating, prosecuting, and reprosecuting a single case. Second, finality is important for the parties in the case. Victims want to move on with their lives and a criminal judgment can provide some closure to help with that process.[26] Although victims rarely can be made whole, a final resolution can assist them to put a criminal experience behind them. Third, courts want cases to be resolved. They, too, operate with limited resources.[27] Dockets are overflowing, and judges have both a practical and psychological need to believe that they have fairly and finally resolved a case.

The interest in finality is important not just for the prosecution. A fundamental rationale for the prohibition on double jeopardy is that a suspect should not be subject to repetitive trials.[28] Defendants should be able to move on with their lives, and the results of their criminal proceedings should not depend on the prosecution's luck in trying a case repeated times or on the government's ability to wear down the resources

*Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 764, 777 n.143 (2005).

26. *See* Creekpaum, *supra* note 23, at 1182 ("When every trial exposes the defendant to significant 'embarrassment, expense, and ordeal,' the virtue of finality protects individuals from 'liv[ing] in a continuous state of anxiety and insecurity' while worrying about possible future retrial."); Kristen Lindsay Todd, Comment, *Double Jeopardy and the Death Penalty: A Fundamental Constitutional Protection with Life or Death Consequences*, 27 CAMPBELL L. REV. 117, 127–29 (2004) (explaining that some arguments favoring the prohibition on double jeopardy consider the financial and emotional burdens on the defendant that accompany the extended duration for which he or she is stigmatized because of an unresolved charge).

27. *See McCleskey*, 499 U.S. at 491 ("Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes."); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 597–98 (1994) ("[T]he habeas court is being called on to perform a task that should have been performed at the state-court level. Why, then, repeat the process unnecessarily, taxing limited federal judicial resources which are so sorely needed . . . in criminal trials and appeals 'which deserve our most careful attention?'").

28. *See* Crist v. Bretz, 437 U.S. 28, 33 (1978) ("A primary purpose served by such a rule is akin to that served by the doctrines of *res judicata* and collateral estoppel—to preserve the finality of judgments."); Green v. United States, 355 U.S. 184, 187–88 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense[,] and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."); Creekpaum, *supra* note 23, at 1181–82 ("The virtue of finality, enshrined in the concept of double jeopardy, is a vital ancient protection of individual liberty. When every trial exposes the defendant to significant 'embarrassment, expense, and ordeal,' the virtue of finality protects individuals from 'liv[ing] in a continuous state of anxiety and insecurity' while worrying about possible future retrial." (alteration in original) (footnotes omitted) (citations omitted)); Anna R. Light, Note, *Criminal Law: The Tension Between Finality and Accuracy: Double Jeopardy in Guilty Pleas*—State v. Jeffries, 39 WM. MITCHELL L. REV. 306, 307 (2012) ("When a defendant is in danger of twice being put in jeopardy, the policies of finality and the policies against governmental overreaching invoke enforcement of the Double Jeopardy Clause." (footnotes omitted)).

and stamina of a defendant.[29] In fact, the criminal justice system vests so much interest in the goal of finality that the Supreme Court recently held in *Evans v. Michigan*[30] that when a judge acquits a defendant because the prosecutor failed to prove elements that are not actually required for the offense, the interest in finality governs, and the defendant cannot be retried.[31]

Every procedural aspect of the criminal justice system reflects this fixation with finality. Whether it be statutes of limitation,[32] deadlines for motions for new trials,[33] or the endless rules governing habeas and postconviction relief,[34] the goal of obtaining an accurate result in a case is always tempered by the need for finality. Prosecutors are led to believe that

29. *See Crist*, 437 U.S. at 33, 38 (reasoning that double jeopardy promotes finality, the minimization of distress caused by the process of a criminal trial, and the right to have a chosen jury); *Green*, 355 U.S. at 187–88 (citing "embarrassment, expense[,] and ordeal" as the underlying reasons for double jeopardy).

30. Evans v. Michigan, 133 S. Ct. 1069, 1081 (2013).

31. In *Evans*, the defendant was apprehended while fleeing from a burning building with a gasoline can and subsequently charged with arson. Although the evidence pointed toward his guilt, petitioner moved for a directed verdict of acquittal based on the state's failure to prove the "'[f]ourth' element of the offense 'that the building was not a dwelling house.'" *Id.* at 1073. The trial court granted the motion, but the state appealed and the court of appeals reversed and remanded the case because "burning 'other real property' is a lesser included offense . . . , and disproving the greater offense is not required." *Id.* The court of appeals rejected petitioner's argument that the Double Jeopardy Clause barred retrial. *Id.* A divided Michigan Supreme Court affirmed the court of appeals decision that the trial court made an error of law; thus, retrial was not barred by double jeopardy. *Id.* at 1074. In an eight to one decision, the United States Supreme Court disagreed. *Id.* at 1081. The majority relied on the precedent established by "*Martin Linen*, *Sanabria*, *Rumsey*, *Smalis*, and *Smith*, [which] instruct[ed] that an acquittal due to insufficient evidence precludes retrial," despite the lack of merit in the court's ruling or reliance on an incorrect ruling of law. *Id.* at 1075.

32. *See* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 158 (2008) (explaining that even when the evidence is compelling, "a charge cannot be filed outside the statute of limitations"); Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1544 (1997) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 262 (Powell, J., concurring))).

33. Federal Rules of Criminal Procedure 33 outlines the two time limitations that must be followed in order to move for a new trial. A party has either three years or fourteen days to move for a new trial depending on the circumstances of the case. FED. R. CRIM. P. 33. These limitations are jurisdictional, and a court may not extend those deadlines after their expiration. *Id.* advisory committee's note to 2005 amendments. *See also* United States v. Glenn, 389 F.3d 283, 287 (1st Cir. 2004) (holding that counsel's alleged failure to inform defendant of the seven day limitations period—which changed to fourteen days in 2009—for filing a new trial motion after defendant allegedly asked counsel to withdraw did not equitably toll that period); LAURIE L. LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK 474 n.55 (2013) (discussing the timing of motions).

34. *See* 1 HERTZ & LIEBMAN, *supra* note 14, §§ 3.1–.5, at 117–232 (providing overview of the federal habeas corpus process under AEDPA).

if these rules are followed, both accurate and final decisions will be made.[35]

Postconviction proceedings pose the greatest threat to the belief in the finality of criminal proceedings. By the time of habeas corpus challenges, a defendant has had a trial (or entered a guilty plea) and, most often, a chance to appeal. Yet, the defendant continues to seek relief in the courts. As Justice Ginsburg recently noted in *McQuiggin v. Perkins*,[36] when petitioners later attempt to overturn convictions made final on appeal, the courts "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[37]

The procedural hurdles for seeking habeas relief in both state courts and, especially, federal courts under the Antiterrorism and Effective Death Penalty Act ("AEDPA") have made an art form of embracing the goal of finality over claims of an unfair conviction. Consider, for example, the standards for successive petitions. AEDPA prohibits the filing of same claim successive petitions,[38] which are "petitions seeking to relitigate [federal] claims previously denied on the merits."[39] AEDPA enacts additional procedural and substantive hurdles for new claim petitions. Petitioners must navigate through a procedural obstacle course. First, before filing a successive petition in district court, the petitioner must move for an order authorizing the district court to consider the petition. A three-judge panel in that court can grant the order only if the petition satisfies AEDPA. Even then, the district court must dismiss any claim that the court of appeals has authorized if the applicant has not made a prima facie

35. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 970–71 (1989) (explaining how the rules themselves may not go far enough in ensuring that accurate decisions are made, especially for guilty pleas, if the defendant's knowledge is incomplete or limited).

36. McQuiggin v. Perkins, 133 S. Ct. 1924 (2013). In *McQuiggin*, Floyd Perkins was convicted of first-degree murder and sentenced to life in prison without parole. *Id.* at 1929. Over eleven years after his conviction, he filed a habeas petition on the basis of actual innocence, alleging that his companion on the night of the murder had killed the deceased. *Id.* Under AEDPA, a prisoner has one year to file a petition for habeas corpus, unless the petitioner alleges newly discovered evidence, which allows him to file one year from the date that the facts could have been discovered by due diligence. *Id.* at 1931. Floyd Perkins alleged newly discovered evidence of actual innocence to avoid being time barred. *Id.* at 1929. The Supreme Court addressed the issue of whether AEDPA time limitations can be overcome by a showing of actual innocence. It held that whereas the miscarriage of justice exception continues to overcome procedural defaults, timeliness is a relevant factor in deciding the credibility of the petitioner's actual innocence claim. *Id.* at 1931–32. Thus, Floyd Perkins's claims of innocence faced an uphill battle given his six-year delay in filing his habeas petition.

37. *Id*. at 1932 (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995)).

38. 28 U.S.C. § 2244(b)(1) (2012).

39. 2 HERTZ & LIEBMAN, *supra* note 14, § 28.1, at 1559.

showing that the claim satisfies AEDPA's substantive requirements. The claim must either rely on a new rule of constitutional law made retroactive to the states by the Supreme Court, which must have been unavailable to the petitioner during his state proceedings, or be based on facts that could not previously have been discovered through the exercise of due diligence and, if true, must establish by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[40] Certainly, the rules for seeking relief under a claim of actual innocence reflect the reluctance to reopen proceedings even when a defendant alleges that there is new evidence proving his or her actual innocence. Under *Herrera v. Collins*,[41] a defendant cannot raise a freestanding claim of actual innocence unless he or she demonstrates "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him or her guilty]."[42]

The basic grounds for postconviction relief are also founded on standards that integrate the interest in finality. Most habeas cases involve claims of *Strickland*[43]or *Brady*[44] violations. Under *Strickland v.*

40. 28 U.S.C. § 2244(b)(2)(b)(ii). *See also* 2 HERTZ & LIEBMAN, *supra* note 14, §§ 28.3[d]–[e], at 1610–32 (discussing AEDPA procedures and legal standards).

41. Herrera v. Collins, 506 U.S. 390, 390 (1993).

42. *Id*. at 442 n.6 (Blackmun, J., dissenting) (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)).

43. *See* Strickland v. Washington, 466 U.S. 668, 671 (1984) (stating that to be reversible, sentencing errors require a finding that counsel deficiency must cause prejudice); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Unendangered Right?*, 29 AM. CRIM. L. REV. 35, 81–83 (1991) (analyzing judicial inconsistencies in context of values served by the right to counsel); Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 927–41 (2013) (analyzing the expanding reach of *Strickland v. Washington*); Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 87–88 (2012) (analyzing the impact *Gideon v. Wainwright* had on the right to counsel); *Right to Counsel*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 455, 473–92 (2005) (analyzing the impact of *Strickland v. Washington*); Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 426–33 (2011) (arguing that federal courts have begun to eliminate the ineffective assistance of counsel doctrine); Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1117–29 (1999) (analyzing the Sixth Amendment's right to effective assistance of counsel).

44. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1436 (2011) ("Brady establishes a retrospective standard for establishing a prospective obligation." (quoting John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 516 (2001)) (internal quotation marks omitted)); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 685–86 (2006) (discussing *Brady*'s effect on the criminal justice system); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535 (2010) ("The United States Supreme Court's

*Washington*, defendants can seek to overturn their convictions for violation of the Sixth Amendment right to effective assistance of counsel. However, the *Strickland* standard requires that defense counsel not only act below professional standards, but also that counsel's errors had a reasonable probability of affecting the outcome of the proceedings.[45] This focus on whether errors affected the underlying proceedings is rooted in the standard for prejudice established in *Brady* for violations of a defendant's due process right to receive exculpatory evidence.[46]

Likewise, the rules governing the effect of the destruction of evidence ensure that only those cases in which the error would have made a difference are reopened by the court. In *Arizona v. Youngblood*[47] and *Illinois v. Fisher*,[48] the Supreme Court held that there has been no violation

*Brady* decision in 1963 offered hope that prosecutors can straddle the fence between their two principal responsibilities: To serve simultaneously as zealous advocates and neutral 'ministers of justice.' . . . But in the ensuing half-century the ideals of *Brady* have not gained much traction in practice. Even worse, the doctrine as presently constituted may provide a disservice to the very concept of justice." (footnotes omitted)); Scott E. Sundby, Essay, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643–44 (2002) ("[E]xamin[ing] the failed promise of *Brady* and argu[ing] that while *Brady* undoubtedly sets forth an important constitutional right, its significance lies primarily outside the realm of pre-trial discovery."); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 145–47 (2012) (examining the practice of courts forgiving prosecutors for failing to disclose *Brady* evidence).

45. *Strickland*, 466 U.S. at 696–98.

46. *See* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1180–81 (2005) (noting that the Supreme Court did not fuse the *Brady* and *Strickland* standards but had a similar approach to materiality); Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1185 (2012) (analyzing the Supreme Court's approach to interpreting the Sixth Amendment); Enrico B. Valdez, *Practical Ethics for the Professional Prosecutor*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 250, 261–64 (2011) (suggesting steps that will ensure employees disclose necessary *Brady* evidence); Leslie Kuhn Thayer, Comment, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 WIS. L. REV. 1027, 1055–56 (arguing for the modification or elimination of the exclusive control requirement).

47. Arizona v. Youngblood, 488 U.S. 51 (1988). In *Youngblood*, the defendant was convicted of sexually assaulting a minor. *Id.* at 52. Because the investigators in the case had only just begun using DNA testing procedures, some evidence was improperly stored, and as a result, the DNA evidence in the case was corrupted. *Id.* at 54. On appeal, the defendant contended that he would have been exonerated had the DNA evidence been properly preserved. *Id.* The United States Supreme Court upheld the conviction, finding that a violation of the Due Process Clause of the Fourteenth Amendment requires the defendant to show bad faith on the part of investigators with regard to the destruction of evidence. *Id.* at 58.

48. Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam). In *Fisher*, the Supreme Court reaffirmed the standard set forth in *Youngblood*, continuing to abide by a high standard that makes it difficult for defendants to argue that destroyed evidence impacted the fairness of their proceedings. *Id.* at 547–48. Respondent Gregory Fisher failed to appear after he was charged with cocaine possession. *Id.* at 545. He remained a fugitive for ten years until he was apprehended on an unrelated charge. *Id.* By the time the state reinstated the cocaine possession charge, the substance seized from him had been destroyed in

of a defendant's right to a fair trial unless a defendant can show that prosecutors destroyed evidence in bad faith and that the defendant was prejudiced by the evidence that was lost.[49] In setting its standard, the Court has taken a narrow view of the universe of "evidence" in a case and what its value might be, especially if technological changes become available to help defendants probe what additional information seized evidence might reveal.[50] In this day and age, it is not readily apparent when evidence is seized how important it might be to a case or what its exculpatory value might be.

Lastly, courts naturally embrace the finality of judgments because they must do so to justify the imposition of sentences. The retributive goal of punishment is tethered to the belief that a defendant must be punished in order to sear the verdict into the consciousness of the defendant and society.[51] Once marked as a lawbreaker, a defendant may be set aside and

accordance with police procedures. *Id.* at 546. The Supreme Court held that the destroyed evidence was not the type of "material exculpatory evidence" that would undermine the integrity of the prosecution's case, and that Gregory Fisher was required to prove that the police acted in bad faith when they destroyed the evidence. *Id.* at 548. Without such a showing, there could be no violation of Gregory Fisher's due process rights. *Id.*

49. *Fisher*, 540 U.S. at 548; *Youngblood*, 488 U.S. at 58.

50. Both courts and commentators have long been concerned with the *Youngblood* standard, recognizing how the destruction of physical evidence can undermine defendants' attempts to demonstrate their innocence. *See, e.g.*, State v. Morales, 657 A.2d 585, 594 (Conn. 1995) (holding that the police's failure to preserve the victim's jacket stained with her attacker's semen violated the defendant's right to present potentially exculpatory evidence and warranted Connecticut's departure from the *Youngblood* standard); State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) (rejecting the bad faith analysis set forth in *Youngblood* in favor of a balancing approach to determine whether the state's destruction of a videotape taken of the defendant's performance on sobriety tests infringed upon the defendant's due process rights); Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 279–83 (2008) (questioning the validity of the *Youngblood* standard given the advance of DNA testing technology, the development of innocence initiatives to give access to DNA testing for convicted individuals, and the near impossibility to prove the bad faith requirement set by *Youngblood*); Albert M.T. Finch, III, Note, *"Oops! We Forgot to Put It in the Refrigerator!": DNA Identification and the State's Duty to Preserve Evidence*, 25 J. MARSHALL L. REV. 809, 832 (1992) ("[T]he 'bad faith' standard inappropriately focuses on the motive of the investigator rather than the relative value of the lost evidence.").

51. *See, e.g.*, 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) ("[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense . . . . The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it."); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627 (1992) ("[T]he fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer." (quoting C.W. K. Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 221 (1954)) (internal quotation marks omitted)); Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264–65 (1987) ("[C]riminal conviction charges a moral fault—if not the violation of a moral standard embodied in the criminal prohibition, then the fault of doing what the law has forbidden.").

discarded as society's waste.[52] With the general presumption that a defendant received a fair trial and that the rules of the trial ensured the reliability of the verdict, there is a bias that evidence presented closer to the time of the crime is more reliable than evidence later discovered.

Postconviction proceedings challenge all of these assumptions, especially as there are advancements in technology[53] and the social sciences.[54] Professor David Kennedy wrote: "The value of finality, then, is dependent on the degree of confidence in the result of the process, and ultimately on whether that confidence is justified."[55] While prosecutors and judges tend to have great confidence that if established pretrial and trial procedures are followed, then an accurate result will occur, experience has taught us differently. There are no guarantees that even the perfect trial will produce an accurate result, and given standards for harmless error,[56] our trials are anything but perfect.

In contrast with the prosecutor's focus on finality, defense lawyers stay focused on whether the defendant's conviction produced an accurate result. Generally, defense lawyers have less confidence that trial rules will produce accurate results because these rules are often violated.[57] Moreover,

52. *See* STEPHEN, *supra* note 51, at 81–82 ("I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.").

53. *See* ROMAN ET AL., *supra* note 5, at 10 (describing how postconviction DNA testing detects wrongful convictions); Craig M. Cooley, *Advancing DNA Technology and Evolving Standards of Decency: Do Capital Prisoners Have an Eighth Amendment Right to Post-Conviction DNA in Light of* Osborne*?*, 4 CHARLESTON L. REV. 569, 570–71 (2010) (stating that advancements in DNA testing technology have a potential role in postconviction proceedings).

54. *See* Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 217, 220–21 (2006) (telling the story of five teenage boys who had falsely confessed and been convicted of rape, and who were released thirteen years later after the true attacker had confessed); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 148 (2008) ("[E]yewitness error is the leading contributor to wrongful convictions—present in 79 [percent] of the first 200 DNA exonerations."); *id.* at 161 ("[Sixteen percent] of the first 200 DNA exonerations involved false confessions.").

55. Kennedy, *supra* note 22, at 28.

56. *See* Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1351 (1994) (explaining the difficulties in applying the range of harmless error standards created by the courts); Meehan Rasch, Note, *California's Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Proceedings and Establishing the Proper Test for Dependency*, 35 W. ST. U. L. REV. 433, 436–38 (2008) (describing the incoherence of the harmless error doctrine).

57. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 233–37 (1998) (presenting evidence on the pervasiveness of police perjury); Donald A. Dripps, *Police, Plus Perjury, Equals*

even when there have been no identifiable errors in procedure, it is not in the defense's interest to accept the finality of a result. Lack of finality gives a defendant hope that one day a wrongful conviction will be remedied.

There are good reasons why defendants do not subscribe to the belief that all of the rules put into place for a fair trial necessarily guarantee a fair and accurate result. The rules are too malleable to ensure that all of the pertinent information regarding a case is obtained before trial. Defense counsel has broad discretion to decide how much investigation to do before trial.[58] The procedural rules can only process evidence that is obtained. If this evidence is never located, then the rules alone do not guarantee an accurate result. As science improves so does our understanding of how jurors' internal prejudices might affect their analysis of evidence.[59] Even our very perception of defendants and the seriousness of their crimes changes over time. For example, the image of those convicted of three

*Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 693 (1996) (same); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 109 & n.159 (1992) (nothing that eleven out of eleven public defenders surveyed "believe that at least some of the time the prosecutors 'knew or had reason to know' that the police were lying in suppression hearings"); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 2–3 (2010) (presenting evidence on the pervasiveness of police perjury ).

58. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) ("In any [ineffective assistance of counsel] case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); Miles v. Ryan, 691 F.3d 1127, 1144 (9th Cir. 2012) (stating that courts will not grant habeas petitions on grounds of defense counsel's failure to investigate simply because the defendant disagreed with his counsel's chosen defense strategy). For thoughtful discussions of the challenges in setting investigative standards for defense counsel, see John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again":* Williams v. Taylor*,* Wiggins v. Smith*,* Rompilla v. Beard*, and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 147–48 (2007) (comparing the Supreme Court's "transition in the rigor of the Court's review of claims that trial counsel conducted an inadequate investigation" in *Strickland v. Washington*, *Darden v. Wainwright*, and *Burger v. Kemp*); Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521, 579 n.294 (2005) ("Sixty-seven percent of the petitions reviewed by the Texas Defender Service . . . contained . . . claims with 'no extra-record materials reflecting [an] investigation.' . . . The Texas Defender Service used these facts to conclude that counsel in those cases had rendered incompetent assistance." (citation omitted)); Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 80–98 (2007) (explaining the evolution of the *Strickland* test and comparing the standard to that of *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*).

59. *See* Findley, *supra* note 54, at 166 ("[F]aulty forensic sciences played a role in [57 percent] of the first 200 DNA exonerations." (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 81 n.95 (2008))); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 167 (2011) ("Social science has shown that bias, racial or otherwise, is entrenched and pervasive throughout the jury system.").

strikes crimes as hardened criminals who can never be let out of prison has changed with our understanding of the harshness of these laws.[60] Thus, defense lawyers are reluctant to allow a verdict and sentence to be fixed in time. Prosecutors think they got it right because they followed the rules. Defense lawyers tend to believe that prosecutors have not completely followed the rules and, even if they did, much can be overlooked or inappropriately disregarded given those rules.[61]

In postconviction proceedings, defense lawyers and prosecutors work in opposite directions. Prosecutors want to shut down any attempt to overturn a conviction. Defense lawyers do not want to quit until they are positive they have received an accurate result. Thus, it is hard to find common ground.

## III. HOW DIFFERING PERSPECTIVES AFFECT THE HANDLING OF POSTCONVICTION CASES

As the sides move in opposite directions, their immediate goals in postconviction investigation, discovery, and litigation differ as well. For prosecutors, the goal is to shut down postconviction litigation at the earliest possible stage. Thus, if procedural rules can be used to dismiss a case or prevent an evidentiary hearing, prosecutors will raise them.

The goal for the defense is exactly the opposite. Those who are convicted try individually and, when possible, through counsel to reopen a case. Realizing how difficult it is to win a postconviction claim, defense

60. *See* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 610 (2012) (arguing that strikes given to juveniles is a form of cruel and unusual punishment); Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion's Failure to Ameliorate Punishment Under California's Three Strikes Law*, 41 DUQ. L. REV. 1, 2–3, 12 (2002) (arguing that judges' powers to reduce three-strikes sentences after *People v. Superior Court* (*Romero*), 917 P.2d 628, 628 (Cal. 1996), are not sufficiently utilized, and as a result, defendants convicted of petty and nonviolent crimes are serving hefty sentences under California's three strikes law).

61. One of the biggest and most legitimate complaints by defense lawyers is that prosecutors get to decide whether discovered evidence qualifies for disclosure under *Brady* standards. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009) (arguing that even ethical prosecutors might fail to disclose exculpatory evidence due to *Brady*'s materiality standard); Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (arguing that *Brady* has caused "many prosecutors to become adept at . . . gamesmanship to avoid compliance" with disclosure); *id.* at 531–38 (discussing the same in detail); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1135–36 (2005) (arguing that *Brady* encourages the withholding of some favorable evidence). While prosecutors may honestly believe that they afforded a defendant a fair trial because undisclosed evidence was unlikely to exonerate the defendant, the defense perspective is that the rules did little, under the circumstances, to ensure the defendant's right to a fair trial.

lawyers often opt for scorched earth tactics in habeas litigation.

### A. POSTCONVICTION INVESTIGATIONS

There are significant problems with how postconviction investigations are handled by both prosecutors and defense counsel. Prosecutors will routinely use the same officers whose misconduct is under scrutiny to investigate postconviction claims brought by habeas petitioners.[62] From the prosecutor's perspective, this is often the quickest way to complete the investigation and close the case because the original investigator will already know the basic facts of the case. Of course, the big problem with this approach is that the assigned investigator has an inherent conflict of interest and is unlikely to probe to overturn a conviction in a case in which he was responsible for convicting the defendant.[63]

Detectives can take very aggressive approaches when conducting their postconviction interviews of trial and potential trial witnesses. It is not uncommon for prosecution investigators to remind trial witnesses of the testimony they gave at trial and to subtly or not so subtly threaten them with perjury if they recant at the postconviction stage.[64] Investigators also may mislead witnesses as to the purpose of their postconviction inquiries, leading them to believe that persons challenging a conviction have malicious motives in seeking a rehearing.[65] Postconviction investigators may hide from witnesses the fact that they are being taped[66] or not share

62. *See generally* Levenson, *supra* note 9 (finding that such assignments are common and suggesting that new investigators be assigned to habeas cases because "[t]rial investigators have too much invested to fairly and objectively evaluate their own work"). Because a natural conflict of interest arises when law enforcement officers are assigned to investigate their own alleged misconduct in postconviction investigations, those officers are often reluctant to point out the flaws in their cases for fear of jeopardizing their credibility. *Id.* at S226. Thus, there continues to be a need for jurisdictions to adopt specific standards that prevent police officers from conducting postconviction investigations on cases where their own misconduct is at issue.

63. *Id.* at S240–41.

64. *See, e.g.*, Traverse for Petitioner at 125, Kash Register v. Rackley (*In re* Kash Register), No. A078883 (Cal. Super. Ct. July 2013) (on file with the *Southern California Law Review*) ("Respondent made thinly-veiled threats to prosecute him for perjury if he assisted the [p]etitioner.").

65. *Id.* at 59.

66. In California, law enforcement officials frequently secretly record postconviction interviews even though California prohibits one-party consent for taping conversations. CAL. PENAL CODE § 631 (West 2008). Law enforcement officers assert that they qualify for exemption because they are permitted to record conversations in criminal investigations. *See* CAL. PENAL CODE § 633 ("Nothing in Section 631 . . . prohibits . . . any . . . police officer . . . from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter."). However, courts have never held that habeas investigations qualify as "criminal investigations." Rather, habeas investigations are technically civil cases, *Habeas Corpus*, LEGAL INFO. INST., www.law.cornell.edu/wex/habeas_corpus (last visited Apr. 2, 2014), and the California Penal Code

with them newly discovered evidence demonstrating a possible miscarriage of justice in the case. These practices regularly occur despite that there is a general duty of prosecutors and law enforcement to use only legitimate methods in postconviction proceedings.[67]

Prosecution teams can also make it difficult for defense counsel to conduct their own investigations. A postconviction investigation by an incarcerated inmate is nearly impossible for the inmate to conduct on his own.[68] Even when counsel is secured, it is still a daunting task for habeas counsel to get the cooperation of prosecution witnesses. Frequently, petitioners will not get past the first step. Habeas counsel must frequently rely on the prosecutor for contact information to reach trial witnesses and investigators on the case. To avoid reopening a case, prosecutors will regularly tell habeas counsel that witnesses do not wish to be located.

Prosecutors and their investigators are extremely protective of witnesses long after a case has been tried.[69] Even when there is no demonstrated threat of violence to a witness, prosecutors tend to view them as fragile individuals who can be coerced or cajoled at any time into changing their stories. It does not even occur to the government team that witnesses may have been living with nagging doubts for years or decades. Certainly, there is little or no follow-up effort to determine whether a witness has discovered any reason to doubt his or her testimony at trial.

Finally, prosecutors are so committed to ensuring that their convictions are final, that they may intentionally or inadvertently cover up for actions of fellow prosecutors during a trial. There are both personal and legal reasons for this conduct. First, prosecutors naturally support their colleagues. It is a brotherhood and sisterhood of individuals who work

generally prohibits nonconsensual taping in civil cases, CAL. PENAL CODE § 631.

67. *See* Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976) ("[Post]conviction judicial decisions . . . should be made with the sole purpose of insuring justice.").

68. *See* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1235 (2012) ("[F]ederal courts engage in mythical thinking in assuming that the average incarcerated inmate is as able to litigate and conduct factual investigations as the professional attorney.").

69. *See* Motion to Exclude Detective Winn from Evidentiary Hearing & Bar Her Contact with Witnesses at 8, *In re* Obie Steven Anthony III, No. BA097736 (Cal. Super. Ct. Aug. 16, 2011) (on file with the *Southern California Law Review*) (describing how a detective tried to dissuade a witness from providing habeas testimony that would contradict the witness's trial testimony); Motion to Exclude Investigators Joe Vita, Detective Roland Rodriguez, & Investigator Curtis McLean from Evidentiary Hearing at 8–9, *In re* Kash Register, No. A078883 (Oct. 2013) [hereinafter Motion to Exclude Vita, Rodriguez & McLean] (on file with the *Southern California Law Review*) (explaining how prosecution investigators pressured witness not to deviate from prior testimony).

together on one side in the pursuit of justice.[70] There is a natural inclination to forgive mistakes by prosecutors and assume that they would not have made a difference in the conviction.[71]

Second, there are legal reasons why prosecutors tend not to reveal misconduct by other prosecutors. If there are subsequent civil actions by exonerees for monetary damages, the focus will be on the overall policies and practices of the prosecutor's office.[72] Misconduct by one prosecutor may raise the issue of competency, failure in training, or bad supervision of other prosecutors. Knowing that a successful habeas action may lead to embarrassing and costly actions against the prosecutor's office, even prosecutors who were not involved in the original trial are generally reluctant to probe too deeply into the actions of their colleagues or to make them available for interviews by habeas counsel. The prosecutor's goal is to shut the door on investigations of misconduct allegations as early as possible in the habeas process.

70. In America, prosecutors work together on a fulltime basis in prosecutorial offices and create a culture focusing on the needs and operations of that office. *See* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1146–57 (2012) (discussing how a prosecutor's work is affected by the office structure in which they work). By contrast, the British criminal justice system uses barristers, British lawyers in private practice, who independently contract to prosecute or defend a particular case. *See* Peter W. Tague, *Guilty Pleas and Barristers' Incentives: Lessons from England*, 20 GEO. J. LEGAL ETHICS 287, 289 n.9 (2007). Although there is still collegiality among prosecutors, there is also more independence in decisionmaking and the handling of pleas and trials. *Id.* at 294.

71. For more regarding prosecutors' cognitive biases, see Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 515 (2007) ("[T]here has been increased attention to the possibility that unintentional cognitive biases can play at least as large a role in wrongful convictions as intentional prosecutorial misconduct.").

72. Individual prosecutors enjoy absolute immunity for their misconduct. However, a prosecution office and the governmental entity governing it do not have such immunity and may be sued if there is a pattern and practice of unlawful behavior. In *Monell v. Department of Social Services*, 436 U.S. 658, 658 (1978), the Supreme Court held that municipalities would no longer enjoy absolute immunity from lawsuits under 42 U.S.C. § 1983 if the constitutional deprivation stems from a governmental custom. *Id.* at 690–91. Whereas the *Monell* standard opened up prosecutorial agencies to civil liability for misconduct such as *Brady* violations, the recent Supreme Court decision in *Connick v. Thompson*, 131 S. Ct. 1350, 1366 (2011), narrowed the scope of liability under § 1983 to cover only patterns of violations or single incidents of extraordinary prosecutorial misconduct. Planned, tolerated and repeated misconduct can create liability for a prosecutorial office. *Id.* at 1366. While it is still extraordinarily difficult to address prosecutorial misconduct through lawsuits, the prospect of civil liability and negative publicity for a group of prosecutors puts pressure on them to circle the wagons when accusations of misconduct or wrongful convictions arise. *See* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209 (2011) ("[Connick] sharply limit[ed] one of the few remaining avenues of redress for prosecutorial misconduct."); David Rittgers, Connick v. Thompson*: An Immunity That Admits of (Almost) No Liabilities*, 2011 CATO SUP. CT. REV. 203, 203 (2011) ("While ethical sanction and criminal prosecution provide theoretical deterrents to misconduct, they have proved ineffective in practice.").

Take, for example, the prosecution's conduct in *Cress v. Palmer*.[73] There, petitioner Thomas Cress was preparing his pro se motion for habeas corpus relief. He filed a pro se motion for trial transcripts with his prosecutor's office on May 8, 1992. Shortly after receiving Thomas Cress's motion, the state of Michigan began implementing a statewide program to "increase storage space" by destroying evidence from cases determined to be "closed."[74] At least one prosecutor at the office was aware that Thomas Cress was pursuing habeas relief before the directive went into effect. Nevertheless, that prosecutor ordered the destruction of all physical evidence related to Thomas Cress's case that fall.[75] No one bothered to inform Thomas Cress that his evidence had been destroyed. The court held that because *Youngblood* applies to the pretrial destruction of evidence, and "the Supreme Court has not clearly established that [post]conviction destruction [of evidence] is a due process violation," Thomas Cress's claim regarding the destruction of evidence "was not cognizable on federal habeas review."[76]

This tendency to wittingly or unwittingly impair postconviction challenges is further illustrated by the prosecution's conduct in *Collins v. City of New York*.[77] Petitioner Jabbar Collins was granted habeas relief in 2010 after serving sixteen years for a murder conviction.[78] Periodically after his conviction in 1994, in appealing his conviction and also in seeking state habeas relief, Jabbar Collins made requests to the Kings County District Attorneys Office ("KCDA"), pursuant to New York's Freedom of Information Law ("FOIL"), seeking evidence of any statements made by the police or district attorneys where they made promises to witnesses who testified against him, and any other impeachment or exculpatory evidence they may have. Prosecutors, acting as FOIL officers, repeatedly denied the existence of such documents.[79] However, in 2008, as Jabbar Collins was pursuing federal habeas relief, employees at KCDA suddenly produced the same documents that Jabbar Collins had been seeking for fifteen years.[80] The federal judge "lambasted KCDA, calling the office's conduct—and, in particular its continued denials of wrongdoing—'shameful' and 'a

73. Cress v. Palmer, 484 F.3d 844 (6th Cir. 2007).
74. *Id.* at 848.
75. *Id.* at 848.
76. *Id.* at 853.
77. Collins v. City of N.Y., 923 F. Supp. 2d 462 (E.D.N.Y. 2013).
78. *Id.* at 466.
79. *Id.* at 468.
80. *Id.* at 469.

tragedy.'"[81] Although Jabbar Collins was granted federal habeas relief on *Brady* grounds, he was unable to pursue a civil action against the KCDA office or prosecutors, as they enjoyed "absolute immunity."[82]

There are other investigative obstacles to petitioners investigating their own habeas cases. Current laws on the handling of physical evidence allow law enforcement to discard old evidence unless the evidence is destroyed in bad faith and the petitioner can show prejudice. These rules, established well before the regular use of DNA and other forensic tests, still stand as an impediment to defendants seeking postconviction relief today.

The seminal case of *Arizona v. Youngblood*,[83] was decided in 1988. Larry Youngblood was convicted of sexually assaulting a minor.[84] The investigators in the case had only just begun using DNA testing procedures, resulting in some evidence being improperly stored, corrupting the DNA evidence.[85] On appeal, the defendant contended that he would have been exonerated had the DNA evidence been properly preserved.[86] The United States Supreme Court upheld the conviction, finding that a violation of the Due Process Clause of the Fourteenth Amendment requires the defendant to show bad faith on the part of investigators regarding the destruction of evidence.[87] Years later, it turned out that Youngblood was correct in his assertion.[88]

More recently, in *Illinois v. Fisher*,[89] the Supreme Court reaffirmed the *Youngblood* rule. Gregory Fisher was arrested and charged with

81. *Id.*

82. *Id.* at 470. *See also id.* at 470–72 (discussing jurisprudence on absolute immunity and its effect on Jabbar Collins's case).

83. Arizona v. Youngblood, 488 U.S. 51 (1988). For years, commentators have criticized the *Youngblood* standard. *See generally* Catherine Greene Burnett, *"If Only": Best Practices for Evidence Retention in the Wake of the DNA Revolution*, 52 S. TEX. L. REV. 335 (2011) (finding the *Youngblood* standard to be unworkable in light of DNA testing advancements); Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893 (2009) (labeling the *Youngblood* standard as an "insurmountable burden on defendants"); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739 (discussing myths surrounding the justice system and how "wrongful convictions sound an increasingly loud discordant note in . . . the American criminal justice system").

84. *Youngblood*, 488 U.S. at 52.

85. *Id.* at 53–54.

86. *Id.* at 54–55.

87. *Youngblood*, 488 U.S. at 57–59.

88. In 2000, defense counsel was able to convince the police department to use new, sophisticated DNA tests to analyze the degraded evidence in Larry Youngblood's case. The new tests exonerated Larry Youngblood, and he was released from prison after serving a decade on his wrongful conviction for sexual assault. *Larry Youngblood*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Youngblood.php (last visited Apr. 1, 2014).

89. Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam).

possession of cocaine in Illinois.[90] He was released on bail and failed to appear at trial, at which point a bench warrant was issued.[91] Gregory Fisher was arrested eleven years later in Tennessee, and the prior charge for cocaine possession was reinstated.[92] Upon requesting discovery of all physical evidence in his case, the defendant was informed that the substance confiscated from him after his first arrest had been destroyed, per state policy.[93] The United States Supreme Court held that the *Youngblood* bad faith requirement applied to this case, and therefore, Gregory Fisher's due process rights were not violated because the evidence was merely "potentially useful," rather than "material[ly] exculpatory."[94]

Both of these cases demonstrate a somewhat myopic view by the Supreme Court of the evidentiary value of physical evidence. In this day and age, it is no longer realistic to believe that the only evidentiary value that evidence will have is that which can be detected before trial. Ongoing scientific developments have made it possible to detect additional information from evidence decades later. It is simply not true that there is a limited universe of evidence available regarding a case that can be determined by the time of trial.[95] Just as no one might have known in 1984 that DNA tests could derive from evidence information that conventional serology testing could not reveal,[96] it is impossible to know what information future tests of physical evidence will uncover. Nonetheless, in the interest of finality and defining the limited universe of evidence

90. *Id.* at 545.

91. *Id.*

92. *Id.*

93. *Id.* at 546.

94. *Id.* at 549.

95. *See Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1557 (1995) (explaining that advances in technology have led to new kinds of evidence); Nicole Dapcic, *A Quest for Exculpatory DNA Evidence or a Wild-Goose Chase? Expansion of Searches for Lost Evidence Under* Horton v. State of Maryland, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 77, 81 (2011) ("Modern DNA testing has exposed the fact that testimony and information used to try defendants during the period of inferior forensic science 'may have contributed to wrongful convictions of innocent people.'").

96. *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 830 (2010) ("[E]very year since 1989, in about 25 percent of the sexual assault cases referred to the FBI . . . the primary suspect has been excluded by DNA testing." (ellipsis in original) (quoting EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii (1996)) (internal quotation marks omitted)). *See generally* Paul C. Giannelli, *Forensic Science: Under the Microscope*, 34 OHIO N.U. L. REV. 315 (2008) (analyzing legal and technical changes in forensic science in the last thirty years); Paul C. Giannelli, *Regulating Crime Laboratories: The Impact of DNA Evidence*, 15 J.L. & POL'Y 59 (2007) (same) [hereinafter Giannelli, *Regulating Crime Laboratories*].

applicable to a criminal case, the law on destruction of evidence works against a petitioner's continual quest for new information about his case.

### B. POSTCONVICTION DISCOVERY PRACTICES

Prosecutors' interest in ensuring the finality of convictions also impacts postconviction discovery practices. Postconviction discovery in many states is very limited. Many times, there are no specific statutes governing postconviction discovery.[97] Prosecutors are not eager to open their files, nor those of their investigators, for inspection by habeas petitioners. There is certainly nothing like open file discovery of these files, even though interests that may have limited discovery access at the time of trial may no longer apply in the postconviction context. For example, at the time of trial, prosecutors may be concerned that the defendant will harass a witness before trial. With the defendant incarcerated, such contact is much more limited.[98] Also, at pretrial, there is the possibility that open discovery

97. *See* 1 THOMSON REUTERS, CRIMINAL PRACTICE MANUAL § 19:32 (2013) ("[M]ost states have no . . . [rules] specifically permitting and regulating discovery in [post]conviction proceedings."). Nearly all of the attention on postconviction discovery has been focused on DNA testing. *See, e.g.*, *New York Fails to Pass Criminal Justice Reforms*, INNOCENCE PROJECT (July 8, 2013, 12:45 PM), http://www.innocenceproject.org/Content/New_York_Fails_to_Pass_Criminal_Justice_Reforms.php (discussing criminal justice reform legislation aimed to reduce the wrongful conviction rate, which was not passed). *See generally* THOMSON REUTERS / WEST, POST-CONVICTION RELIEF THROUGH DNA TESTING (STATUTES) (2012) (providing a fifty-state survey of the legal status of postconviction relief through DNA testing); *Access To Post-Conviction DNA Testing*, INNOCENCE PROJECT http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Mar. 31, 2014) (discussing general trends in postconviction DNA testing laws); Press Release, Innocence Project, Innocence Project Applauds Governor Cuomo for Making Wrongful Conviction Reform a Priority in Coming Legislative Session (Jan. 9, 2013), http://www.innocenceproject.org/Content/Innocence_Project_Applauds_Governor_Cuomo_for_Making_Wrongful_Conviction_Reform_a_Priority_in_Coming_Legislative_Session.php (mentioning proposed non-DNA testing reforms). However, what is lacking are statutes relating to general, non-DNA discovery in postconviction cases. *See, e.g.*, OKLA. STAT. tit. 22, § 1089(D)(3) (2013) ("Subject to the specific limitations of this section, the [c]ourt of [c]riminal [a]ppeals may issue any orders as to discovery or any other orders necessary to facilitate [post]conviction review.").

98. The courts have broad discretion to withhold witness information in posttrial proceedings, as it does in pretrial discovery matters. *E.g.*, COLO. CONST. art. II, § 16 ("[T]he accused shall have the right . . . to meet the witnesses against him face to face."); People v. Ray, 252 P.3d 1042, 1044 (Colo. 2011) (en banc) ("[Post]conviction counsel made a minimal showing of why the witnesses' addresses are material to [post]conviction proceedings. . . . The trial court abused its discretion by lifting the protective order and requiring the disclosure of the witnesses' addresses."); People v. Dist. Court, 933 P.2d 22, 25 (Colo. 1997) (en banc) ("Generally, the rule is that a defendant's right to obtain a witness' address is in aid of the defendant's right of confrontation. . . . The defendant's right of confrontation, however, is not without limitations." (citation omitted)); *id.* at 25–27 (elaborating further on the defendant's right to confrontation and finding that "the witnesses' safety in this case outweighs the defendants' confrontation right"); People v. Robles, 302 P.3d 269, 273–74 (Colo. App. 2011) (finding that a trial delay to secure a witness's safety did not prejudice the defendant). *See also, e.g.*, U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to be confronted with the witnesses against

could impede ongoing investigations regarding the case.[99] A habeas petition that is filed years after a crime, however, is unlikely to cause such problems.

Despite the change in circumstances, prosecutors often safeguard their files as if they hold state secrets. They will disclose no more than they are required to do by statute or court order. For example, in California, there is no general discovery rule for postconviction cases unless the defendant has been sentenced in a capital case or to life without the possibility of parole.[100] Rather, it is left to the courts to order discovery in habeas corpus proceedings on a case-by-case basis.[101]

Practically, it can be a nightmare for habeas petitioners to get the evidence they need to support their claims. District attorneys frequently claim that their files are protected by the work product doctrine[102] and are reluctant to demand open access to police files. Prosecutors also routinely contest efforts to obtain new evidence through additional forensic and DNA testing. Instead, they are eager to maintain the finality of a conviction by keeping their files closed.

Finally, the concept of a postconviction *Brady* duty is relatively new. In *District Attorney's Office for the Third Judicial District v. Osborne*,[103]

him."). No additional rules barring habeas litigants from seeking information are needed to protect witnesses who are genuinely at risk of harm.

99. To the extent that there is an ongoing investigation, current laws, including the Federal Freedom of Information Act and the California Public Records Act, have exceptions from disclosure for information that might jeopardize an ongoing investigation. *See* 5 U.S.C. § 552(b)(7) (2012) ("This section does not apply to matters that are . . . records or information compiled for law enforcement purposes."); CAL. GOV'T. CODE § 6255 (West 2008) ("The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.").

100. CAL. PENAL CODE § 1054.9 (West 2008).

101. *E.g.*, *In re* Scott, 61 P.3d 402, 417–18 (Cal. 2003).

102. Typically, state laws provide: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined [elsewhere in the code]." CAL. PENAL CODE § 1054.6. "Work product" may be defined as, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." CAL. CIV. PROC. CODE § 2018.030(a) (West 2007). *See also* Hickman v. Taylor, 329 U.S. 495, 510 n.9 (1947) ("[A]ll documents prepared by or for counsel with a view to litigation."). To the extent that prosecutors invoke the work product privilege to bar disclosure of reports in their files, they must be careful not to use the privilege to create a per se bar to their files. Even with a work product privilege, ordinary requests for "relevant, [non]privileged facts" are not shielded from discovery. *Hickman*, 329 U.S. at 508. Thus, a report of a witness interview, or letters to witnesses and their lawyers regarding any leniency they will receive in exchange for their testimony, should not be shielded by the work product privilege.

103. *See, e.g.*, Dist. Att'y's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009). In *Osborne*, the defendant had been convicted in Alaska state court of kidnapping, assault, and sexual assault. *Id.* at 58. He sought to retest the DNA used to convict him. *Id.* The Supreme Court held that due

the United States Supreme Court held *Brady* did not apply in the postconviction setting.[104] However, in 2011, the American Bar Association ("ABA") amended its Model Rules of Professional Conduct to impose an ethical duty on prosecutors to reveal exculpatory evidence obtained after conviction. ABA Model Rule 3.8(g) provides that "[w]hen a prosecutor knows of new, credible[,] and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," he or she must disclose the information to a court, and normally to the defendant as well.[105] Yet, this rule, like many other *Brady* rules, is difficult to enforce because prosecutors may not recognize new evidence to be exculpatory.[106] Prosecutors are more likely to discount any new evidence as not sufficiently exculpatory to warrant reopening a case.

Overall, prosecutors tend to approach discovery in postconviction proceedings with the mindset that the evidence relevant to a case comes from the finite universe of the evidence that was available at the time of trial. Once the prosecution and defense have had a chance to present that evidence to a jury, the case should be resolved. There is very little recognition that the information obtainable from a piece of evidence or witness can change over time, altering the likely outcome of a case.[107]

process did not extend to issues regarding DNA testing. *Id.* at 74–75. The Court reasoned that if it extended constitutional rights to the handling of DNA evidence, it would be responsible for creating a new constitutional code of rules, which it was reluctant to do. *Id.* at 74. Instead, it left it to state legislatures and courts to monitor postconviction DNA testing. *Id.* at 74–75.

104. *Id.* at 68–69.

105. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2012). *See also* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 429 (2009) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8) (describing the "special responsibilities" of a prosecutor); Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 312–15 (2010) (explaining the duties of a prosecutor to disclose evidence).

106. *See* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2135 (2010) ("Because the prosecutor believes that the defendant is guilty, she is likely to weigh the evidence against him as strong. In contrast, she is likely to view evidence that might be helpful to the defendant's lawyer as unreliable, distracting, or immaterial. As a consequence, she may conclude that the evidence is not material and exculpatory, or perhaps not even exculpatory at all."); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2163–64 (2010) (explaining that prosecutors sometimes do not understand what they are legally required to turn over); Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 78 (2013) ("[I]t is also plausible that prosecutors, not understanding the proposed defense case as well as their adversaries, do not identify what will turn out to be key exculpatory evidence.").

107. *See supra* note 86 and accompanying text.

### C. POSTCONVICTION LITIGATION RULES: HURDLE-JUMPING OVER PROCEDURAL OBSTACLES

Most of habeas litigation is not about the merits of a case. Rather, it is a morass of procedural rules designed to limit convicted defendants' access to the courts for postconviction relief. AEDPA[108] takes these procedural hurdles to a new level. In order to preserve finality, and give deference to local courts' resolution of criminal cases, both state and federal postconviction procedures require that a petitioner exhaust his remedies in the trial court before seeking relief elsewhere.[109] There are also rules against successive petitions,[110] rules setting forth strict statutes of limitation for habeas actions,[111] and rules limiting appellate review of habeas petitions.[112]

These procedural hurdles so dominate postconviction litigation that cases rarely receive evidentiary hearings and decisions on the merits.[113] AEDPA also created a complicated and time-consuming labyrinth of rules

108. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 26 U.S.C., 28 U.S.C., and 42 U.S.C.).

109. 28 U.S.C. § 2254(b)(1)(A) (2012). *E.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1413 (2011) ("AEDPA erects multiple hurdles to a state prisoner's ability to introduce new evidence in a federal habeas proceeding."); Wright v. State, 19 Cal. Rptr. 3d 92, 95–97 (Ct. App. 2004) (requiring prisoners exhaust all administrative remedies).

110. 28 U.S.C. § 2244(b). *See also* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 703 (2002) ("[AEDPA] significantly curtails the opportunities for federal habeas corpus petitioners to file a second or 'successive' petition in cases in which a claim could not be filed or fully adjudicated at the time of the first petition."); Jerrod M. Maddox, Note, *The Precious Safeguard Impaired:* Magwood v. Patterson *and the Supreme Court's New Approach to Second and Successive Federal Habeas Corpus Petitions*, 2 ALA. C.R. & C.L. L. REV. 195, 197 (2011) ("[T]he pertinent gatekeeping provision of AEDPA is the bar on 'second or successive' petitions.").

111. 28 U.S.C. § 2244(d)(1). *See also* Douglas J. Glaid, *The Antiterrorism and Effective Death Penalty Act of 1996: A New One-Year Limitation for Filing a Federal Habeas Corpus Petition*, FLA. B. J., July–Aug. 2001, at 55, 55 (stating that AEDPA creates a one-year statute of limitations period); Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 368–69 (2005) (discussing the application of equitable tolling in the AEDPA context); Wallace, *supra* note 16, at 703 (discussing the difficulty of courts in applying AEDPA's statute of limitations).

112. 28 U.S.C. § 2253. *See generally* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (criticizing judges' denial of habeas relief through reliance on AEDPA's stated legislative purposes: "principles of comity, finality, and federalism").

113. Even before the Supreme Court's decision in *Pinholster*, less than 1 percent of federal habeas actions in death penalty and life without parole cases resulted in an evidentiary hearing. *See* KING, CHEESMAN & OSTROM, *supra* note 17, at 36 ("Of all cases, including those still pending, nine included an evidentiary hearing, a rate of one of every 243 cases or ([0.4 percent]).")); *id.* at 60 ("The pre-AEDPA studies did not report the frequency of evidentiary hearings, but one federal report using the AO data noted that [1.1 percent] of all habeas cases received an evidentiary hearing, a rate that is higher, not lower, than the rate after AEDPA.").

for judges. The one thing it does do effectively is send a clear message to judges that if there is a bar to reopening a case, the court should avail itself of it. The rules were drafted to serve the primary interest of bringing finality to criminal cases.[114]

Postconviction rules put a thumb (or more like a fist) on the side of the scales of justice that favor finality over certainty in accuracy. The recent case of *McQuiggin v. Perkins*[115] aptly demonstrates the manner in which postconviction litigation is skewed in favor of finality over accuracy when there is a tension between the two in habeas cases. In *McQuiggin*, the petitioner failed to comply with AEDPA's statute of limitations. Nonetheless, the petitioner submitted three affidavits by key government witnesses that supported petitioner's claim that he had been wrongfully convicted.[116] The Court created a very narrow avenue for raising an actual innocence gateway for habeas petitions that would otherwise be blocked by AEDPA's procedural bars. Even when there is a claim of actual innocence, the court and prosecutor's drive for finality will bar full litigation of that claim unless the petitioner can show "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."[117]

Knowing that the standards are so exacting, habeas petitioners often resort to scorched earth strategies in postconviction proceedings. Petitioners realize that they can no longer raise just doubts about

114. *See* John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 441–42 (2011) ("AEDPA's primary goal was to simultaneously reduce the number of successful habeas challenges in state capital cases while accelerating the pace at which federal courts adjudicate those challenges.").

115. McQuiggin v. Perkins, 133 S. Ct. 1924 (2013).

116. *Id.* at 1929. In 1997, Floyd Perkins was convicted of murdering his friend, Rodney Henderson. *Id.* Rodney Henderson was stabbed to death after Floyd Perkins and his friend, Damarr Jones, attended a party with him. *Id.* at 1928–29. Damarr Jones was the key witness against Floyd Perkins. *Id.* at 1929. Between 1997 and 2002, Floyd Perkins obtained three affidavits tending to show his innocence and Damarr Jones's guilt for Rodney Henderson's murder. *Id.* The first affidavit, submitted by Floyd Perkins's older sister, stated that a third party told her that Damarr Jones openly boasted about stabbing Rodney Henderson and taking his clothes to be cleaned afterward. *Id.* The second affidavit was by a friend who stated that Damarr Jones confessed to him that he had stabbed Rodney Henderson and that the friend had accompanied Damarr Jones to take his bloodstained clothes, "orange pants, and a colorful shirt" to the cleaners. *Id.* The final affidavit was by the drycleaners, who described that on or about the day of Rodney Henderson's murder, a man fitting Damarr Jones's description dropped off a pair of bloodstained orange pants and a multicolored shirt. *Id.* at 1930. In 2008, Floyd Perkins filed a habeas petition asserting newly discovered evidence of actual innocence on the basis of the three affidavits. *Id.* at 1929. Taken together, the affidavits tended to prove that Damarr Jones, not Floyd Perkins, had committed the murder. *Id.* at 1929–30.

117. *Id.* at 1928 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)) (internal quotation marks omitted).

prosecution witnesses (even those kinds of doubt that may have raised reasonable doubt); they must go for the knockout punch. It is not enough to argue that the petitioner may be innocent. Petitioners and their counsel must engage in the equivalent of thermal nuclear habeas warfare to succeed. The net result is a distorted, exaggerated practice where petitioners are more likely to argue that every prosecutor is a *Brady* cheater, every defense lawyer provides ineffective assistance of counsel, and every police officer is dismissive of exculpatory evidence.

Of course, prosecutors tend to take the opposite approach. They reflexively defend not only their own investigators and witnesses, but also their opposing defense counsel at trial. The net result is that the court gets distorted pleadings from both sides in habeas litigation. While not every petitioner is a saint, it is also not true that they all play fast and loose with the system. The truth can lie somewhere in between. There are many bad trials where mistakes are known or where, due to no fault of anyone, not all of the evidence is known or understood at the time of trial.[118] Although it is costly and inconvenient to revisit these proceedings, the underlying question that should be nagging at everyone is whether the outcome was accurate enough to justify long-term incarceration of the defendant.

### D. WHERE DOES THIS CONSTRUCT LEAD US?

The entrenched roles of both sides in habeas litigation have led to a system where the court and litigants are frustrated and dissatisfied. Petitioners feel as if the criminal justice system has lost interest in whether they are really guilty, and the government feels like the petitioners will never stop challenging the outcome of their cases. Each side becomes entrenched in its role, and it is hard to get out of that mold.

To really make postconviction relief work, prosecutors must think it is part of their role to regularly reassess their cases, and habeas counsel must find avenues to raise their concerns without engaging in scorched earth litigation practices. This is a greater challenge than it might first appear. There are many pressures, culturally and otherwise, that convey to prosecutors the message that they should win cases and not change the results of cases they have won.[119] What we need to do is no less than

118. For an excellent discussion of why this occurs, see generally Dan Simon, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).

119. *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulations Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 95 (1995) (suggesting that "the diffusion of responsibility among the various authorities who oversee federal prosecutors" may lead to prosecutorial misconduct); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607,

redefine what "winning" means in the postconviction world.[120]

Similarly, defense lawyers must be open to pursuing postconviction avenues that do not assume that all prosecutors and police are liars and cheaters. Nor can they assume that all defense trial lawyers missed something that a competent lawyer would have found. They must be open to strategies that invite cooperative postconviction efforts to honestly evaluate the accuracy of a conviction.

## IV. MODIFYING PROSECUTION AND DEFENSE LAWYERS' ROLES IN POSTCONVICTION PROCEEDINGS

Generally, the criminal justice community must engage in a serious discussion about the need for and role of postconviction proceedings. Even though defendants have been convicted, people are not disposable and are not going away. Lawyers and judges who think that once a trial and appeal are concluded, they can move on to the next matter, must realize that a criminal case is a lifelong responsibility. As long as those defendants live, everyone involved in their cases has a responsibility to ensure that the criminal justice system reaches the proper result. Prosecutors must understand that finality is an elusive concept in criminal law and will always be trumped by interests in obtaining an accurate result.

In addition to lawyers making a long-term commitment to cases, there are also specific changes that would help ensure greater reliability and integrity in postconviction proceedings. In each phase of postconviction proceedings, changes can be made that will better balance the interests in finality and accuracy.

### A. MODIFYING THE PROSECUTION AND POLICE ROLES IN THE INVESTIGATIVE PHASE OF POSTCONVICTION PROCEEDINGS

There are several concrete changes that can be made to enhance the

614 (1999) ("The United States Attorney is the representative . . . of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (quoting Berger v. United States, 295 U.S. 78, 88 (1935)) (internal quotation marks omitted)); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 568 (1999) (discussing the emphasis that prosecutors place on winning cases as opposed to seeking justice); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2100–01 (2009) (explaining that incentives exist for prosecutors to pursue cases where the effort required is low and the conviction rates are high).

120. *See* Levenson, *supra* note 119, at 568 ("Potential prosecutors must be evaluated not only for their skill in winning cases, but also for their ability and judgment in filling in the gaps left in the law with decisions that will serve both sides' search for justice.").

prosecutor's role in postconviction proceedings. First and foremost, prosecutors must view it as part of their role to be open to a postconviction review of a case.[121] Due to the lapse of time between trials and postconviction proceedings, many prosecutors consider it someone else's problem when postconviction challenges are filed. In many prosecution offices, separate habeas units will handle these cases. The benefit of having separate units is that the new set of lawyers may be less personally invested in the conviction. The downside is that the new lawyers will also be less familiar with the facts of the case and will eventually have to involve the trial prosecutors in the proceedings in order to respond to the challenges.

Prosecutors must be invested enough in an accurate resolution to their cases to not view every habeas petition as a personal attack on that prosecutor or the law enforcement officers involved in the case. Mistakes occur even by the most well-meaning prosecutor. If a prosecutor has a conflict with a habeas case, it is frequently because that prosecutor realizes that he or she crossed the ethical line in obtaining a conviction. Thus, the initial reform is that prosecutors have to be trained not to fear habeas proceedings, but to see it as part of their responsibility to ensure, even long after the trial has occurred, that the proper verdict was rendered. If prosecutors view postconviction challenges in this manner, it is more likely they will conduct a full and fair investigation of postconviction issues.

1. Ethical Rules for Investigators

Current postconviction investigations by prosecutors and their officers raise serious concerns. The actions by police officers can be shocking as they seek to convince witnesses not to recant their trial testimony or intimidate other witnesses from coming forward in support of a habeas petition. For example, it is rather standard practice for police officers to be allowed to interview witnesses who now claim prosecutorial or police misconduct. In essence, the police are now investigating their own misconduct or that of their close associates.[122]

Ethical rules for investigators would help prevent these types of abuses that undermine postconviction proceedings.[123] Independent

121. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2012) (giving prosecutors the duty to disclose newly discovered exculpatory evidence even following conviction); Kuckes, *supra* note 105, at 459 ("The prosecutor's ethical duty to remedy wrongful convictions—the first substantive change to the ABA's prosecutorial ethics rule in many years—promises to become one of the most important provisions in the current rule.").

122. Levenson, *supra* note 9, at S226.

123. *Id.* at S227.

investigators whose own integrity is not being challenged should participate in the investigations. Better yet, prosecutors should consider working together with defense counsel in a collaborative manner to interview witnesses for the postconviction claim.[124]

In addition to not allowing investigators to investigate their own misconduct, there should be strict rules on how officers must behave in postconviction investigations. They should not be allowed to trick or mislead witnesses who claim to have evidence in support of the defense. The ethical rules governing the conduct of prosecutors prohibit such conduct,[125] and prosecutors are responsible for those that they supervise as well.

Investigators and prosecutors should not be allowed to hide evidence that might tend to support a habeas petition as occurred in *Collins v. City of New York*.[126] There is no reason that a person should serve sixteen years in prison because the prosecution team does not want to disclose reports that demonstrate previously undisclosed deals with witnesses or evidence that witnesses had recanted their testimony. The federal court that granted habeas relief in the case was absolutely correct. Such conduct is "shameful" and "a tragedy."[127]

Prosecutors and police must be as committed to rectifying wrongful convictions as the habeas petitioner and his or her counsel. Postconviction investigations that deliberately seek to hide exculpatory evidence or to prevent witnesses from revisiting their testimony should be prohibited.[128]

124. *See* Levenson, *supra* note 106, at 81–83 (discussing benefits of inquisitorial model for ferreting out exculpatory evidence for defendants); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L . REV. 699, 710–13 (2014) (same).

125. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012) (discussing fair conduct pertaining to opposing counsel); AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.2 (1993) (discussing prosecution conduct with witnesses).

126. Collins v. City of N.Y., 923 F. Supp. 2d 462, 470 (E.D.N.Y. 2013) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process." (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)) (internal quotation marks omitted)).

127. *Id*. at 469.

128. Prosecutors and habeas counsel should work together to adopt best practices in interviewing witnesses for habeas proceedings. Unfortunately, it is not unusual for law enforcement to suggest to witnesses that "they did their job" when the case was originally tried and that the defendant is just trying to inconvenience witnesses. Nor is it unusual for law enforcement to repeatedly remind habeas witnesses of their prior testimony so that they will not deviate from it in the habeas proceedings. *See, e.g.*, Motion to Exclude Vita, Rodriguez & McLean, *supra* note 69, at 8–9 (explaining how prosecution investigators pressured witness not to deviate from prior testimony). Such attempts to influence witness testimony are improper and impede the factfinding process.

2. Preservation of Evidence

Contrary to the Supreme Court's holdings in *Arizona v. Youngblood*,[129] *Illinois v. Fisher*,[130] and their progeny,[131] there should be an affirmative duty on law enforcement and the prosecution to preserve physical evidence or, at least, a useable sample from it. Technology changes so quickly that one certainly cannot state with confidence that the information available from physical evidence at the time of trial is the only information that might be discerned from that evidence in the future.[132] The Supreme Court's holdings in *Youngblood* and *Fisher* were premised on an assumption that all of the information available from a piece of evidence was that which was apparent when the evidence was first obtained. However, we know that this assumption is no longer true. Because of the increased capability to expand the universe of information available from a piece of evidence, it should be considered per se bad faith to destroy or lose evidence relating to a case.[133]

New technology has also made it easier to store evidence. In an era when the federal government can collect and store metadata for all calls made by Americans overseas,[134] as well as envelope photographs of all

129. Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

130. Illinois v. Fisher, 540 U.S. 544, 547–48 (2004) (per curiam).

131. *See, e.g.*, Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007) (holding that there is no duty to preserve evidence during postconviction proceedings). *But see* Commonwealth v. Lambert, 765 A.2d 306, 363 (Pa. Super. Ct. 2000) (holding that an unsubstantiated claim that evidence was destroyed does not support postconviction petition for habeas relief).

132. *See generally* DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS (2008) (advocating that science and technology advances are important tools for the legal field and justice); BARRY A.J. FISHER, TECHNIQUES OF CRIME SCENE INVESTIGATION (5th ed. 1993) (describing technological improvements to methods of conducting forensic investigations). In fact, judges also realize that the "snapshot" approach to viewing evidence in a case can be misleading. *See* Brian M. Hoffstadt, *Judging by a Snapshot of the Law*, L.A. DAILY J., Aug. 20, 2013, at 1, 1, 6 (discussing "[w]hat information may courts consider when deciding cases").

133. Because modern technology is constantly improving, scientists are discovering new ways to test DNA that have exonerated convicted defendants. *E.g.*, *Glen Woodall*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Glen_Woodall.php (last visited Apr. 2, 2014) (describing the story of Glen Woodall who was convicted of rape in 1987 and exonerated in 1992 with the help of new DNA testing technology). *See also* Giannelli, *Regulating Crime Laboratories*, *supra* note 96, at 84–86 (discussing the first several convicted defendants who were exonerated by early DNA testing).

134. *See* Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 6, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html (describing the National Security Administration's Prism program); Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data (explaining that the National Security Agency's Prism program allows the agency to access participating companies'

mail sent by Americans,[135] it certainly should be possible to create repositories of key physical evidence from murder cases, especially those where the defendant is given a life sentence. The routine destruction of evidence from criminal trials serves as an impediment to later attempts to establish the innocence of a person claiming to have been wrongfully convicted. It is particularly "shameful" and "tragic" when the prosecution destroys evidence during pending postconviction litigation that seeks to ascertain the exculpatory value of such evidence.[136]

3. Regular Audits by Prosecutors of Their Cases

If, indeed, prosecutors have an obligation to ferret out injustice, then we should also consider creating a system where prosecutors engage in routine audits of cases even after their convictions are final. These audits may entail correspondence with defense counsel to determine if there have been any new developments in the case, as well as a check by prosecutors that no new evidence has been discovered by the investigators on the case. For example, if prosecutors realize that a conviction was obtained through the testimony of an officer who has since been discovered to have lied in another case, such a development should and could trigger an immediate review of the prior conviction.

The most likely objection to this proposal is that it takes too much time and effort by prosecutors who must continue to handle new cases.[137] However, it need not be a burden to prosecutors or defense lawyers. A once-a-year checklist, at least for the most serious cases, will keep prosecutors and defense lawyers in communication and create a collaborative model in which wrongful convictions are exposed as soon as problems are noted. This is much preferable to the current system in which

servers, including those of Google, Facebook, Skype, and most recently, Apple, without having to obtain court orders); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=1& (reporting that President George W. Bush authorized monitoring of international communication without securing a court order).

135. Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement*, N.Y. TIMES (July 3, 2013), http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html?pagewanted=all (discussing that the Mail Isolation Control and Tracking program, created in 2001 to abate anthrax attacks, requires the United States Postal Service to photograph the outside of each envelope that is processed in the U.S. and enables it to retrace the envelope's path at the request of law enforcement).

136. Collins v. City of N.Y., 923 F. Supp. 2d 462, 469 (E.D.N.Y. 2013). *See also id.* at 470 (holding a prosecutor immune from a 42 U.S.C. § 1983 action for destruction of exculpatory evidence during postconviction proceedings).

137. Medwed, *supra* note 21, at 50 ("[A]sking for prosecutors to do more work in [post]conviction matters might push many of these financially strapped organizations beyond the breaking point.").

incarcerated petitioners, either alone or with the help of counsel, labor for years to discover evidence that might support a reversal of their conviction. It also has the added benefit of creating a system in which both the prosecutor and defense are committed to the integrity of convictions. In a collaborative system, it is less likely that prosecutors' immediate instinct will be to dispose of a habeas petition as quickly as possible, rather than exploring its merits.

There is a current movement to create Conviction Integrity Units in the United States. A growing number of prosecutors' offices have created such units, although much of their focus has been on DNA testing.[138] The district attorney's offices in Houston, St. Paul, and New York City have been instrumental in exonerating wrongfully convicted defendants.[139] The Dallas County, Texas, program has a particularly effective model for prosecutorial units dedicated to investigating claims of wrongful conviction.[140]

Finally, it is possible to move to a model where prosecutors and defendants will file joint habeas petitions, identifying for the court where there may be grounds for a habeas action and where the prosecution contests the defense arguments. Such joint petitions were used, for example, during the Rampart crisis in Los Angeles.[141]

### B. MODIFYING THE DISCOVERY PROCESS FOR HABEAS ACTIONS

The discovery process for habeas actions also can be modified to ensure that postconviction reviews are accurate. Rather than ad hoc discovery rules for some cases (primarily cases involving death sentences or life without possibility of parole), it would be helpful to have discovery rules for all postconviction cases. In order to thoroughly investigate a postconviction challenge, habeas counsel needs the physical evidence,

138. *Id*. at 61–65.

139. *Id*. *See also* Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837, 838 n.4 (2011/2012) (describing the conviction integrity unit in Dallas, Texas); Kristine Hamann, *New York Law Enforcement Creates Best Practices to Prevent Wrongful Convictions*, 27 CRIM. JUST. 36, 40 (2012) (proposing that prosecutorial best practices should include conviction integrity units); Barbara Parker Hervey & D. Kaylyn Betts, *Beyond the Bench: The Texas Court of Criminal Appeals' Work to Improve the Criminal Justice System Outside the Box*, 73 TEX. B.J. 560, 560 (2010) (explaining that the Texas Criminal Justice Integrity Unit has helped exonerate some individuals who were wrongfully convicted).

140. Medwed, *supra* note 21, at 62–64.

141. *See* Rick Young, *The Outcome of the Rampart Scandal Investigations*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/lapd/later/outcome.html (last updated July 2008) ("The District Attorney's office . . . filed [sixty-four] writs and attorneys representing defendants . . . filed [twenty-two] others that, unopposed by the DA's office, [were] granted by the Court.").

witness files, trial record, prosecutor's files, police investigative files, defense lawyer files and court files. Obtaining these files can be a virtual scavenger hunt in many cases. Creating a central repository for the records of a case would expedite habeas actions. Once again, with technology that allows large volumes of information to be scanned and stored, such an effort is now feasible.

In most cases, one would expect that there would be open file discovery for postconviction proceedings.[142] Prosecution and police concerns about compromising ongoing investigations should abate by the time of postconviction challenges. If the prosecution believes that there is still an ongoing threat to witnesses, they can apply to the court for appropriate protective order. In general, however, a habeas petitioner should have open access to the prosecution's and police's files.

One issue that arises in postconviction discovery is whether prosecutors' files should be protected by the attorney work product doctrine. Yet, the work product privilege should not serve as an obstacle to full discovery. While it is generally true that "writings which reflect an attorney's mental impressions, conclusions, opinions[,] or legal theories" is not discoverable,[143] the very issue in a habeas case may be whether the prosecutor had reason to believe that false evidence was being presented because of the prosecutor's impressions of a witness or investigator. In such situations, the duty of a prosecutor to provide exculpatory evidence trumps any claim to work product privilege.[144]

It is also imperative that a mechanism be created for unrepresented petitioners to get full discovery from the prosecution. It is extraordinarily difficult for inmates to obtain and retain discovery for their habeas cases. First, they have to hope that they receive any materials that are mailed to them at their custodial locations. Second, as they are transferred from one facility to another, it is difficult for them to retain possession of their files. As with other problems, the answer to this problem may lay with technological advances. One proposal could be to create a computer file with the discovery for a habeas case that is accessible by the petitioner in custody, his or her prison counselor, or other "habeas helper."[145]

142. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-903(a)(1) (2011) (requiring prosecutors "to make available to the defendant the complete files . . . involved in the investigation of the crimes committed or the prosecution of the defendant" upon the defendant's motion).

143. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

144. *See* United States v. Armstrong, 517 U.S. 456, 474–75 (1996) (Breyer, J., concurring in part and concurring in the judgment) (presupposing *Brady* overrides the work product doctrine).

145. Currently, prison staffs do not provide assistance to inmates seeking postconviction relief.

Resources are also needed to assist petitioners who need to interview witnesses and investigators regarding their case. Not surprisingly, many witnesses do not want to get involved in a case. In their minds, they have done their duty and the case is over. However, there are other witnesses who are eager to come forward with additional information or even to recant their testimony. Sometimes, these individuals can even be the investigators on the initial case. Petitioners need assistance in interviewing these individuals. Again, designated habeas assistants, even if they are not lawyers, can help with this problem.

Finally, there needs to be a dramatic change in the attitude of law enforcement officials regarding the role and value of postconviction investigations. Generally, investigators are reluctant to assist in locating witnesses or making themselves available for interviews. Yet, the officers may be the best repository of critical information in a case. A particularly important reform for postconviction discovery would be allowing the defendant, with a representative, access to the police investigator in a case.

### C. MODIFYING THE POSTCONVICTION LITIGATION PROCESS

Postconviction law has become so complicated that even those charged with enforcing it are frequently confused as to how it should be applied. This is particularly the case with provisions of AEDPA.[146]

Rather, "case managers" or "prison counselors" focus on staffing issues and the setting of parole dates. There is limited access to a law library. Habeas helpers are no more than other inmates or law clerks who are given a crash course in the legal system. Even when inmates seek assistance from the prison law clerks, they are forbidden from retaining their trial records and paperwork. The Department of Corrections imposes strict property limitations on inmates, six cubic feet per inmate, which often means that they must choose between keeping their groceries or their paperwork. Additionally, much of the paperwork that inmates manage to retain gets stolen or misplaced. Further, the law clerks that assist other inmates are often harassed by prison staff. The bottom line is that a lack of resources and trained personnel make it extremely difficult for inmates to successfully pursue petitions for retrial. Telephone Interview with Keith Chandler, Prison Lawyer (Aug. 6, 2013) (on file with the *Southern California Law Review*). *See also* Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 377–83 (2006) (discussing obstacles to prisoner litigation); Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1569–72 (1997) (discussing current problems with jailhouse lawyers).

146. *See* Kovarsky, *supra* note 112, at 445–46 (arguing that courts' inclinations to interpret AEDPA's ambiguities to promote comity, finality, and federalism are poorly executed and run contrary to AEDPA's legislative intent); Sloane, *supra* note 16, at 634–36 (examining how federal courts, in dealing with a distinct standard of review, have struggled to interpret AEDPA's "adjudication on the merits" provision); Wallace, *supra* note 16, at 704 (examining how courts have struggled to interpret AEDPA's one-year statute of limitations provision for state prisoners particularly because "Congress did not clearly define what constitutes collateral review" and many states do not clearly indicate what procedures are part of the direct review or collateral review process).

The goal of AEDPA was to limit access to postconviction relief[147] and to maintain the finality of convictions. This law has done more to entrench prosecutors in the belief that their primary responsibility is to fight any attempts to reexamine a conviction than any other doctrine in the law. Rather than considering the possible merits of a petition, prosecutors focus on the procedural hurdles designed to ensure a conviction's finality.

Let me offer a bold proposal. It's time to repeal AEDPA, or at least the current version of it.[148] Like the Federal Sentencing Guidelines, a law that looks like a good idea at the time it is drafted can end up being too complicated and too unfair to serve a useful purpose.[149] Since 1997, the Supreme Court has had to issue a regular series of decisions to explain the application of AEDPA and ease its effects on barring postconviction challenges.[150] Certainly, litigation over the meaning and effect of AEDPA

147. *See supra* notes 108–09 and accompanying text.

148. *See generally* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 Harv. C.R.-C.L. L. Rev. 299 (2006) (advocating repeal of AEDPA if constitutional flaws cannot be cured); Uhrig, *supra* note 68 (same).

149. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Federal Sentencing Guidelines would no longer be mandatory because they violated *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000). *Booker*, 543 U.S. at 244. Prior to its ruling, the guidelines had created a tremendous amount of controversy, with repeated calls for their repeal. *See* Conference Summary, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2060 (1992) ("The guidelines should be abandoned. Disparity under them is terrible; sentences are too harsh; and the guidelines themselves are ridiculously complicated. We should consider the more rational reforms of sentencing institutes, appellate review, and requiring statements of reasons for sentences."); Michael Tonry, *GAO Report Confirms Failure of U.S. Guidelines*, 5 FED. SENT'G REP. 144, 144, 148 (1992) (questioning the conclusion made by the U.S. Sentencing Commission that the new guidelines are better than the old system given that "most judges, defense attorneys, and probation officers on balance did not believe the guidelines were an improvement over the prior system" (citation omitted) (internal quotation marks omitted)).

150. The first AEDPA decision by the Supreme Court was *Lindh v. Murphy*, 521 U.S. 320 (1997). Since then, the Court has issued over one hundred additional opinions on AEDPA-related issues. Close to 8 percent of the Court's published opinions since that time have been regarding AEDPA and its application. *See, e.g.*, McQuiggin v. Perkins 133 S. Ct. 1924, 1935–36 (2013) (holding that although an unexplained delay in filing a habeas petition was not automatically barred by AEDPA's statute of limitations, timeliness was still a factor in determining whether the miscarriage of justice exception could overcome AEDPA's time limitations); Magwood v. Patterson, 130 S. Ct. 2788, 2803 (2010) (reading AEDPA to allow petitioner's challenge to a new death sentence as it was not a "second or successive" habeas corpus application under the meaning of § 2244(b) as amended by AEDPA); Holland v. Florida, 560 U.S. 631, 645 (2010) (holding that AEDPA's statute of limitations is subject to equitable tolling in certain situations such as in the instant case in which petitioner's counsel's misconduct appeared to constitute extraordinary circumstances); Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (finding that the retroactivity standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989), did not constrain Minnesota's retroactivity principles); Panetti v. Quarterman, 551 U.S. 930, 956–60 (2007) (holding that petitioner's claim of incompetency to be executed was not barred by AEDPA's prohibition against "second or successive applications" given the probability that the petitioner's mental state had deteriorated during his incarceration and his incompetency claim was not ready until the

dominates the federal courts.[151] While petitioners should not be allowed to abuse the great writ, the current fixation on procedural hurdles makes it extremely difficult for anyone in the criminal justice system—especially prosecutors and judges—to focus on the possible merits of a petitioner's arguments.

If it is not feasible to repeal AEDPA, several key reforms would be helpful. These include modifying the one-year statute of limitations to fit the type of crime under investigation, rethinking the deliberate bypass rule and how they conflict with claims of ineffective assistance of counsel, and tailoring the standards for successive petitions to allow repeated court review when a case has risk factors (such as its reliance on eyewitness identifications) occur.

Revamping AEDPA is beyond the scope of this Article; however, it is time to scrutinize closely whether current procedural rules for postconviction litigation serve both the purposes of finality and accuracy for our convictions. More significantly, it is time to reform the structure of postconviction litigation so that it embraces more of a cooperative inquisitorial model than the current fight-to-the-death adversarial model.[152]

The American approach to postconviction litigation is foreign to many countries' approach to the issue. In countries that use the inquisitorial system, the focus of postconviction issues continues to be on whether the defendant is guilty.[153] By contrast, the American system focuses on whether the defendant received a fair trial.

In reaction to wrongful convictions in their jurisdictions, some jurisdictions have created Innocence Commissions[154] or Conviction

execution date was set); INS v. St. Cyr, 533 U.S. 289, 325–26 (2001) (holding that AEDPA and Illegal Immigration Reform and Immigration Responsibility Act did not withdraw habeas corpus jurisdiction in deportation cases nor did they retroactively apply to deny relief to an immigrant who had pled guilty to a deportable crime before their enactment); Slack v. McDaniel, 529 U.S. 473, 477–78 (2000) (finding that a habeas petition filed after an initial petition is dismissed without prejudice does not constitute a "second or successive" petition); *Lindh*, 521 U.S. at 322–23 (holding that the standards of habeas relief would not be retroactively applied to noncapital cases pending during AEDPA's enactment because they would warrant new legal consequences).

151. Marc. D. Falkoff, *The Hidden Costs of Habeas Delay*, 83 U. COLO. L. REV. 339, 368 (2012) (showing that beginning in 1997 and continuing through 2008, the number of habeas cases filed in federal courts annually has never dropped below 15,000).

152. *See* Slobogin, *supra* note 124, at 715–30 (proposing an inquisitorial criminal justice system).

153. Even in countries with systems similar to America's system, there is an opportunity to continue to present new factual evidence to the courts. For example, in Finland, the trial court does not have a monopoly on the authority to receive documents. Postconviction litigants can continue to present evidence to the court of appeals. Johnson, *supra* note 19, at 435.

154. Following the Duke lacrosse debacle, North Carolina created the North Carolina Innocence

Integrity Units in the prosecution's offices.[155] These innovations are positive reforms to the current costly approach of zealous adversarial litigation.

Most importantly, the biggest change that is needed is a change in the culture of prosecutors, defense counsel, and judges. Prosecutors too frequently view habeas petitions as attacks on them, their colleagues, and their law enforcement officers. On the other side, defense lawyers are too ingrained in a model that calls on them to attack both the actions and credibility of their opposition. There must be an affirmative role for prosecutors in ferreting out injustice in order to change this practice. Under a new approach to postconviction litigation, a prosecutor's main responsibility should not be to "shut down" a petitioner's efforts at the earliest stage of litigation. It should be to take whatever steps are necessary to ensure there was a fair and accurate resolution of a case.

## V. CONCLUSION: NAVIGATING BUMPS AT THE CROSSROAD

The American criminal justice system does not generally embrace radical changes. Even in the most important areas of the law, changes are evolutionary.[156] The interest in finality dominates so many aspects of our judicial system. On the most basic level, it explains why the Supreme Court does not make new procedural rights retroactive.[157]

Inquiry Commission in 2006. Composed of a bipartisan committee of a judge, prosecutor, defense attorney, victim advocate, acting sheriff, member of the public, and two others, the committee recommends cases for review by a three-judge panel that has the power, upon a unanimous finding of clear and convincing evidence of innocence, to reverse a case. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1049–50 (2010); Jerome M. Maiatico, Note, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1358–59 (2007).

155. Medwed, *supra* note 21, at 62–63.

156. Consider, for example, the evolutionary changes in capital punishment law in the United States since the first execution in 1608. Harvey Gee, *America's Death Penalty Institution*, 42 CUMB. L. REV. 319, 322 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010), and DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: *FURMAN V. GEORGIA* AND THE DEATH PENALTY IN MODERN AMERICA (2010)). Initially, during the colonial era, courts sentenced defendants to the death penalty for many nonlethal, nonviolent crimes including "witchcraft, sodomy, adultery, and incest," *id.*; since then, courts have significantly limited the types of crimes meriting capital punishment. In 1972, the Supreme Court again triggered major changes in capital punishment law when it issued its fractured decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Gee, *supra*, at 324. As public debate continued, the law on the death penalty changed further. For example, in *Coker v. Georgia*, 433 U.S. 584 (1977), the Court outlawed capital punishment for rapists as it was reasoned to be disproportionate to the offense, Gee, *supra*, at 325–26; later, the Supreme Court exempted insane persons, followed by "mentally retarded" persons and juveniles, *id.* at 326. Although public support for the death penalty has ebbed and flowed, it has nevertheless withstood abolition and continues to evolve over time. *Id.* at 332–35.

157. *See* Ellen E. Boshkoff, Note, *Resolving Retroactivity After* Teague v. Lane, 65 IND. L.J. 651,

Yet, revelations as to the numerous wrongful convictions across the country should make us pause and challenge whether our emphasis on finality is still justified. Perhaps there was a time when it made sense to believe that all of the facts really relevant to a case would be known by the time of trial. However, that time has long past. Postconviction investigation and litigation has shown that there is often much more to know about a case and that the value of new evidence or strategies may not reveal itself until long after a conviction.

As we open ourselves up to the possibility that a criminal case has a much longer life than we had previously presumed, there will be bumps in the road. How much difference does new information need to make? Why do the prejudice standards for *Brady* and ineffective assistance of counsel claims not allow such challenges? If there is an ongoing collaborative process, what incentive is there for both sides to be as prepared as possible and present their best evidence at trial? These are all fair questions to ask, but we can either operate in a system where procedural rules seek to downplay the value of new information or embrace a new system where we are on the constant hunt for injustice.

If we look to a sporting model of justice, it is understandable that no one wants to play the championship game again. But, cases are not games, and the most valuable information regarding a case may not be discovered until the second half of the proceedings. That is most likely to occur if both sides play on the same side and are open to the reevaluation of cases.[158] At the crossroads, it is time that prosecutors and defense counsel start walking side by side.

651–53 (1990) (discussing the Supreme Court's reluctance to make new rules retroactive because of a need to maintain integrity of prior rulings; only "watershed" rules are retroactive).

158. Medwed, *supra* note 21, at 37 (explaining that a key variable to the success of postconviction claims of innocence is the prosecutor's attitude toward the defendant's claim).