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If Hindsight is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model

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I. THE CASE OF JOANN PARKS

On April 9, 1989, JoAnn Parks put her three children to sleep and went to bed.[1] Around midnight, she awoke to their screams.[2] Her children were trapped on the other end of their house, and the house was engulfed in flames.[3] The heat from the fire was so intense that JoAnn could not get to her children, and was instead forced out of the house where she ran to her neighbor's home for help.[4]

The neighbors called 911 and one neighbor tried to rescue the children, but the fire made it impossible.[5] When the fire department arrived less than ten minutes later, it was too late.[6] All three of JoAnn's children were dead.[7]

Initial investigations concluded that the fire was caused by an electrical malfunction.[8] Yet, two and a half years later, JoAnn

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1 Reporters' Transcript on Appeal at 1897, 2186–87, 2189, People v. Parks, No. VA 009503 (Cal. Ct. App. May 13, 1993).

2 *Id.* at 2188, 2189.

3 *See id.* at 2186–87, 2188.

4 *Id.* at 2188.

5 *Id.* at 1627, 1628.

6 *See id.* at 2239, 2249–50, 2256, 2257.

7 *See id.* at 2249–50, 2257.

8 *Id.* at 2393, 2825, 2953.

was charged with three counts of murder.[9] At trial, the prosecution argued that JoAnn had intentionally set fire to her own house.[10] The prosecution pointed out that the neighbor who tried to rescue the children and the responding officers smelled of smoke and coughed for several days.[11] On the other hand, however, JoAnn's clothes had very little ash and did not smell strongly of smoke.[12] JoAnn herself did not seem to exhibit any physical issues caused by smoke inhalation.[13] One neighbor testified that JoAnn seemed dazed on the night of the fire.[14] Witnesses also testified that she was not hysterical,[15] as some might expect a mother to respond,[16] although other witnesses testified that she had been crying.[17]

Expert testimony presented by the prosecution indicated that two fires had been set intentionally—one in the living room and another in the southeast bedroom.[18] Experts ruled out an electrical source for the fire,[19] and Ronald Parks himself—the father of the victims and JoAnn's husband, who was at work at the time of the fire[20]—testified that there were no electrical problems in the home.[21]

In addition to the testimony about the fire's origin, a firefighter testified that he found an unburned pattern in front of the closed closet where Parks' son, Ronny, was found.[22] The firefighter testified that the unburned area indicated that something had been placed in front of the closed closet door to keep it from swinging open.[23] Two investigators both agreed that a laundry hamper had been placed in front of the closet door based on this evidence.[24]

The defense's evidence demonstrated the fire could actually have been caused by a defective TV known for its tendency to

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[9] *Id.* at 4, 5.
[10] *Id.* at 1546, 1554.
[11] *Id.* at 1641–42, 1694–95.
[12] *Id.* at 1642.
[13] *Id.* at 2185.
[14] *Id.* at 1561.
[15] *Id.*
[16] *Id.* at 2530.
[17] *Id.* at 1888, 2185.
[18] *See id.* at 2935, 2938–40, 3029.
[19] *Id.* at 2443.
[20] *Id.* at 1892, 1897, 1906, 1911.
[21] *Id.* at 1948.
[22] *See id.* at 2187, 2261.
[23] *Id.* at 2261.
[24] *Id.* at 2261, 3147.

start fires.[25] Nevertheless, JoAnn Parks was convicted on all charges and sentenced to three life terms without parole.[26]

Over the past twenty-six years there have been dramatic new scientific developments in the area of arson investigation.[27] New evidence shows that the fire investigators in JoAnn's case based their investigation on what are now debunked arson myths and the conviction was tainted by incorrect investigative theories.[28] For example, what we commonly understand to be a "flashover" effect was not yet fully understood in 1989.[29] Had the investigators known about such a phenomenon, the prosecution's theory that there were two points of origin to the fire would have been disproven. In fact, there has been a great deal of new research on fire origin that debunks the "greatest damage"[30] theory that was applied to this case.[31] New research makes clear that multiple points of origin does not necessarily indicate arson because fire can and often does jump, starting a new fire in the spot it jumps to.[32] The standard method of determining origins of fire in an electrical fire is now an "arc survey,"[33] but this method was not widely used or mentioned in the National Fire Protection Association ("NFPA") 921 *Guide for Fire and Explosion Investigations* ("NFPA 921").[34]

This new evidence, combined with the evidence of the many house fires caused by the same brand and model of TV owned by the Parks, would likely have guaranteed an acquittal had it all

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[25] *Id.* at 3724.

[26] *Id.* at 5984–86.

[27] *See* Steve W. Carman, *Improving the Understanding of Post-Flashover Fire Behavior*, 2008 INT'L SYMP. ON FIRE INVESTIGATION SCI. & TECH. 221, 223, 225.

[28] *See* Reporters' Transcript on Appeal, *supra* note 1, at 2509–10; John J. Lentini, *The Evolution Of Fire Investigation and Its Impact on Arson Cases*, CRIM. JUST., Spring 2012, at 12, 15, 17.

[29] Lentini, *supra* note 28, at 15, 17.

[30] The assessment of the greatest damage is an investigative technique that searches for the origin of the fire based on the spectrum of lesser to greater damage. *See id.* Current investigative standards warn against this method to identify the origin of the fire. *See id.*

[31] *See* Reporters' Transcript on Appeal, *supra* note 1, at 2509–10; Lentini, *supra* note 28, at 15, 17.

[32] *See Arc: Mapping: A Useful Tool for Discovering a Fire's Origin,* INVESTIGATE FIRES (Nov. 1, 2011), http://investigatefires.com/?p=214.

[33] When a fire burns away the insulation on an electrically charged wiring, the electricity may spark and jump across the surface or air. *Id.* This phenomenon is called "arcing." Arc surveys, also known as "arc mapping," locate and document these arcs to help investigators determine a fire's origins. *Id.*

[34] NFPA 921 is a national manual of uniform guidelines for conducting fire and explosion investigations. NAT'L FIRE PROT. ASS'N, NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS 921-6 (2004) [hereinafter NFPA 921].

been brought to light at the time of trial. However, in the world of post-conviction, the burden of proof shifts to the defendant to prove there is sufficient new evidence of innocence to justify the reversal of the conviction.[35]

California has the most difficult standard in the United States for obtaining the reversal of a conviction based on new evidence of innocence. In California, a conviction will only be reversed based on new evidence when the new evidence completely "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability."[36] In addition, the convicted must show that no "reasonable jury could have rejected" the new evidence of innocence.[37] This is an incredibly high burden of proof.

This article surveys the new evidence standard in post-conviction from around the country and explores the practical and legal ramifications of these standards. The new evidence standard is often what stands between an innocent inmate's prison cell and freedom. The standards should provide a vehicle for the reversal of convictions of the innocent, while not overburdening the system with unjustifiable claims or allowing for the release of those who are factually guilty. That is not the current state of the law across the country. The authors, who have all spent their careers litigating new evidence claims on behalf of innocent clients, conclude the article with a suggested model for post-conviction new evidence statutes.

II. CALIFORNIA'S NEW EVIDENCE STANDARD AND THE DIFFICULTY FOR CASES SUCH AS JOANN PARKS'

Reaching the standard of completely undermining the prosecution's case with evidence that points unerringly to innocence in post-conviction is very difficult to attain. In cases such as JoAnn Parks', where new science undermines the arson conclusions determined at trial, there is a near that certainty the jury would not have convicted in the face of the new evidence. However, under California law the question still remains whether the evidence *completely* undermines the prosecution's case and points unerringly

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[35] *See* People v. Duvall, 886 P.2d 1252, 1258 (Cal. 1995) (citing People v. Gonzalez, 800 P.2d 1159, 1205–06 (Cal. 1990)).

[36] *Gonzalez*, 800 P.2d at 1196 (citing *In re* Hall, 637 P.2d 690, 697–98 (Cal. 1981); *In re* Weber, 523 P.2d 229, 243 (Cal. 1974)).

[37] *In re* Lawley, 179 P.3d 891, 898 (Cal. 2008) (quoting *In re* Clark, 855 P.2d 729, 761 n.33 (Cal. 1993)).

to innocence.[38] In addition to the discredited arson evidence, the case was built on evidence that JoAnn was at the house the night of the fire, fled the house without her children, and her response to the tragedy was not one the jurors found consistent with a grieving mom. So, does new arson science combined with the evidence of television fires *completely* undermine the prosecution's case? Does all of the evidence presented by the prosecution need to be proven false? Even if there is some evidence, should we not reverse a conviction if that evidence would never be sufficient to convict? And, what does "point unerringly to innocence" mean? Unfortunately, both prongs mean different things to different judges and often leave innocent people in prison.

III. A REVIEW OF NEW EVIDENCE STATUTES AND STANDARDS ACROSS THE U.S.: FIVE QUESTIONS ABOUT HOW TO ADDRESS NEW EVIDENCE DISCOVERED AFTER CONVICTION

To some degree, any post-conviction proceedings reflect an attempt to strike the appropriate balance between two conflicting important concepts in the criminal justice system: *finality* and *accuracy*.[39] It is important for convictions to be *final* once they have been entered so that the matter is fully resolved, the system can move on to other matters, the victim can move on with his/her life, and the convicted person can begin serving the penalty.[40] Of course, it is also important that the conviction is *accurate* and the right person has been convicted. Indeed, there is no value to society, victims, or defendants in convicting innocent people. Therefore, there needs to be some way to address those instances where the criminal justice system has gotten it wrong, while also recognizing that in most cases, the conviction is proper.

New evidence statutes like California's have admirable goals, as they ostensibly provide some process for innocent people to obtain relief in the event those innocent people find new information that challenges the truth of their conviction. However, the *kind* of process, and the method of determining whether relief should be granted, is incredibly important. If the process is too difficult, or if the standard is too high, then innocent people will be unable to obtain relief. If it is too low, then convictions may be challenged too

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[38] *See supra* notes 36, 37 and accompanying text.

[39] *See, e.g.*, Fay v. Noia, 372 U.S. 391, 422–24 (1963).

[40] JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 52 (2010).

frequently for the courts to bear.

A. What Is New Evidence?

The term "new evidence," is deceptively simple. Is it any evidence discovered after trial? What about evidence that could have been discovered before the conviction, but was not? If it was discovered shortly after the time of the conviction (and possibly before the sentence), is this truly "new" evidence? Answers to these questions are often counterintuitive in the post-conviction arena, and can be different depending on the state in which the question is raised.[41]

Often, new evidence that was not available to the defendant at trial can be raised in claims other than new evidence. For instance, new evidence can also qualify as:

1. *Brady*[42] material. Brady material is evidence that was suppressed, whether willfully or inadvertently, by the prosecutor or by law enforcement before, during, or after trial, and which is material—that is, there is a reasonable probability of a different result had the evidence been available at the time of trial.[43] Although the evidence is discovered after trial, it could have been discovered before trial but for the prosecution's failure to turn over the evidence.[44] *Brady* violations have their own remedies in law and are not covered by the new evidence law.[45]

2. Evidence that could have been discovered by an effective trial attorney. If trial counsel failed to adequately investigate the case, then the evidence the attorney failed to discover will allow for relief if there is a reasonable probability that, but for those failures and errors, the result would have been different.[46] Although the evidence is discovered after trial, it could have been discovered before trial but for counsel's unprofessional errors.[47] Therefore, similar to *Brady*, an ineffective assistance of counsel claim can be

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[41] For example, California's definition of new evidence is particularly broad. *See, e.g.*, *In re* Branch, 449 P.2d 174, 183–84 (Cal. 1969) ("[I]t is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence. Thus, the term 'new evidence' . . . should be held to include any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial.").

[42] Brady v. Maryland, 373 U.S. 83 (1963).

[43] United States v. Bagley, 473 U.S. 667, 682 (1985); *Brady*, 373 U.S. at 87.

[44] *See, e.g.*, *Brady*, 373 U.S. at 84.

[45] David E. Singleton, *Brady Violations: An In-Depth Look at "Higher Standard" Sanctions For a High-Standard Profession*, 15 WYO. L. REV. 139, 153 (2015).

[46] Strickland v. Washington, 466 U.S. 668, 695 (1984).

[47] *See, e.g.*, Fraizer v. Huffman, 343 F.3d 780, 794–95 (6th Cir. 2003).

brought under the Sixth Amendment, but not a new evidence claim.[48]

3. Evidence that is not new in and of itself, but is evidence that some portion of the trial was false. If, after the trial, evidence arises that shows a witness lied, or the results of a forensic test were erroneous, or some other evidence comes out that the trial rested on an improper conclusion, then this may mean a reversal of the conviction, not under a new evidence law, but instead under a claim that the defendant did not receive a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.[49] In this instance, although the evidence is discovered after trial (e.g., "I lied in Jones's case when I identified him as the perpetrator"), the evidence is usually analyzed in terms of whether, absent the *prior* testimony introduced at trial, the court can have confidence in the conviction.[50] For example, in California, false evidence under state law is grounds for reversal if there is a "reasonable probability" that the result would have been different had the evidence never been introduced in the first place.[51]

4. Evidence that is not necessarily new, but is evidence of actual innocence. An individual may be entitled to relief *regardless* of whether new evidence or other evidence exists in his or her case, provided he or she is actually innocent. Colloquially known as a *Herrera*[52] claim, or a freestanding actual innocence claim, the United States Supreme Court has repeatedly declined to decide whether such relief even exists, holding instead that *if* such a right existed, the "threshold showing . . . would necessarily be extraordinarily high."[53] Despite this language—and the total absence of claimants who have met this standard—many scholars now believe actual innocence is a valid claim of relief, partially because of the increasing number of state statutes recognizing the claim.[54]

Thus, there is quite a bit of overlap between these categories and

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[48] *Strickland*, 466 U.S. at 691–92, 693–94.

[49] *See, e.g.*, White v. Ragen, 324 U.S. 760, 764 (1945) (citing Mooney v. Holohan, 294 U.S. 103, 112–13 (1935)). Note that the Supreme Court has held that state inmates seeking federal relief are only entitled to such relief on false evidence claims if the prosecution knew or should have known that the evidence was false. *See* Cash v. Maxwell, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).

[50] *See In re* Richards, 289 P.3d 860, 869 (Cal. 2012).

[51] *Id.* (quoting *In re* Roberts, 60 P.3d 165, 174 (Cal. 2003)).

[52] Herrera v. Collins, 506 U.S. 390 (1993).

[53] *Id.* at 417.

[54] *See, e.g.*, Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171, 175–76, 203–06 (2014).

most post-conviction petitions contain a mix of one or more claims for relief. Evidence that a witness was given a deal in exchange for his or her testimony may mean the prosecution violated its obligations under *Brady*, and it may also mean the witness testified falsely against the defendant.[55] Recantation cases often contain both false and new evidence claims—the false evidence was the original testimony and the new evidence is the recantation.[56]

However, there are also claims that rely solely on the presentation of new evidence—evidence that simply could not have been discovered until after trial. For example, a witness who saw the entire crime from her window and never told anyone that someone other than the person wrongfully convicted was the perpetrator, may not have been discoverable by either the prosecution or the defense prior to trial. Also, if he or she never testified, then he or she never gave false testimony. The evidence in such a case can then only be raised in a "newly discovered evidence claim" as evidence that was discovered—and discoverable—only after the conviction occurred.[57]

The classic example of this type of distinction is found within the relatively new science of DNA. Before the advent of forensic DNA testing in the late 1980s, an individual could be convicted based in part on testimony that blood found at the crime scene matched the defendant's blood type.[58] Later DNA testing, which shows the blood was, in fact, not a match to the defendant, does not make the prior testimony false because there was a match to the defendant's blood type, even though DNA testing can prove definitively it is not the defendant's blood.[59] The prosecutor was not unethical under *Brady* for presenting the evidence and could not have been faulted for failing to turn over DNA results that did not yet exist. Similarly, the defense attorney was not ineffective for failing to perform DNA testing when that tool was not available at the time of conviction. In these instances, what should the courts do to resolve the case?

Unfortunately for state inmates, in the eyes of the federal courts, the answer is "nothing." The United States Supreme Court has

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[55] *See* Giglio v. United States, 405 U.S. 150, 150–51, 154–55 (1972).

[56] *See, e.g.*, People v. Morillo, No. 7672/91, 2011 WL 7726359, at *12, *13 n.14 (N.Y. Sup. Ct. Oct. 6, 2011).

[57] *See, e.g.*, Tompkins v. State, 994 So. 2d 1072, 1089 (Fla. 2008); *Morillo*, 2011 WL 7726359, at *12.

[58] *Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, http://www.innocence project.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science (last visited May 30, 2016).

[59] *See id.*

recently reaffirmed[60] its prior decisions that the jurisdiction of the federal courts is to decide whether the inmate's constitutional rights were violated *at his or her trial*, and have not resolved whether new evidence that goes only to innocence or guilt is a constitutional claim.[61] In other words, if an innocent person is convicted in a trial that is conducted in accord with all of the firmly established constitutional rights, there may or may not be a right to have the conviction reversed based on new evidence of innocence. The constitution only requires fair trials, not ones that get the right result.[62] The Supreme Court's decision to leave this question unresolved has been further complicated by the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which provides that federal courts may not grant relief for constitutional claims that were denied on the merits by a state court unless the denial was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" to the state court.[63] Therefore, the narrow limitations of AEDPA, coupled with the Supreme Court's failure to hold that innocence is a freestanding constitutional claim, currently preclude federal courts from reviewing the merits of freestanding claims of innocence.[64]

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[60] Dist. Attorney's Office v. Osborne, 557 U.S. 52, 71–72, 73–75 (2009).

[61] Meachum v. Fano, 427 U.S. 215, 224 (1976) ("*[G]iven a valid conviction*, the criminal defendant has been constitutionally deprived of his liberty . . . ." (emphasis added)).

[62] *See* Patterson v. New York, 432 U.S. 197, 208 (1977).

[63] 28 U.S.C. § 2254(d)(1)–(2) (2014) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

[64] *See, e.g.*, Ortiz v. Yates, No. CIV S-08-2165-JAM-TJB, 2010 WL 4628197, at *33 (E.D. Cal. Nov. 5, 2010) ("[T]o the extent Petitioner asserts a freestanding actual innocence claim, he is not entitled to relief because . . . the United States Supreme Court has expressly left open the question of whether a freestanding actual innocence claim based on newly discovered evidence constitutes grounds for habeas relief in a non-capital case. In the absence of Supreme Court authority establishing the cognizability of a freestanding actual innocence claim on federal habeas review, the California Supreme Court's rejection of petitioner's freestanding actual innocence claim could not be contrary to, or involve an unreasonable application of, 'clearly established' Supreme Court authority."). *See also* Wright v. Stegall, 247 F. App'x. 709, 711 (6th Cir. 2007) ("Since the Supreme Court has declined to recognize a freestanding innocence claim in habeas corpus, outside the death-penalty context, this court finds that petitioner's claim is not entitled to relief under available Supreme Court precedent.").

The authors note that many, if not most, of the state statutes and case law surrounding and codifying relief based on new evidence have come about as a direct result of the advent of DNA evidence, and the hundreds of innocent individuals whose cases have been reversed because DNA became available after their convictions. But DNA is not the end of new evidence. There are many examples of other types of new evidence that can prove innocence, including undiscovered witnesses and changes in forensic science, or other technology may make a prior conviction unsustainable.[65] Joann Parks' conviction is but one concrete example.

Unfortunately, many of the changes to the criminal justice system and proposed legislation dealing with new evidence focus in large part on DNA test results. The statutes and case law of Arkansas,[66] Delaware,[67] Maine,[68] Mississippi,[69] Nebraska,[70] Nevada,[71] New

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[65] Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 1076 (2014); John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is there a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(1)(G-1)?*, 76 ALB. L. REV. 1453, 1474 (2013).

[66] *See* ARK. CODE ANN. § 16-112-201(a)(2) (2015) (allowing for post-conviction relief based on new, scientific evidence if that evidence would be sufficient to establish that no reasonable finder of fact would find the claimant guilty of the underlying offense); *id.* § 16-112-208(e)(3) ("[I]f the . . . (DNA) test results, when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal.").

[67] DEL. CODE ANN. tit. 11, § 4504(b) (2015) (allowing for post-conviction relief based on DNA evidence that was not available during trial if it establishes actual innocence, and setting the standard of "clear and convincing evidence" that the petitioner would not have been convicted by a reasonable trier of fact).

[68] ME. STAT. tit. 15, § 2138 (10)(c)(1) (2016) (requiring a court to grant a new trial where DNA test results would make it probable that there would be a different outcome); *see also* State v. Dechaine, 2015 ME 88, ¶ 37, 121 A.3d 76, 96 ("Maine's post-conviction review process 'provides a comprehensive and, except for direct appeals from a criminal judgment, exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences.' The DNA analysis statute affords a defendant a narrow opportunity to prove actual innocence or otherwise obtain a new trial outside of the post-conviction review process. It is, however, limited in scope by its own terms." (citation omitted)).

[69] *See* MISS. CODE ANN. § 99-39-5(2)(a)(ii) (2015) (permitting a motion to vacate based on favorable DNA results that demonstrate by "reasonable probability" there would have been no conviction had the results been available at the time of the original prosecution, and exempting claims based on DNA results from three-year statutes of limitation).

[70] *See* State v. Buckman, 675 N.W.2d 372, 383 (Neb. 2004) ("[T]o warrant a new trial, . . . newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result."); *see also* NEB. REV. STAT. § 29-4123(2) (2015) (permitting vacation of conviction, a setting aside of judgment, and release from custody when DNA results conclusively establish innocence); *id.* § 29-4118(2) (declaring that DNA results that do not establish innocence but have probative value may still permit defendants to bring a motion for a new trial under section 29-2101).

[71] *See* NEV. REV. STAT. § 176.09187(1) (2015) (allowing petitioner to bring a motion for a

York,[72] Ohio,[73] Oregon,[74] Tennessee,[75] Texas,[76] Utah,[77] Vermont,[78] and Wyoming[79] provide for relief, or modify and expand the limited available relief or the applicable standard, only if the claim of new evidence is based on the results of DNA testing.

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new trial based on newly discovered evidence pursuant to section 176.515, notwithstanding time limitations, if DNA or genetic testing favors the petitioner); *see also id.* § 176.515(3) ("Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered evidence may be made only within two years after the verdict or finding of guilt.").

[72] *See* N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(2) (McKinney 2015) ("At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that [f]orensic DNA testing of evidence [has been] performed since the entry of a judgment, [and] that there exists a reasonable probability that the verdict would have been more favorable to the defendant.").

[73] *See* OHIO REV. CODE ANN. § 2953.21(A)(1)(a) (LexisNexis 2015) (providing appropriate relief if petitioner can show by clear and convincing evidence, that the DNA testing results, analyzed in the context of all other admissible evidence, establish actual innocence of the offense); *id.* § 2953.21(A)(1)(b) ("'[A]ctual innocence' means that, had the results of the DNA testing . . . been presented at trial, . . . no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted . . . .").

[74] *See* OR. REV. STAT. § 138.696 (2015) ("If DNA testing . . . produces exculpatory evidence, the person who requested the testing may file in the court that ordered the testing a motion for a new trial based on newly discovered evidence. Notwithstanding the time limit established in ORCP 64 F, a person may file a motion under this subsection at any time during the 60-day period that begins on the date the person receives the test results.").

[75] *See* Mills v. State, No. M2011-00620-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 996, at *17, *55, *62, *70, *71 (Tenn. Crim. App. Nov. 19, 2013) (describing how in a petition for writ of error coram nobis based on DNA test results, relief was given based on new DNA evidence that did not meet actual innocence standards, but met coram nobis standards). The *Mills* court held "that had the new DNA evidence been presented at trial, the result of the proceedings on all of the charges might have been different." *Id.* at *70 (citing State v. Vasques, 221 S.W.3d 514, 527 (Tenn. 2007)).

[76] *See* Frank v. State, 190 S.W.3d 136, 138 (Tex. Ct. App. 2005) ("[O]n application of law to fact [the court must] ascertain whether a defendant has shown, by a preponderance of the evidence, 'that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted.'" (quoting Smith v. State, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005))); *but see Ex parte* Holloway, 413 S.W.3d 95, 97 (Tex. Crim. App. 2013) ("[A]n applicant can establish that it is 'probable' that the verdict would be different on retrial only if he can 'show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.'" (quoting *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996))).

[77] UTAH CODE ANN. § 78B-9-303(2)(b) (LexisNexis 2015) (providing the standard for vacating convictions based on DNA testing); *id.* §§ 78B-9-404(1)(b), (4) (stating that for non-DNA innocence claims, to vacate a conviction with prejudice and expunge a record, a court must find that the petitioner has met a clear and convincing standard of evidence to establish that he or she is factually innocent).

[78] VT. STAT. ANN. tit. 13, § 5561(a) (2015) (providing that, contrary to the two-year time limitation detailed in VT. R. CRIM. P. 33, DNA claims for most cases can be brought at any time (*see* VT. R. CRIM. P. 33)). In Vermont, with a showing of a "reasonable probability . . . that the petitioner would not have been convicted," the court can grant a new trial or provide any relief it deems appropriate. tit. 13, §§ 5566(a)(1), 5569(c).

[79] WYO. STAT. ANN. § 7-12-303(b) (2015) (providing that, contrary to the two-year time limitation detailed in WYO. R. CRIM. P. 33, a convicted person may use DNA test results as the basis for a motion for new trial (*see* WYO. R. CRIM. P. 33(c))).

It falls to state legislatures and state courts to determine how new evidence claims should be considered in their own state courts, and because federal relief is not currently available,[80] it is all the more incumbent upon those state legislatures to craft an effective and workable process for obtaining relief when new evidence is available in a case. An analysis of various state approaches to this problem follows, but a working definition of what is "new evidence" is fairly simple: *new evidence is evidence discovered after a defendant's conviction that could not have been discovered before the conviction.* This definition provides some clarity to the term and presents a framework upon which the central issues of new evidence may be built.

B. What Should the Standard Be for a Successful Claim?

This is perhaps the most important question for states to answer when considering how to draft or revise any legislation providing for relief based on a claim of new evidence. There are varying approaches to this standard.

1. "Reasonable Probability of a Different Result"

Under this standard, new evidence entitles an inmate to relief if there is a reasonable probability of a different result in light of the new evidence. This is most closely analogous to other forms of relief in the post-conviction arena, such as ineffective assistance of counsel,[81] *Brady* violations,[82] or (in the case of California) false evidence.[83] Only one state, Wisconsin,[84] provides for relief based on this standard for all kinds of newly discovered evidence (and not only newly discovered DNA evidence). However, it is worth noting that Wisconsin's procedural limitations on newly discovered evidence, such as that the evidence must have been discovered after trial and that the defendant was not negligent in seeking the

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[80] Dist. Attorney's Office v. Osborne, 557 U.S. 52, 55–56, 73–74, 74 n.4 (2009).

[81] Strickland v. Washington, 466 U.S. 668, 694 (1984).

[82] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[83] *In re* Richards, 289 P.3d 860, 869 (Cal. 2012) (citing *In re* Roberts, 60 P.3d 165, 174 (Cal. 2003)).

[84] *See* State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 ("If the defendant is able to prove all four . . . criteria [including that new material evidence exists], then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." (citing State v. McCallum, 561 N.W.2d 707, 710–11 (Wis. 1997))).

evidence, must be proven by clear and convincing evidence.[85]

At least four other states—New York,[86] Mississippi,[87] Utah,[88] and Vermont[89]—utilize the reasonable probability of a different outcome standard, but only for newly discovered DNA evidence and, as noted previously, employ more rigorous standards when the request for relief based on newly discovered evidence is not based on DNA.[90]

Most likely, the fact that so few states take this approach when considering how new evidence should be considered is likely because, unlike other methods of post-conviction relief, pure new evidence claims do not necessarily contemplate a constitutional violation at trial or an unfair trial.[91] In other words, the defendant is not complaining that the trial or its outcome was unfair based on the evidence presented (or not presented), the way it was presented, or the reasons why he or she was unable to present relevant evidence. When such constitutional violations occur, the state's interest in the *finality* of convictions is lower, because the trial has been tainted in some way.[92] As a result, the standard for relief should be low. In new evidence claims, the defendant is asking for another bite at the apple based on something altogether new, and not because the first bite of the apple was rotten. Because of this, the state's interest in the *finality* of convictions is higher, and arguably, the defendant should therefore meet some higher standard for relief.

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[85] *See* State v. Armstrong, 2005 WI 119, ¶¶ 158, 159, 283 Wis. 2d 639, 702–03, 700 N.W.2d 98, 130 (holding that the preliminary requirements in a claim for relief based on newly discovered evidence are as follows: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative; and the court must then determine whether a reasonable probability exists that a different result would be reached in a trial (quoting State v. Avery, 570 N.W.2d 573, 576 (Wis. Ct. App. 1997))).

[86] N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(2) (McKinney 2015) ("[A]fter the entry of a judgment, the court . . . may . . . vacate such judgment upon the ground that . . . there exists a reasonable probability that the verdict would have been more favorable to the defendant.").

[87] MISS. CODE ANN. § 99-39-5(1)(f) (2015) (permitting motion to vacate based on favorable DNA results that show with "reasonable probability" that had results been available at the time of the original prosecution, the outcome would have been different).

[88] UTAH CODE ANN. § 78B-9-104(2) (LexisNexis 2015) (stating that to obtain a new trial based on newly discovered evidence, the petitioner must show a "reasonable likelihood" that they would have been found not guilty, or less culpable).

[89] VT. STAT. ANN. tit. 13, § 5566(a)(1) (2015) ("The court shall grant the petition . . . if . . . [a] reasonable probability exists that the petitioner would not have been convicted or would have received a lesser sentence for the crime which the petitioner claims to be innocent of . . . .").

[90] *See supra* notes 69, 72, 77–78 and accompanying text.

[91] *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 55–56 (2009).

[92] *See supra* notes 39–40 and accompanying text.

2. Would "Probably" or "More Likely Than Not" Change the Result?

A majority of jurisdictions—twenty-nine states[93] and the District

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[93] **ALABAMA:** ALA. R. CRIM. P. 32.1(e)(4) ("[A]ny defendant who has been convicted of a criminal offense may [be granted] . . . appropriate relief on the ground that . . . [n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court, because . . . [i]f the facts had been known at the time of trial or of sentencing, the result probably would have been different . . . ."); **ARIZONA:** ARIZ. REV. STAT. ANN. § 13-4231(5) (2015) ("[A]ny person who has been convicted of or sentenced for a criminal offense may . . . institute a proceeding to secure appropriate relief [if] . . . [n]ewly discovered material facts probably exist and [those] facts probably would have changed the verdict or sentence."); **COLORADO:** Farrar v. People, 208 P.3d 702, 707 (Colo. 2009) ("[N]ewly discovered evidence . . . must be such that it would probably produce an acquittal." (citing Digiallonardo v. People, 488 P.2d 1109, 1113 (Colo. 1971))); **DELAWARE:** Swan v. State, 28 A.3d 362, 387 (Del. 2011) ("To obtain a new trial . . . [the defendant] must show . . . that newly discovered evidence would have probably changed the result if presented to the jury . . . ." (citing Lloyd v. State, 534 A.2d 1262, 1267 (Del. 1987))); *but see* DEL. CODE ANN. tit. 11, § 4504(b) (2015) ("[A] person convicted of a crime who claims that DNA evidence not available at trial establishes the petitioner's actual innocence may commence a proceeding to secure relief by filing a motion for a new trial in the court that entered the judgment of conviction. The court may grant a new trial if the person establishes by clear and convincing evidence that no reasonable trier of fact . . . would have convicted the person."); DEL. SUPER. CT. CRIM. R. 33 (stating that to qualify for this standard, a motion for new trial must be made prior to or within two years of final judgment); **FLORIDA:** Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) ("[N]ewly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial."); **GEORGIA:** Delguidice v. State, 707 S.E.2d 603, 609 (Ga. Ct. App. 2011) ("[N]ewly discovered evidence [must be] . . . so material that it would probably produce a different verdict . . . ." (quoting Timberlake v. State, 271 S.E.2d 792, 795 (Ga. 1980))); **HAWAII:** HAW. R. PENAL P. 40; State v. Mabuti, 807 P.2d 1264, 1268 (Haw. 1991) ("[T]he [newly discovered] evidence [must be] of such a nature as would probably change the result of a later trial." (quoting State v. McNulty, 588 P.2d 438, 445 (Haw. 1978))); **IDAHO:** State v. Drapeau, 551 P.2d 972, 978 (Idaho 1976) (holding that a new trial based on newly discovered evidence is only justified where, among other requirements, the evidence will probably result in an acquittal); *see also* Small v. State, 971 P.2d 1151, 1158 (Idaho Ct. App. 1998) (holding that the standards set forth in *Drapeau* apply to post-conviction claims); **ILLINOIS:** People v. Ortiz, 919 N.E.2d 941, 949–50 (Ill. 2009) ("[P]ostconviction petitioners [have] the right to assert a freestanding claim of actual innocence based on newly discovered evidence [if] . . . [the] 'conclusive character . . . [of the evidence] would probably change the result on retrial.'" (quoting People v. Morgan, 817 N.E.2d 524, 528 (Ill. 2004))); **INDIANA:** Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010) ("[N]ew evidence will mandate a new trial only when the defendant demonstrates that . . . the evidence . . . will probably produce a different result at retrial." (first alteration in original) (quoting Taylor v. State, 840 N.E.2d 324, 329–30 (Ind. 2006))); **IOWA:** Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998) ("The applicant must show . . . [newly discovered evidence] would probably change the result if a new trial was granted." (citing Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982))); **KENTUCKY:** Foley v. Commonwealth, 425 S.W.3d 880, 886 (Ky. 2014) ("[I]n order for newly discovered evidence to support a motion for new trial it must be 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.'" (quoting Jennings v. Commonwealth, 380 S.W.2d 284, 285–86 (Ky. Ct. App. 1964)) (internal quotation marks omitted)); **MICHIGAN:** People v. Rao, 815 N.W.2d 105, 110–11 (Mich. 2012) ("For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that . . . the new evidence makes a different result probable on retrial." (quoting People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003))); **MISSISSIPPI:** Massey v. State, 131 So. 3d 1213, 1218 (Miss. Ct. App. 2013) ("In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must

appear that the evidence will probably change the result if a new trial is granted." (quoting Witherspoon v. State, 767 So. 2d 1065, 1067 (Miss. Ct. App. 2000))); **NEBRASKA:** State v. El-Tabech, 696 N.W.2d 445, 451 (Neb. 2005) ("The proper standard for reviewing motions for new trial . . . based upon newly discovered evidence . . . is [that the evidence must be] of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result." (citing State v. Buckman, 675 N.W.2d 372, 383 (Neb. 2004))); **NEVADA:** Sanborn v. State, 812 P.2d 1279, 1284–85 (Nev. 1991) ("To establish a basis for a new trial . . . the evidence must be: newly discovered; . . . [and] noncumulative; such as to render a different result probable upon retrial . . . ." (quoting McLemore v. State, 577 P.2d 871, 872 (Nev. 1978))); **NEW HAMPSHIRE:** State v. Etienne, 35 A.3d 523, 554 (N.H. 2011) ("To prevail on a motion for a new trial based upon newly discovered evidence, the defendant must prove . . . that the evidence is of such a character that a different result will probably be reached upon another trial." (quoting State v. Cossette, 856 A.2d 732, 737 (N.H. 2004))); **NEW JERSEY:** State v. Nash, 58 A.3d 705, 723 (N.J. 2013) ("Evidence is newly discovered and sufficient to warrant the grant of a new trial when it is . . . of the sort that would probably change the jury's verdict if a new trial were granted." (quoting State v. Carter 426 A.2d 501, 507–08 (N.J. 1981))); **NEW MEXICO:** State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640 (holding that pursuant to the applicable state statute, motions for a new trial based on newly discovered evidence filed within two years of conviction is grounds for relief if the new evidence "will probably change the result" of a conviction (quoting State v. Volpato, 1985-NMSC-1017, ¶ 7, 102 N.M. 383, 384–85, 696 P.2d 471, 472–73)); *but see* Montoya v. Ulibarri, 2007-NMSC-035, ¶ 28, 142 N.M. 89, 99, 163 P.3d 476, 486 (holding that a petitioner asserting a claim of innocence must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence (citing State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003))); *infra* notes 193–94 and accompanying text; **NEW YORK:** People v. Hamilton, 979 N.Y.S.2d 97, 103 (N.Y. App. Div. 2014) (holding that to win a new trial, defendant must establish by a preponderance of the evidence that the newly discovered evidence "will probably change the result" of the conviction (quoting People v. Marino, 951 N.Y.S.2d 740, 743 (N.Y. App. Div. 2012))); **NORTH CAROLINA:** State v. Peterson, 744 S.E.2d 153, 158 (N.C. Ct. App. 2013) (holding that on a post-conviction claim, to succeed on a claim for relief based on newly discovered evidence, the petitioner must show that, *inter alia*, the new evidence is of such nature that a different result will probably be reached in a new trial (citing State v. Hall, 669 S.E.2d 30, 35 (N.C. Ct. App. 2008))); **OKLAHOMA:** Smith v. State, 1992 OK CR 3, ¶ 15, 826 P.2d 615, 617–18 (holding that in a claim based on newly discovered evidence, the petitioner must prove that the new evidence probably would have changed the verdict if it was presented at trial (citing Green v. State, 1985 OK CR 126, ¶ 12, 713 P.2d 1032, 1037)); **OREGON:** State v. Acree, 134 P.3d 1069, 1071 (Or. Ct. App. 2006) ("[Newly discovered evidence] must be such as will probably change the result if a new trial is granted . . . ." (quoting State v. Arnold, 879 P.2d 1272, 1276 (Or. 1994))); **PENNSYLVANIA:** 42 PA. CONS. STAT. § 9543(a)(2)(vi) (2015) ("To be eligible for relief . . . the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the conviction or sentence resulted from . . . [t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced."); **RHODE ISLAND:** Reise v. State, 913 A.2d 1052, 1056 (R.I. 2007) ("[T]he [newly discovered] evidence [must be] of a kind which would probably change the verdict at trial." (citing Bleau v. Wall, 808 A.2d 637, 642 (R.I. 2002))); **SOUTH CAROLINA:** Clark v. State, 434 S.E.2d 266, 267 (S.C. 1993) ("To obtain a new trial based on after discovered evidence, the party must show that the evidence . . . would probably change the result if a new trial is had . . . ." (citing Hayden v. State, 299 S.E.2d 854, 855 (S.C. 1983))); **VERMONT:** State v. Charbonneau, 2011 VT 57, ¶ 13, 190 Vt. 81, 85, 25 A.3d 553, 557 ("To succeed on a motion for a new trial on the basis of newly discovered evidence, a defendant must show: that 'the evidence is such as will probably change the result if a new trial is granted . . . .'" (quoting State v. Charbonneau, 2009 VT 86, ¶ 14, 186 Vt. 583, 586, 980 A.2d 279, 284)); **WASHINGTON:** State v. Wheeler, 349 P.3d 820, 825 (Wash. 2015) (en banc) (holding that a claim for newly discovered evidence entitles individuals to relief if they can show, among other requirements, the evidence "will probably change the result of the trial."

of Columbia[94]—have some variation of this standard, either by statute or by case law.

The benefit of this standard is twofold: first, it is higher than those standards found in other claims for post-conviction relief (e.g., ineffective assistance of counsel, *Brady*, and violations of Due Process, such as the introduction of false evidence), reflecting that individuals who have received a fair trial must provide some additional showing for relief.[95] That is, this standard establishes that, although these individuals would not have been convicted had this new evidence been available at the time of their trial, their trial was not tainted or constitutionally defective, and so the *finality* of court processes are preserved, without sacrificing the ability to challenge the *accuracy* of those processes. Second, this standard is not so high that innocent individuals are forced to establish their innocence to an unachievable degree. In other words, this standard appears to strike an appropriate and comfortable balance between competing interests in the criminal justice system, and because of this, it is hardly surprising that an overwhelming number of jurisdictions have adopted it.

3. "Clear and Convincing Evidence" the Result Would be or Would Have Been Different and "Clear and Convincing Evidence" the Defendant is Innocent or Not Guilty Beyond a Reasonable Doubt

The statutes and case law of thirteen other states—Alaska,[96] Arkansas,[97] Connecticut,[98] Delaware,[99] Louisiana,[100] Minnesota,[101]

(quoting *In re* Pers. Restraint of Lord, 868 P.2d 835, 851 (Wash. 1994) (en banc))); **WYOMING:** Keene v. State, 835 P.2d 341, 344 (Wyo. 1992) ("[I]n order to gain a new trial upon newly discovered evidence . . . it [must be] so material that it would probably produce a different verdict, if the new trial were granted . . . ." (quoting Opie v. State, 422 P.2d 84, 85 (Wyo. 1967))).

[94] Bouknight v. United States, 867 A.2d 245, 255 (D.C. 2005) ("[A] new trial based on newly-discovered evidence . . . [requires the new evidence be] of such nature that in a new trial it would probably produce an acquittal." (quoting Payne v. United States, 697 A.2d 1229, 1234 (D.C. 1997))).

[95] *Compare* United States v. Bagley, 473 U.S. 667, 682 (1985) (using the "reasonable probability" test for *Brady* material), *with Bouknight*, 867 A.2d at 255 (requiring that newly discovered evidence show the probability of producing an acquittal before a new trial will be granted).

[96] ALASKA STAT. § 12.72.020(b)(2)(D) (2014) ("[A] court may hear a claim based on newly discovered evidence if the applicant . . . establishes by clear and convincing evidence that the applicant is innocent.").

[97] ARK. CODE ANN. § 16-112-201(a)(2) (2005) ("[T]o secure relief . . . [t]he scientific predicate for the claim [must] . . . be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.").

[98] Boles v. Comm'r of Corr., 874 A.2d 820, 823 (Conn. App. Ct. 2005) (requiring that in new

Missouri,[102] Montana,[103] New Mexico,[104] South Dakota,[105] Tennessee,[106] Texas,[107] and Virginia[108]—essentially require the

evidence cases, the petitioner must show actual innocence by clear and convincing evidence and that no reasonable fact finder would find the petitioner guilty (citing Player v. Comm'r of Corr., 808 A.2d 1140, 1142–43 (Conn. App. Ct. 2002))).

[99] DEL. CODE ANN. tit. 11, § 4504(b) (2014) ("[A] person convicted of a crime who claims that DNA evidence not available at trial establishes the petitioner's actual innocence may commence a proceeding to secure relief . . . [which] may [be] grant[ed] if the person establishes by clear and convincing evidence that no reasonable trier of fact . . . would have convicted the person."); *but see* Swan v. State, 28 A.3d 362, 387 (Del. 2011).

[100] LA. CODE CRIM. PROC. ANN. art. 930.3(7) (2016) ("The results of DNA testing performed pursuant to an application granted under Article 926.1 [must] prove[] by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.").

[101] MINN. STAT. § 590.01(4)(b)(2) (2005) ("[A] court may hear a petition for postconviction relief [based on] . . . newly discovered evidence . . . [that] establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted.").

[102] State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (en banc) ("The appropriate burden of proof for a habeas claim based upon a freestanding claim of actual innocence should . . . require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." (citing *Ex parte* Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996))).

[103] State v. Beach, 2013 MT 130, ¶ 13, 370 Mont. 163, 168, 302 P.3d 47, 53 ("[Defendant] must show by clear and convincing evidence that . . . no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim." (second alteration in original) (quoting Beach v. State, 2009 MT 398, ¶ 44, 353 Mont. 411, 421, 168, 220 P.3d 667, 673)).

[104] Montoya v. Ulibarri, 2007-NMSC-035, ¶¶ 28, 29, 142 N.M. 89, 98–99, 163 P.3d 476, 485–86 (stating that a petitioner asserting a freestanding claim of innocence must convince the court by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence); *but see* State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640 ("A motion for a new trial on grounds of newly-discovered evidence will not be granted unless . . . 'it will probably change the result if a new trial is granted . . . .'" (quoting State v. Volpato, 1985-NMSC-017, ¶ 7, 102 N.M. 383, 384, 696 P.2d 471, 472)).

[105] Engesser v. Young, 856 N.W.2d 471, 481 (S.D. 2014) ("[T]he Legislature gave a habeas court the authority to consider the merits of successive petitions for a writ of habeas corpus if the petitioner brought forth newly discovered evidence that, if proven and considered in light of the other evidence, clearly and convincingly established that no reasonable fact finder would have found the petitioner guilty of the underlying offense.").

[106] Dellinger v. State, 279 S.W.3d 282, 290 (Tenn. 2009) (holding that Tennessee's Post-Conviction Procedure Act provides for freestanding claims of actual innocence based on scientific evidence); *see also* TENN. CODE ANN. § 40-30-110(f) (2015) (noting that post-conviction petitioners must prove facts by clear and convincing evidence); *but see* Mills v. State, No. M2011-00620-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 996, at *54–55, *69, *70 (Tenn. Crim. App. 2013) (holding that in a petition for writ of coram nobis based on DNA test results, relief was given based on new DNA evidence that did not meet actual innocence standards, but met coram nobis standards, based on the reasoning that if the new evidence was presented during the trial, the result could have been different (citing State v. Vasquez, 221 S.W.3d 514, 527 (Tenn. 2007))).

[107] *Ex parte* Thompson, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005) ("To merit relief, the applicant bears the burden of showing that the newly discovered evidence *unquestionably establishes his or her innocence* . . . . [T]he reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence." (emphasis added) (citing *Elizondo*, 947 S.W.2d at 209)); *but see Ex parte* Holloway, 413 S.W.3d 95, 97 (Tex. Crim. App. 2013) ("In the context of a free-standing claim of actual innocence, an

defendant establish his or her innocence by clear and convincing evidence before providing for relief. However, at least one of these states, Connecticut,[109] uses the lower "probably" or "more likely than not" standard for newly discovered DNA evidence.

The clear and convincing evidence standard can be problematic, especially for states that require clear and convincing evidence of innocence as opposed to states that require clear and convincing evidence that no reasonable fact-finder, jury, or juror would have convicted in light of the new evidence.[110] For example, Arkansas, Delaware, Montana, New Mexico, South Dakota, Texas, and Virginia utilize some form of the latter standard, while Alaska, Connecticut, Louisiana, Minnesota, Missouri, and Tennessee use the former.[111]

The authors believe the clear and convincing evidence standard is too high, but especially in states that require clear and convincing evidence of innocence. Requiring affirmative evidence of innocence prohibits courts from granting new trials in cases where the newly discovered evidence has completely eliminated all evidence of guilt. Despite the fact that the inmate can thus show that he or she never would have been convicted in the first place, he or she may remain in prison, or even be executed, despite the complete lack of reliable

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applicant can establish that it is *'probable'* that the verdict would be different on retrial only if he can 'show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.'" (emphasis added) (quoting *Elizondo*, 947 S.W.2d at 209)); Frank v. State, 190 S.W.3d 136, 138 (Tex. Ct. App. 2005) ("The Court of Criminal Appeals has determined that de novo review is appropriate for appeals arising under article 64.03 because appellate review does not depend on determinations of demeanor or credibility, but on application of law to fact to ascertain whether a defendant has shown, by a preponderance of the evidence, 'that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted.'" (quoting Smith v. State, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005))).

[108] Turner v. Commonwealth, 694 S.E.2d 251, 264 (Va. Ct. App. 2010) ("[The petitioner] must demonstrate by clear and convincing evidence that based on all of the evidence in the record, 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" (emphasis omitted)).

[109] *See* Thomas v. State, 24 A.3d 12, 25 (Conn. App. Ct. 2011) ("A petitioner must persuade the court that the new trial evidence . . . will *probably*, not merely possibly, result in a different verdict at a new trial . . . ." (alteration in original) (quoting Thomas v. State, 24 A.3d 630, 655–56 (Conn. Super. Ct. 2011))); *cf.* CONN. GEN. STAT. § 52-582 (2015) (stating that such petitions must be brought within three years of judgment unless based on DNA evidence). *See also* Gould v. Comm'r of Corr., 22 A.3d 1196, 1205 (Conn. 2011) ("[T]he legislature had determined that petitions for a new trial on the basis of newly discovered evidence generally can only be brought within three years of the rendition of judgment . . . .").

[110] *Compare Dellinger*, 279 S.W.3d at 285 (allowing petitioner's freestanding claim of actual innocence under clear and convincing evidence standard), *with Holloway*, 413 S.W.3d at 98 (denying relief after finding the petitioner had failed to satisfy by clear and convincing evidence that no reasonable juror would have convicted in light of the new evidence).

[111] *See supra* notes 96–108 and accompanying text.

evidence of guilt, simply because the State requires proof of innocence as opposed to only a showing that no reasonable jury would have convicted. These standards also raise other potential injustices.

For example, in many rape cases, where DNA testing later shows that sperm found in the victim did not come from the man convicted of the crime, prosecutors will argue that the DNA must have come from a consensual lover, or from another perpetrator committing the crime with the defendant—even when the *theory at trial was that there was only one attacker.*[112] Under the "clear and convincing evidence of innocence" standard, however, such a scenario may well prevent courts from concluding the conviction should be reversed.[113]

Finally, requiring affirmative evidence of innocence ignores the reality upon which our criminal justice system was built: even the most innocent person cannot always prove innocence, which is why it is the state's obligation to prove guilt.[114] Post-conviction, proof of innocence becomes even more rare. Many exonerations take place fifteen to twenty years after the crime occurred; at that time, it is nearly impossible to establish a solid alibi so the only way to affirmatively prove innocence is to prove that some other particular person committed the crime.[115] If the police were unable to do so, why should an imprisoned person or their lawyer, often working pro bono, be expected to do so?

4. Miscellaneous Standards Across the Country

Other states have taken a much more individualized approach to the new evidence standard; many are discussed below.

As noted at the beginning of this article, California has arguably the highest standard in the country, only providing for relief when the inmate can establish that the newly discovered evidence

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[112] This theory is so prevalent in the realm of post-conviction DNA testing that "the unindicted co-ejaculator" theory is used as a shorthand for situations when the prosecution simply refuses to concede in spite of the overwhelming evidence of innocence. *See, e.g.*, Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES MAG. (Nov. 25, 2011), http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html?_r=0.

[113] *See, e.g.*, *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (stating that the applicable standard is "extraordinarily high" (citing Schlup v. Delo, 513 U.S. 298, 315 (1995))).

[114] *See, e.g.*, Cupp v. Naughten, 414 U.S. 141, 147 (1973) ("The Court of Appeals in this case stated that the effect of the instruction was to place the burden on respondent to prove his innocence. But the trial court gave, not once but twice, explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt.").

[115] *See, e.g.*, Kaneb, *supra* note 54, at 174.

"undermine[s] the entire prosecution case,"[116] and "point[s] unerringly to [his] innocence."[117]

Maine's standard represents a hybrid of some of the language in other standards. It allows for relief if the inmate can show "by clear and convincing evidence" that DNA results "make it probable that a different verdict would result upon a new trial."[118] However, as noted previously, Maine has held that an individual is not entitled to relief based on new evidence unless the new evidence is DNA.[119]

Maryland's standard provides for relief when the newly discovered evidence "creates a substantial or significant possibility that the result would have been different,"[120] but confusingly, only in claims for a petition for writs of actual innocence, which is necessarily a much higher standard.[121] In addition, Maryland's case law articulates that the "substantial or significant possibility" falls somewhere below "beyond a reasonable doubt" but above reasonable probability.[122]

Massachusetts provides for relief based on newly discovered evidence if a judge determines that "there is a substantial risk that the jury would have reached a different conclusion" had the new evidence been available at the time of trial.[123]

Ohio allows for the granting of relief based on newly discovered evidence if the evidence "discloses a strong probability that it will

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[116] *See* People v. Gonzalez, 800 P.2d 1159, 1196 (Cal. 1990) (citing *In re* Hall, 637 P.2d 690, 694 (Cal. 1981)).

[117] *See In re* Johnson, 957 P.2d 299, 307 (Cal. 1998) (quoting *Hall*, 637 P.2d at 697).

[118] ME. REV. STAT. ANN. tit. 15, § 2138(10)(C)(1) (2015) (providing that the petitioner has the burden of proving by clear and convincing evidence that DNA test results "make it probable" that there would be a different verdict if a new trial is granted); *see also* State v. Twardus, 2013 ME 74, ¶ 20, 72 A.3d 523, 531–32 ("[A] defendant seeking a new trial based on newly discovered evidence must establish by clear and convincing evidence that . . . 'the evidence is such as will probably change the result if a new trial is granted . . . .'" (quoting State v. Cookson, 2003 ME 136, ¶ 29, 837 A.2d 101, 110)).

[119] State v. Dechaine, 2015 ME 88, ¶ 39, 121 A.3d 76, 96.

[120] MD. CODE ANN., CRIM. PROC. § 8-301(a)(1) (LexisNexis 2015) ("A person [may] . . . file a petition for writ of actual innocence . . . if the person claims that there is newly discovered evidence that . . . creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined.").

[121] *See id.*

[122] *See* Yonga v. State, 108 A.3d 448, 461 n.4 (Md. Ct. Spec. App. 2015) ("We favor, however, a standard that falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might' which is less stringent than probable. We think that a workable standard is: [t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." (quoting Yorke v. State, 556 A.2d 230, 234–35 (Md. 1989))).

[123] Commonwealth v. Weichell, 847 N.E.2d 1080, 1089 (Mass. 2006) ("[T]he judge must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." (quoting Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986))).

change the result if a new trial is granted."[124]

A small minority of states—Kansas,[125] North Dakota,[126] and West Virginia[127]—provide for relief if the inmate can show the evidence "would likely" or "ought to" produce a different result. This is a very slightly higher standard than standards that require the inmate establish the evidence "would more likely than not" change the result, although in practice it may be a distinction without a difference.

These unique approaches to the standard for new evidence reflect, more often than not, the particular language found in prior cases in those particular states.

5. States with Different Standards for Different Forms of Relief

One interesting approach employed by at least three states is to have different standards available for different forms of relief. In most states, when a court grants a newly discovered evidence claim, the inmate gains a new trial.[128] This makes sense with some standards and burdens of proof, but does it make sense if one has proven that one is innocent with clear and convincing evidence? Certainly in California, where one must point unerringly to innocence with evidence no reasonable jury could reject,[129] it makes little to no sense to retry such a person.

The authors have identified two states and the District of Columbia that provide for dismissal of charges with prejudice

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[124] State v. Gillispie, 2012-Ohio-2942, 985 N.E.2d 145, ¶ 43 (2d Dist.) (quoting State v. Petro, 76 N.E.2d 370, 370 (Ohio 1947)); *but see* OHIO REV. CODE ANN. § 2953.21(A)(1)(a) (LexisNexis 2015) (stating that in a motion to vacate or set aside a conviction based on DNA testing results, relief is appropriate if the petitioner can show by "clear and convincing evidence" that the DNA testing results, analyzed in the context of all other admissible evidence, establish actual innocence of the offense); *id.* § 2953.21(A)(1)(b) ("'[A]ctual innocence means . . . no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted . . . .").

[125] State v. Cook, 135 P.3d 1147, 1166 (Kan. 2006) ("The test for determining whether a new trial is warranted on the ground of newly discovered evidence . . . . [depends on] whether the evidence is of such materiality that it would be likely to produce a different result upon retrial." (citing State v. Norton, 85 P.3d 686, 690 (Kan. 2004))).

[126] Tweed v. State, 2010 ND 38, ¶ 16, 779 N.W.2d 667, 675 ("To prevail on a motion for new trial on the basis of newly discovered evidence . . . 'the defendant must show . . . [that] the weight and quality of the newly discovered evidence would likely result in an acquittal.'" (quoting Moore v. State, 2007 ND 96, ¶ 9, 734 N.W.2d 336, 339)).

[127] State *ex rel.* Smith v. McBride, 681 S.E.2d 81, 91 (W. Va. 2009) ("The evidence must be such as ought to produce an opposite result at a second trial on the merits." (quoting State v. Fraizer, 253 S.E.2d 534, 537 (W. Va. 1979))).

[128] *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 675 (2005).

[129] *See supra* notes 116–17 and accompanying text.

and/or immediate release from custody when an inmate meets a higher standard. Specifically, the District of Columbia provides for a new trial when a petitioner shows that it is more likely than not that he or she is actually innocent, and provides for vacating the conviction and dismissing the relevant count with prejudice when the movant establishes by clear and convincing evidence that he or she is innocent.[130]

Similarly, Nebraska allows the court to vacate the conviction, set aside the judgment, and order the person released from custody when DNA evidence conclusively establishes innocence, and permits a person to bring a motion for a new trial when newly discovered DNA evidence does not establish innocence but has probative value and could arguably meet the standard for a new trial that requires a showing that the new evidence would probably have produced a substantially different result.[131]

Utah also has similar provisions, permitting a new trial when the petitioner shows a reasonable likelihood of a different outcome, and vacation of the conviction with prejudice and expungement of the record when a petitioner proves factual innocence with clear and convincing evidence.[132]

C. What Procedural Bars, If Any, Should Prevent an Individual From Securing Relief?

1. Due Diligence

States are almost universal in their insistence that an individual who has new evidence in his or her case must show diligence in discovering that evidence. The states of Alabama,[133] Alaska,[134] Arizona,[135] Arkansas,[136] Colorado,[137] Delaware,[138] Florida,[139]

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[130] D.C. CODE § 22-4135(g)(2)–(3) (2016).

[131] NEB. REV. STAT. §§ 29-2101, 29–4118(2), 29-4123(2)–(3) (2015); *see also* State v. Buckman, 675 N.W.2d 372, 381–82 (Neb. 2004) (discussing the Nebraska statutory framework and when the court can vacate a judgment based on DNA results).

[132] UTAH CODE ANN. §§ 78B-9-104(1)(e), (2), 78B-9-303(2)(b), 78B-9-404(1)(b) (LexisNexis 2015).

[133] ALA. R. CRIM. P. 32.1(e)(1) ("Newly discovered material facts exist which require that the conviction or sentence be vacated from the court, because . . . [t]he facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence.").

[134] ALASKA STAT. § 12.72.020(b)(2) (2015) ("[A] court may hear a claim . . . based on newly discovered evidence if the applicant establishes due diligence in presenting the claim . . . .").

[135] ARIZ. REV. STAT. ANN. § 13-4231(5)(b) (2015) ("Newly discovered material facts exist if .

Georgia,[140] Hawaii,[141] Idaho,[142] Illinois,[143] Indiana,[144] Iowa,[145] Kansas,[146] Kentucky,[147] Louisiana,[148] Maryland,[149]

. . [t]he defendant exercised due diligence in securing the newly discovered material facts.").

[136] ARK. CODE. ANN. § 16-112-201(a)(2) (2015) ("[A] person convicted of a crime may commence a proceeding to secure relief . . . if the person claims under penalty of perjury that . . . [t]he scientific predicate for the claim could not have been previously discovered through the exercise of due diligence . . . .").

[137] *See* Farrar v. People, 208 P.3d 702, 706 (Colo. 2009) ("[E]vidence will be considered newly discovered for purposes of a motion for new trial only if it was both unknown to the defendant and his counsel in time to be meaningfully confronted at trial and unknowable through the exercise of due diligence.").

[138] *See* Swan v. State, 28 A.3d 362, 387 (Del. 2011) ("To obtain a new trial . . . [the defendant] must show . . . that the evidence was discovered since trial, and could not have been discovered before trial with due diligence . . . ." (citing Lloyd v. State, 534 A.2d 1262, 1267 (Del. 1987))).

[139] *See* Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) ("[N]ewly discovered . . . facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979))).

[140] *See* Timberlake v. State, 271 S.E.2d 792, 795 (Ga. 1980) ("It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court . . . that it was not owing to the want of due diligence that he did not acquire it sooner . . . ." (quoting Emmett v. State, 205 S.E.2d 231, 235 (Ga. 1974))).

[141] *See* State v. Mabuti, 807 P.2d 1264, 1268 (Haw. 1991) ("A motion for new trial based on newly discovered evidence will only be granted if . . . such evidence could not have been discovered before or at trial through the exercise of due diligence . . . ." (quoting State v. McNulty, 588 P.2d 438, 445 (Haw. 1978))).

[142] *See, e.g.*, State v. Drapeau, 551 P.2d 972, 978 (Idaho 1976) ("A motion based on newly discovered evidence must disclose . . . that failure to learn of the evidence was due to no lack of diligence on the part of the defendant." (internal quotation marks omitted)).

[143] *See, e.g.*, People v. Morgan, 817 N.E.2d 524, 527–28 (Ill. 2004) (noting that "newly discovered" evidence is evidence that was unavailable at the initial trial and which could not have been discovered through diligence at an earlier time).

[144] *See, e.g.*, Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010) (explaining that new evidence allows for a new trial only if the defendant demonstrates that "due diligence" was exercised in discovering the new evidence (quoting Taylor v. State 840 N.E.2d 324, 330 (Ind. 2006))).

[145] *See, e.g.*, Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998) ("[T]he evidence could not have been discovered earlier in the exercise of due diligence.").

[146] *See, e.g.*, State v. Cook, 135 P.3d 1147, 1166 (Kan. 2006) (demonstrating that the defendant must establish that new evidence could not have been offered at trial with "reasonable diligence" (citing State v. Norton, 85 P.3d 686, 689–90 (Kan. 2004))).

[147] *See, e.g.*, Commonwealth v. Harris, 250 S.W.3d 637, 642 (Ky. 2008) ("Newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence." (citing Richardson v. Head, 236 S.W.3d 17, 22 (Ky. Ct. App. 2007))).

[148] LA. CODE CRIM. PROC. ANN. art. 851(B)(3) (2016) ("The court, on motion of the defendant, shall grant a new trial whenever . . . [n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.").

[149] MD. CODE ANN., CRIM. PRO. § 8-301(a)(2) (LexisNexis 2015) ("A person charged by indictment or criminal information with a crime . . . may, at any time, file a petition for writ of actual innocence . . . if the person claims that there is newly discovered evidence that . . . could not have been discovered in time to move for a new trial under Maryland Rule 4-331.").

Massachusetts,[150] Michigan,[151] Minnesota,[152] Mississippi,[153] Montana,[154] New Jersey,[155] New Mexico,[156] New York,[157] North Carolina,[158] North Dakota,[159] Oregon,[160] Rhode Island,[161] South

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[150] *See, e.g.*, Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986) ("Not only must the allegedly new evidence demonstrate the materiality, weight, and significance that we have described, but it must also have been unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial.) The defendant has the burden of proving that reasonable pretrial diligence would not have uncovered the evidence." (citations omitted)).

[151] *See, e.g.*, People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003) ("For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that . . . 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial.'" (quoting People v. Johnson, 545 N.W.2d 637, 638 n.6 (Mich. 1996))).

[152] MINN. STAT. § 590.01(4)(b)(2) (2015) ("[A] court may hear a petition for postconviction relief if . . . the petitioner alleges the existence of newly discovered evidence . . . that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition.").

[153] *See, e.g.*, Witherspoon v. State, 1999-CA-01146-COA (¶ 6) (Miss. Ct. App. 2000) ("In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence . . . could not have been discovered before the trial by the exercise of due diligence." (citing Moore v. State, 508 So. 2d 666, 668 (Miss. 1987))).

[154] *See, e.g.*, State v. Beach, 2013 MT 130, ¶ 10, 370 Mont. 163, 167, 302 P.3d 47, 52 ("The failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part.").

[155] *See, e.g.*, State v. Nash, 58 A.3d 705, 723 (N.J. 2013) ("Evidence is newly discovered and sufficient to warrant the grant of a new trial when it is . . . 'discovered since the trial and not discoverable by reasonable diligence beforehand.'" (quoting State v. Carter, 426 A.2d 501, 508 (N.J. 1981))).

[156] *See, e.g.*, Montoya v. Ulibarri, 2007-NMSC-035, ¶ 31, 142 N.M. 89, 99, 163 P.3d 476, 486 (holding that a defendant must be able to show that newly discovered evidence was not able to be discovered through due diligence before trial).

[157] *See, e.g.*, People v. Hamilton, 979 N.Y.S.2d 97, 103 (N.Y. App. Div. 2014) (requiring that claims for relief based on newly discovered evidence must establish that the evidence was not discoverable before trial by the exercise of due diligence (citing People v. Marino, 951 N.Y.S.2d 740, 744 (N.Y. App. Div. 2012))); *cf. Hamilton*, 979 N.Y.S.2d at 108 ("[A] constitutional violation occurs only if there is clear and convincing evidence that the defendant is innocent." (citations omitted)).

[158] *See, e.g.*, State v. Peterson, 744 S.E.2d 153, 157 (N.C. Ct. App. 2013) ("To prevail on a motion for appropriate relief based on newly discovered evidence, a defendant must establish . . . that due diligence was used and proper means were employed to procure the testimony at the trial." (quoting State v. Hall, 669 S.E.2d 30, 35 (N.C. Ct. App. 2008))).

[159] *See, e.g.*, Tweed v. State, 2010 ND 38, ¶ 16, 779 N.W.2d 667, 675 ("To prevail on a motion for new trial on the basis of newly discovered evidence under N.D.R. Crim. P. 33, 'the defendant must show . . . [that] the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence." (quoting Moore v. State, 2007 ND 96, ¶ 9, 734 N.W.2d 336, 339)).

[160] *See, e.g.*, State v. Arnold, 879 P.2d 1272, 1277 (Or. 1994) ("[E]vidence that may justify a court in granting a new trial . . . must be such as, with reasonable diligence, could not have been discovered before or during the trial; . . . [and] must be such that it cannot, with reasonable diligence, be used during trial.").

[161] *See, e.g.*, Reise v. State, 913 A.2d 1052, 1056 (R.I. 2007) ("When conducting the analysis of an application for postconviction relief based on newly discovered evidence, . . . [t]he [defendant], [as a] threshold, . . . must establish that . . . the evidence was not discoverable prior to trial despite the exercise of due diligence; [and that] the evidence is not merely cumulative or impeaching but rather is material to the issue upon which it is admissible."

Carolina,[162] Texas,[163] Utah,[164] Vermont,[165] Washington,[166] West Virginia,[167] Wisconsin,[168] Wyoming,[169] and the District of Columbia[170] require some showing of diligence before an inmate may obtain relief based upon a claim of new evidence.

However, in the post-conviction arena, the due diligence standard is hard to apply. Defendants lose their right to an attorney after their initial appeal so they are often left unrepresented, in a prison cell, unable to conduct the investigation required to unearth new evidence.[171] Should it be sufficient that they continually sought out

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(citations omitted)).

[162] *See, e.g.*, Clark v. State, 434 S.E.2d 266, 267 (S.C. 1993) ("To obtain a new trial based on after discovered evidence, the party must show that the evidence . . . could not have been discovered before trial.").

[163] *See, e.g.*, Lee v. State, 186 S.W.3d 649, 659–60 (Tex. Ct. App. 2006) ("A defendant is entitled to a new trial because of newly discovered evidence when the defendant shows . . . the movant's failure to discover or obtain the evidence was not due to a lack of diligence." (quoting Keeler v. State, 74 S.W.3d 31, 36–37 (Tex. Crim. App. 2002))).

[164] UTAH CODE ANN. § 78B-9-104(e)(i) (LexisNexis 2015) ("[N]either the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence.").

[165] *See, e.g.*, State v. Charbonneau, 2011 VT 57, ¶ 13, 190 Vt. 81, 85, 25 A.3d 553, 557 ("To succeed on a motion for a new trial on the basis of newly discovered evidence, a defendant must show: that 'the evidence is such . . . that it could not have been discovered before the trial by the exercise of due diligence; that it is material to the issue; *and* that it is not merely cumulative or impeaching.'" (quoting State v. Charbonneau, 2009 VT 86, ¶ 14, 186 Vt. 583, 586, 980 A.2d 279, 284)).

[166] *See, e.g.*, *In re* Pers. Restraint of Lord, 868 P.2d 835, 851 (Wash. 1994) (en banc) ("[T]he defendant must show . . . 'that the evidence . . . could not have been discovered before trial by the exercise of due diligence.'" (quoting State v. Williams, 634 P.2d 868, 873 (Wash. 1981) (en banc))).

[167] *See, e.g.*, State *ex rel.* Smith v. McBride, 681 S.E.2d 81, 91 (W. Va. 2009) ("It must appear . . . that [the defendant] was diligent in ascertaining and securing [the] evidence, and that the new evidence is such that due diligence would not have secured it before the verdict." (second and third alteration in original) (quoting *In re* Renewed Investigation of State Police Crime Lab., Serology Div., 633 S.E.2d 762, 763 (W. Va. 2006))).

[168] *See, e.g.*, State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 49, 750 N.W.2d 42, 52 ("[T]he defendant . . . [must] not [have been] negligent in seeking the evidence." (quoting State v. McCallum, 561 N.W.2d 707, 710 (Wis. 1997))).

[169] *See, e.g.*, Opie v. State, 422 P.2d 84, 85 (Wyo. 1967) ("[I]t is incumbent on a party who asks for a new trial on the grounds of newly discovered evidence to satisfy the court . . . that [knowledge of the evidence] was not owing to the want of due diligence that it did not come sooner." (citing United States v. Johnson, 142 F.2d 588, 592 (7th Cir. 1944))).

[170] *See, e.g.*, Payne v. United States, 697 A.2d 1229, 1234 (D.C. Cir. 1997) ("[T]he party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence." (quoting Heard v. United States, 245 A.2d 125, 126 (D.C. Cir. 1968))).

[171] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 612 (1974); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 508–09 (2009) ("[C]onvicted defendants generally lack the resources to uncover new evidence or to follow up effectively on their own."). It has been made clear that "[t]he duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal

assistance while they were incarcerated? Does it even make sense to have a due diligence standard? If new evidence comes to light, should the court not consider it regardless of whether or not the defendant had been diligent in seeking it out? Do we as a society benefit when citizens are locked up due to them not showing due diligence in seeking out new evidence? If due diligence is supposed to protect the state's interest in having the ability to respond to new evidence, shouldn't the burden be on the state to show prejudice from the failure to present a timely claim of new evidence?

2. Time Frames and Sunset Provisions

New evidence can be discovered at any time. In the criminal justice world, however, claims for new evidence are often cognizable only through a motion for new trial, before the trial court loses jurisdiction of the case and it is sent to direct appeal.[172] This means that, in many states, newly discovered evidence is only cognizable as a claim for a very short period of time after conviction but before the imposition of a sentence, or within a few months after the conviction and sentence.[173] Generally, statutes that impose time restrictions on new evidence claims attempt to limit the number of claims heard after the conviction, thus preserving the *finality* of such convictions over their *accuracy*.[174] For some states, once this time period has passed, claims for relief based on newly discovered evidence may no longer be available.[175] These are some of the common deadlines found in statutes across the country:

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defendant in a continuing effort to reverse his conviction, but only to assure . . . an adequate opportunity to present his claims fairly in the . . . appellate process." *Ross*, 417 U.S. at 616.

[172] *See* Paul Mogin, *Using New Evidence of a Constitutional Violation to Get a New Trial*, CHAMPION, Sept.–Oct. 2003, at 26, 28.

[173] *Compare* N.Y. CRIM. PROC. LAW § 330.30(3) (McKinney 2015) (authorizing new evidence as grounds for setting aside or modifying a verdict, if brought on motion after a verdict of guilty and before sentencing), *with* TEX. R. APP. PROC. 21.4(a) (authorizing a thirty-day filing period for a motion for new trial after sentencing).

[174] *See* Medwed, *supra* note 128, at 690–91 ("[T]ime limits arguably promote finality . . . by pinpointing a date at which the parties know that any exposure stemming from the relevant incident has ceased."); *cf.* United States v. Johnson, 327 U.S. 106, 112 (1946) (noting that, while under the federal criminal appeals scheme, motions for new trials in light of new evidence may be made for an "extraordinary length of time[;]" the resulting potential to delay enforcement of sentences requires courts to keep a watchful eye for meritless appeals).

[175] Medwed, *supra* note 128, at 690 (noting that time limitations present a significant obstacle for the filing of new claims).

a. Ten Days

Oregon provides just ten days after the entry of judgment to file a motion for new trial based on newly discovered evidence in non-DNA cases.[176]

b. 120 Days

Ohio provides for a window of just four months from the date of the verdict to file a claim for relief based on new evidence.[177] However, if the claim is based on DNA evidence, and if the defendant can additionally establish "by clear and convincing proof" that he or she could not have discovered the DNA results within the 120-day time period, he or she may file a claim after the four-month period.[178]

c. One Year

Louisiana mandates that motions for new trial be filed within one year of the verdict unless based on DNA evidence.[179] Even still, motions for a new trial based on newly discovered evidence brought within one year of conviction are subject to the lower "would

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[176] *See* OR. R. CIV. P. 64(F)(1) ("A motion to set aside a judgment and for a new trial, with the affidavits or declarations, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside."); *but see* OR. REV. STAT. §§ 138.690, 138.696 (2016) (explaining that motions for DNA testing and grants of relief based on DNA testing results are exempt from the established time limit in Rule 64 of the Oregon Rules of Civil Procedure).

[177] *See* OHIO R. CRIM. P. 33(B) ("Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or . . . within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.").

[178] OHIO REV. CODE ANN. § 2953.21(A)(1)(a) (LexisNexis 2015) ("Any person who has been convicted of a criminal offense . . . and who is an offender for whom DNA testing [] was performed . . . and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case . . . provided results that establish, by clear and convincing evidence, actual innocence of that felony offense . . . may file a petition in the court that imposed sentence, . . . asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."); *see also id.* § 2953.21(A)(1)(b) ("'[A]ctual innocence' means that . . . no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.").

[179] *See* LA. CODE CRIM. PROC. ANN. art. 853(B) (2016) ("When the motion for a new trial is based on Article 851(B)(3) of this Code, the motion may be filed within one year after the verdict of judgment of the trial court . . . ."); *but see id.* art. 930.8(A)(2) (noting that applications for post-conviction relief may be considered even if they are filed after more than two years of the conviction and final sentencing, provided that the grounds for relief establish a constitutional violation).

probably have produced a different verdict standard,"[180] while motions brought later based on newly discovered DNA evidence require "clear and convincing evidence that the petitioner is factually innocent."[181] Additionally, the accused can present newly discovered evidence if discovered after one year from conviction and within two years of discovering the new facts, but only when that newly discovered evidence supports a state or federal constitutional claim.[182] As discovered above and below, both Louisiana state courts[183] and the U.S. Supreme Court have left open the question of whether actual innocence is a freestanding constitutional claim.[184]

In Tennessee, although motions for new trial must be filed within thirty days of the sentence,[185] petitions for post-conviction relief[186] and petitions for writs of error coram nobis[187] based on newly discovered evidence may be filed within one year of when the judgment becomes final.

d. Eighteen Months

Alaska provides for a window of eighteen months from the date of the judgment,[188] although a defendant may file a petition outside of this window if the claim "was not known" within this time frame, and if he or she "establishes due diligence in presenting the claim."[189]

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[180] State v. Thomas, 48,530-KA, p. 8–9 (La. App. 2 Cir. 12/4/13); 131 So. 3d 84, 89 (citing State v. Watts, 2000-0602, p. 6 (La. 1/14/03); 835 So. 2d 441, 447; State v. Hammons, 597 So. 2d 990, 994 (La. 1992)).

[181] LA. CODE CRIM. PROC. ANN. art. 930.3(7) (2016).

[182] *Id.* arts. 853(B), 930.8(A), 930.3(1).

[183] *See, e.g.*, State v. Pierre, 2013-0873, p. 8 (La. 10/15/13); 125 So. 3d 403, 408.

[184] *See, e.g.*, Dist. Attorney's Office v. Osborne, 557 U.S. 52, 71–72 (2009).

[185] TENN. R. CRIM. P. 33(b).

[186] TENN. CODE ANN. § 40-30-102(a) (2015).

[187] *Id.* § 27-7-103 (2015); *see also* State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999) (holding that the statute of limitations for a petition for writ of error coram nobis is one year from the date the judgment becomes final in the trial court); Mills v. State, No. M2011-00620-CCA-R3PC, 2013 Tenn. Crim. App. LEXIS 996, at *60–61, *63, *71 (Tenn. Crim. App. Nov. 19, 2013) (granting coram nobis relief long after the conviction, based on new DNA evidence that did not meet actual innocence standards, but met coram nobis standards).

[188] ALASKA STAT. §12.72.020(a)(3)(A) (2015) (stating that claims of new evidence must be raised within eighteen months of judgment or one year from when direct appeal is final); ALASKA R. CRIM. P. 35.1(c).

[189] ALASKA STAT. § 12.72.020(b)(2)(A).

e. Two Years

Delaware imposes a strict time limit of two years from the date of the judgment in the case to file a motion for a new trial based on newly discovered evidence.[190] However, a defendant can bring a motion for DNA testing within three years of the date of the conviction,[191] and can then bring a motion for a new trial following favorable DNA results, provided those results establish "by clear and convincing evidence that no reasonable trier of fact . . . would have convicted the person" in light of the testing.[192]

Maine allows for motions for a new trial based on DNA results within "[t]wo years after the date of conviction," or within two years of the date that "new technology with respect to DNA analysis that is capable of providing new material information" came into existence.[193]

New Mexico's statute sets a two-year time limit from the date of the defendant's conviction to file a motion for a new trial based on new evidence.[194] Requests for relief past the two-year time limit may be heard under a higher standard.[195]

Wyoming's code requires newly discovered evidence claims to be raised within two years of the final judgment in the case.[196] However, Wyoming's statute for post-conviction DNA testing states that "[n]otwithstanding any law or rule of procedure that bars a motion for a new trial as untimely, a convicted person may use" DNA test results as the basis for a motion for a new trial.[197]

In Florida, motions for a new trial based on newly discovered evidence must be brought within two years of when the judgment and sentence become final,[198] unless the defendant discovers new evidence and can show due diligence in failing to present the claim within the two-year time period.[199]

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[190] DEL. SUPER. CT. R. CRIM. P. 33 (stating motions for a new trial must be made prior to or within two years of final judgment).

[191] DEL. CODE ANN. tit. 11, § 4504(a) (2015).

[192] *Id.* § 4504(b).

[193] ME. REV. STAT. tit. 15, § 2137(2)(B), (C) (2015).

[194] N.M. DIST. CT. R. CRIM. P. 5-614(C).

[195] *See, e.g.*, Montoya v. Ulibarri, 2007-NMSC-035, ¶ 30, 142 N.M. 89, 99, 163 P.3d 476, 486 ("[Proof] by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence [is required]." (quoting *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996))).

[196] WYO. R. CRIM. P. 33(c).

[197] WYO. STAT. ANN. § 7-12-303(b) (2015).

[198] FLA. R. CRIM. P. 3.850(b).

[199] *Id.* at 3.850(b)(1) ("[A] motion shall be filed or considered . . . if filed more than 2 years after the judgment . . . [if] the facts on which the claim is predicated were unknown to the

f. Three Years

In Mississippi, for non-DNA claims [200] a defendant must bring a motion within three years of when the State Supreme Court rules on the defendant's direct appeal, or within three years of when he or she could have brought an appeal, or within three years of entry of a judgment if there was a guilty plea.[201] DNA claims are exempted from these time limits.[202]

g. Five Years

Other than setting no time limits, Nebraska provides perhaps the most lenient timeframe. Nebraska allows for motions for a new trial based on newly discovered evidence to be filed within five years after the date of the verdict, or later if based on DNA, or if the non-DNA evidence could not have been discovered within the five-year window.[203]

h. No Time Limit

Only two states—New Jersey[204] and New York[205]—explicitly state that inmates may challenge their conviction "at any time" when the challenge is based on newly discovered evidence. Other states have no express time limit, implying those claims may be brought at any time. However, as noted previously, most jurisdictions, even those without time limits, require a showing of diligence.[206]

Similar to due diligence, is society served by sunset provisions on new evidence statutes and time limits for presenting new evidence?

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movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence[.]").

[200] MISS. CODE ANN. § 99-39-5(2) (2015).

[201] *Id.* § 99-39-5(2).

[202] *Id.* § 99-39-5(2)(a)(ii) (exempting claims based on DNA results from three-year statute of limitations).

[203] NEB. REV. STAT. § 29-2103(4) (2015) ("A motion for new trial . . . shall be filed within a reasonable time after the discovery of the new evidence and cannot be filed more than five years after the date of the verdict, unless the motion and supporting documents show the new evidence could not with reasonable diligence have been discovered and produced at trial and such evidence is so substantial that a different result may have occurred."); *see also id.* §§ 29-4120(1), 29-4123(2) (2015) (noting that a motion to vacate a conviction and set aside judgment has no time limits when based on DNA test results).

[204] N.J. CT. R. 3:20-2 ("A motion for new trial based on the ground of newly-discovered evidence may be made at any time . . . .").

[205] N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2015).

[206] *See, e.g., id.*; WYO. STAT. ANN. § 7-12-303(d) (2015); FLA. R. CRIM. P. 3.850(b)(1).

Of course it is a nice idea to have cases fully resolved, but if there is new evidence and no prejudice to the prosecution by presenting it, it does not make sense to have limits on the presentation of evidence. The cost of incarceration continues to rise each year.[207] There may be some financial benefits in restricting filings by inmates, but these savings are dramatically overwhelmed by the cost of corrections.[208] In addition, there is the moral question of incarcerating someone for a crime that new evidence can disprove. And, of course, there are cases in which new evidence points to the actual offender.[209] Society is certainly not served by restricting the ability to bring that evidence to light by introducing false or arbitrary time restrictions on evidence.

3. Other Requirements

Many states have additional requirements above and beyond diligence or artificial sunset provisions. The most common requirements are that the new evidence must be material and must not be merely cumulative to the evidence at trial or qualify as impeachment evidence. Thirty states[210] and the District of

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[207] *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 34–35 (2011).

[208] *See id. See also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1624–25 (2003) (noting that inmate filings place a substantial burden on the court system every year, which amounted to approximately $51 million dollars in 1995).

[209] *See, e.g.*, Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1182–83 (2010).

[210] **ALABAMA:** ALA. R. CRIM. P. 32.1(e)(2)–(3) ("[A]ny defendant who has been convicted of a criminal offense may institute a proceeding . . . to secure appropriate relief on the ground that . . . [n]ewly discovered material facts exist . . . [that are] not merely cumulative to other facts that were known[,] . . . [nor] merely amount to impeachment evidence."); **ALASKA:** ALASKA STAT. § 12.72.020(b)(2)(B)–(C) (2015) (noting that the court may hear a claim based on newly discovered evidence if the evidence is not cumulative to the evidence presented at trial nor impeachment evidence); **ARIZONA:** ARIZ. REV. STAT. ANN. § 13-4231(5)(c) (2015) ("Newly discovered material facts exist if . . . [t]he newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence."); **COLORADO:** Farrar v. People, 208 P.3d 702, 706–07 (Colo. 2009) ("[T]he newly discovered evidence must be of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial."); **DELAWARE:** Swan v. State, 28 A.3d 362, 387 (Del. 2011) ("To obtain a new trial . . . [defendant] must show . . . the evidence is not merely cumulative or impeaching."); **GEORGIA:** Timberlake v. State, 271 S.E.2d 792, 795–96 (Ga. 1980) ("[Defendant must establish that the evidence] 'is so material that it would probably produce a different verdict[,] . . . that it is not cumulative only[,] . . . [and] a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.'" (alteration in original) (citations omitted)); **HAWAII:** State v. Mabuti, 807 P.2d 1264, 1268 (Haw. 1991) (holding that only newly discovered evidence that is more material and not simply cumulative or solely for impeachment will support motion for new trial (quoting State v. McNulty, 588 P.2d 438, 445 (Haw. 1978))); **IDAHO:** State v. Drapeau, 551 P.2d 972, 978

(Idaho 1976) ("A motion based on newly discovered evidence must disclose . . . that the evidence is material, [and] not merely cumulative or impeaching."); **IOWA:** Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998) (holding that postconviction relief is appropriate only when the newly discovered evidence is material and not merely cumulative or impeaching (quoting Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982))); **MASSACHUSETTS:** Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986) ("The evidence said to be new not only must be material and credible but also must carry a measure of strength in support of the defendant's position. Thus newly discovered evidence that is cumulative of evidence admitted at trial tends to carry less weight than new evidence that is different in kind." (citations omitted)); **MICHIGAN:** People v. Rao, 815 N.W.2d 105, 110 (Mich. 2012) (stating that a claim of newly discovered evidence provides grounds for relief only if the evidence was not cumulative (quoting People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003))); **MINNESOTA:** MINN. STAT. § 590.01(4)(b)(2) (2015) ("[A] court may hear a petition for postconviction relief if . . . the evidence is not cumulative to evidence presented at trial, [and] is not for impeachment purposes."); **MISSISSIPPI:** Witherspoon v. State, 1999-CA-01146-COA (¶ 6) (Miss. Ct. App. 2000) (citing Moore v. State, 508 So. 2d 666, 668 (Miss. 1987)); **MONTANA:** State v. Beach, 2013 MT 130, ¶ 10, 370 Mont. 163, 167, 302 P.3d 47, 52 ("[T]o determine whether 'newly discovered evidence' warrant[s] a new trial[,] . . . '[t]he evidence must be material to the issues at trial; [and] . . . be neither cumulative nor merely impeaching.'" (quoting Beach v. State, 2009 MT 398, ¶38, 353 Mont. 411, 419, 220 P.3d 667, 673)); **NEW HAMPSHIRE:** State v. Etienne, 35 A.3d 523, 554 (N.H. 2011) (holding that to prevail on a motion for new trial, defendant must prove the new evidence is not cumulative, but is on the merits and material (quoting State v. Cossette, 856 A.2d 732, 737 (N.H. 2004))); **NEW JERSEY:** State v. Nash, 58 A.3d 705, 723 (N.J. 2013) ("Evidence is newly discovered and sufficient to warrant the grant of a new trial when it is . . . 'material to the issue and not merely cumulative or impeaching or contradictory.'" (quoting State v. Carter, 426 A.2d 501, 508 (N.J. 1981))); **NEW MEXICO:** Montoya v. Ulibarri, 2007-NMSC-035, ¶ 31, 142 N.M. 89, 99, 163 P.3d 476, 486 ("Under the motion for [a] new trial standard, a defendant must show that the evidence . . . [is] not merely cumulative; and . . . it must not be merely impeaching or contradictory." (quoting State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640)); **NEW YORK:** People v. Hamilton, 979 N.Y.S.2d 97, 103 (N.Y. App. Div. 2014) (holding that claims for relief based on newly discovered evidence must establish that the evidence is "material to the issue," and not impeaching or contradictory); **NORTH CAROLINA:** State v. Peterson, 744 S.E.2d 153, 157 (N.C. Ct. App. 2013) ("To prevail on a motion for appropriate relief based on newly discovered evidence, a defendant must establish . . . that [the new evidence] is competent, material and relevant, . . . that the newly discovered evidence is not merely cumulative, [and] that it does not tend only to contradict a former witness or to impeach or discredit him." (quoting State v. Hall, 669 S.E.2d 30, 35 (N.C. Ct. App. 2008))); **NORTH DAKOTA:** Tweed v. State, 2010 ND 38, ¶ 16, 779 N.W.2d 667, 675 ("A district court may grant post-conviction relief when . . . 'the newly discovered evidence is material to the issues at trial.'" (quoting Moore v. State, 2007 ND 96, ¶ 9, 734 N.W.2d 336, 339 (N.D. 2007))); **OREGON:** State v. Arnold, 879 P.2d 1272, 1277 (Or. 1994) ("[E]vidence that may justify a court in granting a new trial must . . . be material to an issue[,] . . . not be merely cumulative[, and] . . . not be merely impeaching or contradicting of former evidence."); **RHODE ISLAND:** Reise v. State, 913 A.2d 1052, 1056 (R.I. 2007) (holding that the threshold issue in determining whether an application for post-conviction relief based on newly discovered evidence may be considered is whether the evidence is cumulative, impeaching, or material to the issue (citing Bleau v. Wall, 808 A.2d 637, 642 (R.I. 2002))); **SOUTH CAROLINA:** Clark v. State, 434 S.E.2d 266, 267 (S.C. 1993) (stating that a new trial based on "after discovered evidence" requires a showing that the evidence is material to a claim of actual guilt or innocence, and does more than merely impeach (citing Hayden v. State, 299 S.E.2d 854, 855 (S.C. 1983))); **TEXAS:** Lee v. State, 186 S.W.3d 649, 659–60 (Tex. Ct. App. 2006) ("A defendant is entitled to a new trial because of newly discovered evidence when the defendant shows . . . the new evidence is admissible and is not merely cumulative, corroborative, collateral, or impeaching." (quoting Keeter v. State, 74 S.W.3d 31, 36–37 (Tex. Crim. App. 2002))); **UTAH:** UTAH CODE ANN. § 78B-9-104(1)(e)(ii)–(iii) (LexisNexis 2015) ("[N]ewly discovered material evidence . . . that requires the court to

Columbia[211] have these additional requirements.

Requiring new evidence to be material does not seem to be much of a burden. If the evidence is not material, then it certainly would not be sufficient—under any of the new evidence standards—to lead to a reversal. The cumulative requirement, however, can be problematic. For example, if what the defense presented at trial was that the defendant had an alibi for the crime, that alibi might be rejected by the jury because the jury did not find the alibi witness credible (for example, a known gang member and/or someone with a criminal record). If, after trial, a new alibi witness—one with an unassailable and unimpeachable background, and one with no motive to lie comes forward to corroborate the alibi evidence at trial, is that cumulative evidence? It is very difficult to assess the reasons juries reject evidence; therefore, courts should be very lenient in how they apply this standard. But what exactly does "merely" cumulative really mean? It is very much open to interpretation.

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vacate [a] conviction or sentence . . . [must demonstrate that] the material evidence is not merely cumulative of evidence that was known[,] . . . [nor is it] impeachment evidence."); **VERMONT:** State v. Charbonneau, 2011 VT 57, ¶ 13, 190 Vt. 81, 85, 25 A.3d 553, 557 ("To succeed on a motion for new trial on the basis of newly discovered evidence, a defendant must show . . . 'that it is material to the issue[,] *and* that it is not merely cumulative or impeaching.'" (quoting State v. Charbonneau, 2009 VT 86, ¶ 14, 186 Vt. 583, 980 A.2d 279)); **WASHINGTON:** *In re* Pers. Restraint of Lord, 868 P.2d 835, 851 (Wash. 1994) (en banc) (holding that newly discovered evidence provides a basis for relief if the evidence is more than cumulative or impeaching (quoting State v. Williams, 634 P.2d 868, 873 (Wash. 1981))); **WEST VIRGINIA:** State *ex rel.* Smith v. McBride, 681 S.E.2d 81, 91–92 (W. Va. 2009) ("[I]n order to obtain a new trial based upon newly discovered evidence . . . '[s]uch evidence must be new and material, and not merely cumulative[,] and cumulative evidence is additional evidence of the same kind to the same point.'" (quoting State v. Frazier, 253 S.E.2d 534, 573 (W. Va. 1979))); **WISCONSIN:** State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 ("When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove . . . 'the evidence is material to an issue in the case[,] and . . . not merely cumulative.'" (quoting State v. McCallum, 561 N.W.2d 707, 710–11 (Wis. 1997))); **WYOMING:** Opie v. State, 422 P.2d 84, 85 (Wyo. 1967) ("[T]he general rule [is] that it is incumbent on a party who asks for a new trial on the grounds of newly discovered evidence to satisfy the court . . . that it is so material that it would probably produce a different verdict, if the new trial were granted[,] and that it is not . . . speaking to facts in relation to which there was evidence at the trial." (citing United States v. Johnson, 142 F.2d 588, 592 (7th Cir. 1944))).

[211] *See* Payne v. United States, 697 A.2d 1229, 1234 (D.C. 1997) (stating that the burden for a new trial based on newly discovered evidence is on the petitioner to establish under a five-prong test that the evidence being offered is not merely cumulative or impeaching, but is material to the merits of an issue (quoting Heard v. United States, 245 A.2d 125, 126 (D.C. 1968))).

D. Should Actual Innocence Claims Be Treated Differently from Newly Discovered Evidence Claims?

In many states, such as Alaska, California, Connecticut, Illinois, Minnesota, Texas, and others, "post-conviction newly discovered evidence" claims are currently the same as "actual innocence" claims. Courts and litigators often refer to them by either name.

Other states have either not recognized a freestanding claim of actual innocence, or, like the U.S. Supreme Court, have not resolved whether actual innocence is a freestanding claim.[212] For instance, Florida, which provides for a new trial when "newly discovered evidence . . . [is] of such nature that it would *probably* produce an acquittal on retrial,"[213] has not recognized a freestanding actual innocence claim.[214]

Louisiana courts have recognized actual innocence claims based on DNA evidence, but have not resolved whether there is a freestanding actual innocence claim not based on DNA evidence that is cognizable in state post-conviction proceedings.[215]

Other states, such as California,[216] Connecticut,[217] Illinois,[218] New Mexico,[219] and New York,[220] have explicitly recognized the right to a freestanding claim of actual innocence, but some treat actual innocence claims differently from newly discovered evidence claims.

For instance, in New Mexico, one may present a motion for new trial based on newly discovered evidence within two years of judgment, and the court may grant relief where the new evidence "will probably change the result if a new trial is granted."[221] After

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[212] Leventhal, supra note 65, at app.; *see supra* notes 52–53 and accompanying text.

[213] Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

[214] Tompkins v. State, 994 So. 2d 1072, 1088–89 (Fla. 2008).

[215] *See* State v. Pierre, 2013-0873, p. 8 (La. 10/15/13); 125 So. 3d 403, 408.

[216] *In re* Lawley, 179 P.3d 891, 897 (Cal. 2008) ("We have long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence.").

[217] Gould v. Comm'r of Corr., 22 A.3d 1196, 1204 (Conn. 2011) ("With respect to the correct standard, Miller unequivocally and unmistakably set forth a two part test for obtaining habeas relief on the basis of a freestanding claim of actual innocence." (citing Miller v. Comm'r of Corr., 700 A.2d 1108, 1130–31 (Conn. 1997))).

[218] In *People v. Ortiz*, the court held that "[t]he due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." People v. Ortiz, 919 N.E.2d 941, 949–50 (Ill. 2009) (citing People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004); People v. Washington, 665 N.E.2d 1330, 1336–37 (Ill. 1996)).

[219] Montoya v. Ulibarri, 2007-NMSC-035, ¶¶ 29–30, 142 N.M. 89, 99 163 P.3d 476, 486.

[220] People v. Hamilton, 979 N.Y.S.2d 97, 99 (N.Y. App. Div. 2014).

[221] *Montoya*, 2007-NMSC-035, ¶ 29, 142 N.M. at 99, 163 P.3d at 486 (quoting State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640); *see also* N.M. STAT. ANN.

two years, however, a petitioner may bring a freestanding claim of actual innocence based on the Due Process Clause of New Mexico's Constitution, but must show "by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."[222]

New York does not impose a time limit on newly discovered evidence claims subject to a "will probably change the result of a new trial standard," but does impose other procedural requirements, such as the evidence must be discovered after the trial, be material, not cumulative, and does not merely impeach or contradict the trial evidence.[223] However, New York case law has also recognized a freestanding claim of actual innocence based on the New York Constitution's Due Process Clause and prohibition against cruel and unusual punishment, and that freestanding innocence claims are not subject to the procedural restrictions imposed on newly discovered evidence claims, but that they are subject to a higher standard—clear and convincing evidence of innocence.[224]

As discussed above, Utah provides for both newly discovered evidence claims and actual innocence claims, but with different standards and different relief for each—a newly discovered evidence claim and a showing of a reasonable likelihood of a different outcome entitles one to a new trial, whereas an actual innocence claim in which one proves innocence by clear and convincing evidence entitles one to have the conviction vacated with prejudice and to have one's record expunged.[225]

Given that the U.S. Supreme Court has recognized that a showing of actual innocence—a showing that it is more likely than not that no reasonable juror would convict—entitles state petitioners to have their otherwise procedurally barred constitutional claims heard,[226] it makes sense that states should follow New York's model and not impose any procedural restrictions on freestanding claims of actual innocence.

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§ 5-614(C) (2015).

[222] *Montoya*, 2007-NMSC-035, ¶ 1, 30, 138 N.M. at 91, 99, 163 P.2d at 484, 478, 486 (citing *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)).

[223] *Hamilton*, 979 N.Y.S.2d at 103.

[224] *Id.* at 107–08.

[225] *See* UTAH CODE ANN. § 78B-9-104(1)(e)(iv), (3); *supra* note 76 and accompanying text.

[226] Schlup v. Delo, 513 U.S. 298, 326–27 (1995). When constitutional claims are subject to "a procedural bar" such as timeliness or successive or abusive petitions, a federal court can consider those otherwise barred constitutional claims on the merits if a petitioner makes a sufficient showing of "actual innocence." *See id.*

E. How May a New Evidence Claim Be Presented?

As noted previously, newly discovered evidence is often considered cognizable only in a motion for a new trial, with time limits in place based on traditional motions for a new trial, which are necessarily tied to the jurisdiction of the trial court in the original conviction.[227] However, for a number of reasons claims of new evidence should more appropriately be made via a petition for writ of habeas corpus.

First, the grounds for a new evidence claim may be discovered at any time, and are not necessarily tied in any way to the timeframes found in motions for a new trial.[228] New evidence may take years to develop, even decades, after the conviction has become final.[229] The reason motions for a new trial are heard semi-contemporaneously to the judgment of conviction is because the trial court still has jurisdiction over the case, but this does not mean newly discovered evidence will suddenly present itself during that time period.[230]

Second, new evidence claims rarely stand alone. Evidence which is discovered after the case is over may give rise to other claims, such as claims of ineffective assistance of counsel or a *Brady* violation; thus, it makes sense for courts to hear all of these claims in one petition in order to determine whether the conviction should be reversed.[231] Finally, new evidence claims necessarily contemplate facts outside the record, and no matter the standard, these new facts must be weighed against the evidence developed at trial.[232] The habeas process also deals with facts outside the record of the case, and a judge's role when determining habeas is to determine whether those new facts justify relief when compared to the evidence developed at trial.[233]

IV. CALFORNIA'S NEW EVIDENCE STANDARD IS SO HIGH THAT IT VIOLATES THE RIGHT TO DUE PROCESS

The Due Process Clause of the Fourteenth Amendment provides

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[227] *See* Mogin, *supra* note 172, at 28.

[228] *See, e.g.*, Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 965–66 (1994).

[229] *See id.*

[230] *See* State v. Lee Lim, 7 P.2d 825, 834 (Utah 1932) (Straup, J., dissenting).

[231] *See, e.g.*, McKenzie v. United States, No. 12-CV-3221 (KAM), 2015 U.S. Dist. LEXIS 148558, at *22 (E.D.N.Y. Nov. 2, 2015).

[232] Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

[233] *See* State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. 2003).

protection against state actions that violate "fundamental fairness."[234] While criminal procedures and applications of burdens of proof are generally left to the states, "the State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[235]

A. The Use of a Heightened Standard for Relief Based on Newly Discovered Evidence While There is Near-Uniform Application of a Standard More Protective of Individual Rights in Other States Violates Fundamental Fairness and the Due Process Clause

The United States Supreme Court has explained that "widely shared practice" is one of the "concrete indicators of what fundamental fairness and rationality require."[236] "The near-uniform application" of a burden of proof can show that use of a "heightened standard offends a principle of justice that is deeply rooted in the traditions and conscience of our people."[237]

In *Cooper v. Oklahoma*, Oklahoma was one of only four states that required criminal defendants prove by clear and convincing evidence that they are incompetent, whereas forty-six states and the federal courts required defendants prove incompetence by a preponderance of the evidence at most.[238] Some "[s]tates place no burden on the defendant at all, but rather require the prosecutor to prove the defendant's competence . . . once a question about competency has been credibly raised."[239]

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[234] *See, e.g.*, Medina v. California, 505 U.S. 437, 448 (1992) ("Discerning no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process, we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation" (quoting *Dowling*, 493 U.S. at 352)); Dowling v. United States, 493 U.S. 342, 352 (1990) ("[W]hether the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'" (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977))). In *Lovasco*, the Court stated that its task was to determine whether the complained of action "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (first quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); then quoting Rochin v. California, 342 U.S. 165, 173 (1952)).

[235] Cooper v. Oklahoma, 517 U.S. 348, 367 (1996) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

[236] Schad v. Arizona, 501 U.S. 624, 640 (1991).

[237] *Cooper*, 517 U.S. at 362 (quoting *Medina*, 505 U.S. at 445).

[238] *See Cooper*, 517 U.S. at 360–62.

[239] *Id.* at 361–62.

Specifically, in *Cooper*, the Court said: "The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'"[240]

Thus for instance, California, which is the only state that requires that newly discovered evidence "must undermine the entire prosecution case and point unerringly to innocence" with evidence no "reasonable jury could . . . reject[]," [241] is violating due process by employing a heightened standard when there is near-uniform application of standards that are more protective of individual rights in other states.[242]

As discussed above, every other state's standard for habeas relief based upon newly discovered evidence is substantially lower than California's. The vast majority of the states require *at most* that a petitioner show that it is more likely than not that the newly discovered evidence would have changed the outcome of the original trial or would do so at a new trial (i.e., proof by a preponderance of the evidence).[243]

While a minority of states require that the newly discovered evidence proves innocence by clear and convincing evidence,[244] that standard remains significantly lower than California's, which appears to require at least proof of innocence beyond a reasonable doubt by requiring that one "unerringly" prove innocence with evidence no "reasonable jury could . . . reject[]."[245] Indeed, Texas, which requires that an applicant with newly discovered evidence unquestionably establish innocence, has explained that applicants meet that burden when they demonstrate "by clear and convincing evidence that no reasonable juror would have convicted."[246] The standard focuses the court's attention on whether there remains substantial evidence of guilt, as opposed to whether an inmate is able to conclusively establish innocence with affirmative evidence of such, as currently required in California.[247]

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[240] *Id.* at 362 (quoting *Medina*, 505 U.S. at 445).

[241] *In re* Lawley, 179 P.3d 891, 898 (Cal. 2008) (citations omitted).

[242] *See supra* notes 236–40 and accompanying text.

[243] *See* discussion *supra* Part III.2.B.

[244] *See* discussion *supra* Part III.2.C.

[245] *In re Lawley*, 179 P.3d at 898 (citations omitted).

[246] *Ex parte* Thompson, 153 S.W.3d 416, 417, 420 (Tex. Crim. App. 2005); *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

[247] *See Ex parte* Elizondo, 947 S.W.2d at 206, 209.

In fact, several states have considered and expressly rejected heightened standards of proof comparable to California's "points unerringly to innocence" standard as unjust because they are nearly impossible to meet. In *Jones v. State*, the Florida Supreme Court overruled a standard that required a petitioner to show that newly discovered evidence "*conclusively* would have prevented" conviction.[248] The court held that this "conclusiveness test" (like California's "unerringly" test) was too high, almost impossible to meet, and "r[an] the risk of thwarting justice in a given case."[249]

Similarly, in *Marble v. State*,[250] the Supreme Court of Montana recently rejected a standard requiring a petitioner to "affirmatively and unquestionably establish his innocence" with new evidence as too rigid and extraordinarily high.[251] The *Marble* court reasoned that a standard requiring a petitioner to "unquestionably establish his innocence" was illogical and inconsistent with Montana's statutory framework for post-conviction relief, which, like California's, provides for relief in the form of an order for additional briefing, further discovery, or a new trial (as opposed to an acquittal or dismissal of charges with prejudice).[252]

In *Montoya v. Ulibarri*, the Supreme Court of New Mexico declined to follow California's standard for post-conviction relief based on newly discovered evidence, which it held to impose "a heavy burden on petitioners."[253] While, like California, the New

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[248] Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) (citations omitted).

[249] *Id.* (adopting instead a standard that newly discovered evidence should more likely than not result in an acquittal on retrial).

[250] Marble v. State, 2015 MT 242, 380 Mont. 366, 355 P.3d 742.

[251] *Id.* at ¶ 32, 380 Mont. at 376, 355 P.3d at 748–49.

[252] *See id.* There are states that provide for dismissal of charges with prejudice and/or immediate release from prison upon meeting a higher standard. For example, the District of Columbia provides for a new trial when a petitioner shows that it is more likely than not that he or she is actually innocent, and also provides for vacating the conviction and dismissing the relevant count with prejudice when the movant establishes by clear and convincing evidence that he or she is innocent. D.C. CODE § 22-4135(g)(2)–(3) (2016). Similarly, Nebraska allows the court to vacate the conviction, set aside the judgment, and order the person released from custody when DNA evidence conclusively establishes innocence, and permits a person to bring a motion for a new trial when newly discovered DNA evidence does not establish innocence but has probative value and could arguably meet the standard for a new trial that requires a showing that the new evidence would probably have produced a substantially different result. NEB. REV. STAT. §§ 29-2101, 29-4118(2), 29-4123 (2015). Utah also has similar provisions, permitting a new trial when the petitioner shows a reasonable likelihood of a different outcome, and vacation of the conviction with prejudice and expungement of the record when a petitioner proves factual innocence with clear and convincing evidence. UTAH CODE ANN. §§ 78B-9-104(1)(e), (2), 78B-9-303(2)(b), 78B-9-404 (1)(b) (LexisNexis 2015).

[253] Montoya v. Ulibarri, 2007-NMSC-035, ¶ 26, 142 N.M. 89, 98, 163 P.3d 476, 48 (quoting *In re* Clark, 855 P.2d 729, 739 (Cal. 1993)). The court instead decided to adopt a "clear and

Mexico Supreme Court believed the standard for post-conviction relief should be higher than that on a motion for new trial based on newly discovered evidence, the court held that the burden "should not be so insurmountable that it is practically impossible for a petitioner to prove his innocence."[254] The New Mexico Supreme Court agreed with the Texas Supreme Court, which observed in *Elizondo* that a standard requiring a petitioner to prove his innocence beyond a reasonable doubt was a theoretical impossibility "because exculpatory evidence can never outweigh inculpatory evidence under this standard of sufficiency."[255]

California's use of a significantly heightened standard—despite the fact that there is uniform application of a standard of proof more protective of individual rights in every other state—violates fundamental fairness and the Due Process Clauses of the Fourteenth Amendment and Article 1, Section 7 of California's Constitution.[256] Further, it supports the additional evidence that California's use of a heightened standard violates a principle of justice that is deeply rooted in the traditions and conscience of our people.

B. As Evidenced by Balancing the Risk of Error, the Individual Interest, and the Government Interest, Employing a Heightened Standard for Newly Discovered Evidence Claims Violates Due Process

United States Supreme Court precedent confirms that due process must be flexible to protect the innocent and "minimiz[e] the risk of error."[257] Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[258] The Court has explained that this "flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend[s] upon the need to serve the purpose of minimizing the risk

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convincing evidence" standard. *Montoya*, 2007-NMSC-035, at ¶ 30, 142 N.M. at 99, 163 P.3d at 486 (citing *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)).

[254] *Montoya*, 2007-NMSC-035 at ¶ 29, 142 N.M. at 99, 163 P.3d at 486 (quoting State v. Garcia, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 661, 125 P.3d 638, 640).

[255] *Montoya*, 2007-NMSC-035 at ¶ 29, 142 N.M. at 99, 163 P.3d at 486 (quoting *Elizondo*, 947 S.W.2d at 205).

[256] *See* U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7.

[257] Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 13 (1979) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[258] *Mathews*, 424 U.S. at 334 (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

of error."[259] Accordingly:

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[260]

In addition, the Court has said:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.[261]

Therefore, "[t]he 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'"[262]

Our society has long since determined that the factfinder should have a high degree of confidence in the correctness of criminal convictions and "our society has willingly chosen to bear a substantial burden in order to protect the innocent."[263] "The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free."[264] "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[265]

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[259] *Greenholtz*, 442 U.S. at 13 (citing *Mathews*, 424 U.S. at 335).

[260] *Mathews*, 424 U.S. at 335.

[261] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

[262] Cooper v. Oklahoma, 517 U.S. 348, 362 (1996) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990)).

[263] Patterson v. New York, 432 U.S. 197, 208 (1977).

[264] *Addington*, 441 U.S. at 428 (citing *Patterson*, 432 U.S. at 208).

[265] Schlup v. Delo, 513 U.S. 298, 325 (1995); *see also In re* Davis, No. CV409-130, 2010 WL 3385081, at *41 (S.D. Ga. Aug. 24, 2010) ("If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it

In *Cooper v. Oklahoma*, the Supreme Court also held that Oklahoma's use of a heightened standard for determining competency—one that required clear and convincing evidence as opposed to a preponderance of the evidence—violated due process because it "imposes a significant risk of an erroneous determination . . . ."[266]

Any standard that requires affirmative proof of innocence imposes too great of a risk of error on the individual. Our criminal justice system is guided by the "fundamental" understanding that fairness and justice can only be achieved if innocence must be presumed unless guilt is proven beyond a reasonable doubt.[267] As clinical professor and former Innocence Network President Keith Findley argues in discussing "clear proof of innocence[:]" "to demand certainty [of innocence] is to demand the impossible, . . . [but] in the end, the best we can or should do is rely on the legal standards that define guilt and, absent proof of guilt, presume innocence."[268]

California's standard for newly discovered evidence in particular, which requires that inmates "point unerringly to innocence" with evidence no "reasonable jury could . . . reject[],"[269] places the entire risk of error on the individual.[270] Further, it fails to recall the understanding upon which the criminal justice system was built—that even the most innocent person cannot always affirmatively prove innocence.[271] The United States Supreme Court has held that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[272] Yet California's standard does just that.

As one California Supreme Court Justice explained in criticizing this standard:

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is unknown to this Court.").

[266] *Cooper*, 517 U.S. at 363, 369.

[267] *See* Findley, *supra* note 209, at 1191.

[268] *Id.* at 1162, 1190. Professor Findley goes on to state that "[a]nything less than that [presumption] invites endless controversy about subjective assessments of guilt and innocence, unwarranted insult and injury to the innocent who are forced to live under a continuing cloud of suspicion, and erosion of some of our most fundamental constitutional principles." *Id.* at 1162.

[269] *In re* Lawley, 179 P.3d 891, 898 (Cal. 2008) (quoting *In re* Clark, 855 P.2d 729, 761 n.33 (Cal. 1993) (internal quotation marks omitted).

[270] *Id.* at 898.

[271] *See* Findley, *supra* note 209, at 1200; *see also* S.B. 694, 2015-2016 Reg. Sess. (Cal. 2015) (lowering the standard for habeas corpus relief in California).

[272] *In re* Winship, 397 U.S. 358, 364 (1970).

> The requirement of the majority that the petitioner prove his innocence, either by establishing an alibi or by identifying the perpetrator of the crime, is unreasonable and unwarranted. A perfectly innocent person may be unable to prove an alibi. And it is preposterous to demand of the accused that he place his finger upon the real culprit in order to exculpate himself. Although Billings has presented an alibi, it is unnecessary for us to consider it. When the chain of proof is destroyed, he needs none.[273]

Thus, given the real danger that affirmative evidence of innocence may be lacking even for the factually innocent, states should not ask for anything further to prove innocence when new evidence destroys the evidence of guilt; instead, courts must presume innocence in the absence of adequate proof of guilt.

There can be no greater risk of error in our justice system than that an innocent person is wrongfully convicted, or that an innocent person with new evidence that shows that he or she was wrongfully convicted is denied relief and forced to remain in prison or even face execution.

Further, the weighing of the individual's interests versus the state's interests also demonstrates that heightened standards for newly discovered evidence claims violate due process. While any post-conviction claim raises the specter of concerns regarding judicial economy, floodgates, and finality, the individual liberty interests retained by the innocent overcome society's interests in "finality, comity, and conservation of scarce judicial resources."[274] Thus, "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration."[275]

V. RECOMMENDATIONS FOR LEGISLATION AND A PROPOSAL FOR A NEW MODEL

A. Legislative Considerations and Recommendations

Clearly the authors are highly critical of California's new evidence standard. Each of them has had claims of their innocent clients rejected, fully knowing that those cases would have been successful in other states with lower standards. It is heartbreaking

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[273] *In re* Billings, 298 P. 1071, 1119 (Cal. 1930) (Langdon, J., dissenting).

[274] Schlup v. Delo, 513 U.S. 298, 324–25 (1995).

[275] *Id.* at 320–21 (internal quotation marks omitted) (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)).

knowing that the clients will likely die in prison having lost their final chance at freedom.

Based on the discussion in this article the authors propose that new evidence statutes recognize the legal, social, and moral importance of allowing inmates to present evidence of their innocence, undermine evidence of their guilt, and ultimately seek their freedom. The authors also recognize that the courts must be able to screen out non-meritorious claims and not re-litigate every criminal case in the habeas process. Based on these counterbalancing interests, new evidence statutes should:

1. Not be limited to DNA evidence. There is no reason that one area of science is signaled out as the sole basis for a new evidence claim. There are other sciences that present compelling new evidence, as well as witness testimony that can sometimes destroy a criminal conviction. For example, long before DNA evidence there was compelling post-conviction evidence, as in the tragic case of William Jackson Marion, hanged for the murder of a man who was later found alive.[276]

2. Allow for relief where there is a "reasonable probability of a different result in light of the new evidence;" or, at the most, allow for relief where it is more likely than not the defendant would not be convicted on retrial in light of the new evidence. The fundamental question should be whether the defendant would have been convicted if the trial court had been aware of the evidence. Any higher standard keeps people in prison who never should have been there in the first place. That does not serve society or the individual. However, as noted previously, the "reasonable probability" standard is often seen as too low for claims based solely on newly discovered evidence, as this standard is used when the trial was constitutionally defective in some way.[277] In this event, the standard should, at the most, allow for relief where it is more likely than not that the defendant would not be convicted on retrial in light of the new evidence. This, indeed, is the standard proposed by the authors of the California state legislation in 2015.[278]

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[276] *See* Bill Kelly, *1887 Hanging Remains Nebraska's Most Controversial Execution*, NET NEB. (Feb. 7, 2013), http://www.netnebraska.org/article/news/1887-hanging-remains-nebraskas-most-controversial-execution.

[277] *See supra* Part III.2.A.

[278] S.B. 694, 2015-2016 Reg. Sess. (Cal. 2015) ("A writ of habeus corpus may be prosecuted for, but not limited to, . . . new evidence . . . that is credible, material, *presented without*

3. Not include due diligence, time limits, or sunset provisions. It is typically impossible for inmates to launch their own investigation into new evidence.[279] They sit in their cells and desperately seek help. It is difficult for a court to assess whether the inmate has exercised due diligence based on the restrictions; and as a practical matter, it makes very little sense as a requirement. Inmates do not sit on evidence that could prove their innocence. Society and the individual are not served by rules that restrict the introduction of evidence that can establish innocence and lead to the release of an inmate. Similarly, society and the individual are not served because the evidence came to the court "late" under time limits and sunset provisions. These are heavy-handed methods to limit litigation and they do so at far too great an expense.

4. Not include other requirements that the evidence be material, cumulative, and not merely for impeachment. These other requirements, so common in statutes across the country, serve very little purpose but to deny relief for those cases that meet the standard in all other respects. For example, take a case where new evidence shows the *sole prosecution witness* lied when she identified the defendant. If that new evidence shows that it is more likely than not the defendant would never have been convicted had the evidence been available at the time of trial, why would we not want the conviction to be reversed? There are exceptions to every rule, and society is not served by keeping innocent people in prison on technicalities.

B. Proposed Model Legislation Addressing New Evidence

In conclusion, the authors propose the following legislation:

(1) Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint.

(2) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

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substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.").

[279] *E.g.*, Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 51 (2002) ("The inmate is confined, unable to investigate, and often without training in the law or mental ability to comprehend the requirements of [habeas law]." (alteration in original)).

(a) New evidence exists that would more likely than not have changed the outcome at trial/would change the outcome on retrial.

(3) Claims based on newly discovered evidence may be presented at any time after the conviction, regardless of when the evidence is discovered.