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"It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, 'whether I do good or whether I do evil is immaterial, for innocence itself is no protection,' and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever." - John Adams[1]

I. INTRODUCTION

In 1985, George Seward was convicted of rape and assault with intent to murder and sentenced to two consecutive life terms with an

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She began her career as a trial attorney with the Office of the Public Defender for the State of Maryland in 1988. She has tried misdemeanor and felony cases, including several death penalty cases. She created and operated a Forensics Division in the Office of the Public Defender in the early 1990s and has served as the co-chair of the Forensics Committee of the National Association of Criminal Defense Lawyers (NACDL). She is an expert on forensic DNA testing and various other forms of scientific evidence and has lectured on this topic around the country and published articles on the topic.

Ms. Nethercott has taught a seminar course on Wrongful Convictions at the University of Baltimore School of Law, a course on comparative criminal procedure at Haifa University and the University of Curacao and has taught a Post-Conviction Clinic at the University of Maryland School of Law. She has also served on the faculty of the Judicial College of Maryland, providing training on scientific evidence to judges, and has served as a consultant to the Maryland Rules Committee on various issues, including DNA evidence, eyewitness identification, and criminal discovery reform. Over the last two decades, she has been involved in drafting legislation, advising legislators on pending legislation, and testifying before legislative committees on issues related to forensic laboratories, exoneree compensation, eyewitness identification policies for law enforcement, and regulation of informant testimony in Maryland. She retired as the Director of the University of Baltimore Innocence Project Clinic in July of 2021, and now serves as counsel to the Mid-Atlantic Innocence Project in Washington, DC, and continues to represent clients. She is a graduate of Northeastern University School of Law.

1. John Adams, Adams Argument for the Defense: 3-4 December 1770, Founders Online, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016 [https://perma.cc/QBE3-SWDD] (last visited Nov. 20, 2022) (paraphrased for clarity).

additional seventy-three years.[2] His case has all the hallmarks of a wrongful conviction.[3] It is based on a single cross-racial eyewitness identification[4] that was possibly contaminated by a composite drawing[5] and made seventy days after the crime occurred.[6] There was no corroborating physical evidence,[7] and numerous fingerprints recovered from the scene[8] did not match those of Mr. Seward.[9]

Alibi evidence eventually emerged years later that supported Mr. Seward's longstanding contention that he did not commit the crime and this evidence was presented to a post-conviction court in 1997.[10] The prosecution opposed granting relief to him, and the court obliged based on a finding that his trial attorney had been effective in his attempts to produce the alibi evidence at his trial.[11] In 2012, following the enactment of the Writ of Actual Innocence,[12] which allowed for the presentation of newly discovered evidence without a time limit, Mr. Seward petitioned for a new trial again.[13] A Baltimore County Circuit Court found the alibi evidence to be newly discovered and material and vacated his convictions.[14] Yet, eighteen years after

2. Seward v. State, 130 A.3d 478, 480 (Md. 2016).
3. C*onviction*, BLACK'S LAW DICTIONARY (11th ed. 2019).
4. Alexis Agathocleous, *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020), https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ [https://perma.cc/TBW5-NTNP] ("[P]eople tend to be less accurate when making cross-race identifications."); Gary L. Wells & Deah S. Quinlivan, Abstract, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. HUM. BEHAV. 1, 1 (2009) ("[M]istaken identification is the primary cause of convictions of the innocent."); *see* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008) (noting that of 200 exonerations, "79%[] were convicted based on eyewitness testimony"); *see also* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 PSYCH., PUB. POL'Y, & L. 3, 3–4 (2001).
5. *See* Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 J. EXPERIMENTAL PSYCH.: APPLIED 147, 147–55 (2005).
6. *See* Agathocleous, *supra* note 4 (noting the deterioration of memory over time).
7. Brief of Appellant at 10–13, Seward v. State, 130 A.3d 478 (Md. 2016) (No. 12).
8. *Id.* at 9.
9. *Id*. at 10–11, 13. "Despite knowing this early on, the police did not inform the prosecutor's office the prints were negative . . . and did absolutely nothing to conduct any other fingerprint investigation for four months, until the eve of trial, in March 1985." *Id*. at 12.
10. *Seward*, 130 A.3d at 480.
11. *Id.*
12. *See* MD. CODE ANN., CRIM. PROC. § 8-301 (West 2022).
13. *Seward*, 130 A.3d at 480.
14. *Id*. at 481.

the presentation of this alibi evidence, and after several rounds of litigation at the trial and appellate level, his conviction remained intact because of the appellate court's characterization of the performance of his trial attorney.[15]

The State's case against Mr. Seward rested entirely on a cross-racial identification by the victim who described him as having no facial hair.[16] Nineteen fingerprints recovered from the location of the crime did not match Mr. Seward.[17] A stolen getaway car used by the perpetrator to leave the scene was located by the police, who obtained fingerprint evidence from the car[18] that led to the identification of numerous other suspects.[19] Although Mr. Seward was not one of these suspects, once a police officer decided that the composite sketch the victim generated resembled Mr. Seward, his photo was placed in a photo array, and seventy days after the crime, the victim chose his photo.[20]

The victim testified at trial that she was positive her attacker had no facial hair, even though the State conceded that at the time of the offense, Mr. Seward had facial hair and a mustache.[21] During his trial, Mr. Seward's lawyer and the presiding judge directed his employer to search for records that showed he was at work miles away from where the crime occurred.[22] The employer was unable or unwilling to do an adequate search for the records,[23] but they were

15. *Id.* at 481–82, 484–85. Mr. Seward was granted a new trial by the Circuit Court for Baltimore County in 2012. The State appealed the grant of a new trial, and the Court of Special Appeals reversed the order of the Circuit Court and reinstated his conviction in 2014. In 2015, the Court of Appeals held that the Court of Special Appeals did not have jurisdiction to entertain the appeal and remanded the case to the Baltimore County Circuit Court for trial. Mr. Seward ultimately entered an *Alford* plea to the charges in exchange for an agreement to release him with a sentence of time served. *See* Megan Rose, *The Freedom Plea: How Prosecutors Deny Exonerations by Dangling the Prison Keys*, PROPUBLICA (Sept. 7, 2017, 8:00 AM), https://www.propublica.org/article/freedom-plea-prosecutors-deny-exonerations-dangling-prison-keys [https://perma.cc/A8Y2-SZY4].

16. Brief of Appellant, *supra* note 7, at 10.

17. *Id.* at 9–10.

18. *Id.* at 9.

19. *Id.* at 11.

20. *Id.*

21. *Id.* at 10; *see also* Robert A. Erlandson, *Man Is Found Guilty in Parkville Rape*, THE BALT. SUN, March 30, 1985, at 5A ("Police found no fingerprints or other physical evidence in the house or in the victim's car . . . ."). The article reports the victim's identification of Mr. Seward "left [the judge] in no doubt of Seward's guilt" despite the absence of other evidence. *Id.*

22. Brief of Appellant, *supra* note 7, at 7.

23. *Id.* at 7.

eventually found by Mr. Seward's post-conviction counsel eleven years later.[24]

In 1997, after the payroll records were finally produced by his former employer, Mr. Seward filed a post-conviction petition alleging that his lawyer had been ineffective by not forcing the employer to search more thoroughly for the evidence in 1985.[25] The State argued, and the post-conviction court agreed, that his lawyer had been effective in his efforts to obtain the evidence.[26] Mr. Seward's petition was denied.[27] Finally, after the enactment of a new statute in 2009 known as the Writ of Actual Innocence,[28] Mr. Seward asked the trial court to treat the payroll records as "newly discovered evidence" and grant him a new trial on the basis that there was a substantial possibility that he would not have been convicted had the factfinder at trial been presented with this evidence.[29] The trial court vacated the conviction based on a finding that the evidence was "newly discovered" and material.[30]

The State appealed, and the Chief Judge of the Court of Special Appeals reversed the holding of the only court that actually considered the exonerating evidence and the circumstances surrounding its discovery and production[31] and reinstated Mr. Seward's conviction and life sentence. The court based this decision on a finding that the evidence at issue was not "newly discovered" due to insufficient diligence on the part of Mr. Seward's trial counsel.[32]

This case exemplifies the injustice that occurs when prosecutors and courts are more concerned with guaranteeing the finality of criminal convictions than with ensuring that they are based on accurate determinations of guilt.[33] Both the result in this case and the

24. *Id.* at 4.
25. *Id.* at 16.
26. *Id.* at 5, 17.
27. Seward v. State, No. 84 CR 3827, 1999 WL 35241901, at *1, *5 (Md. Cir. Ct. Balt. City Jan. 25, 1999).
28. *See* MD. CODE ANN., CRIM. PROC. § 8-301 (West 2022).
29. State v. Seward, 102 A.3d 798, 803 (Md. Ct. Spec. App. 2014).
30. *Id.*
31. Brief of Appellant, *supra* note 7, at 5.
32. *Seward*, 102 A.3d at 813.
33. *See* Seward v. State, 130 A.3d 478, 483 (Md. 2016) ("When an order denies a petition based on allegedly newly discovered evidence, the petitioner can never refile 'on the basis of the same [ ] evidence.' The order, then, prohibits the petitioner from further 'prosecut[ing] or defend[ing] his . . . rights and interests in the subject matter of the proceeding.'").

legal rationale underpinning it seem far removed from any commonly understood notion of basic fairness[34] but do reflect the strong prosecutorial and judicial commitment in Maryland to insulating criminal convictions from collateral attack.[35] This article explores Maryland's legislative and judicial approach to the problem of wrongful convictions and the struggle to balance the concerns of finality and accuracy as the number of exonerations in the state and throughout the country continue to increase.[36] It proposes a statutory reform that would place greater importance on ensuring that convictions are based on a reliable factual foundation and less importance on assessing the diligence of a defendant's trial counsel if the failures of trial counsel were not attributable to any action of the defendant.[37]

While the legislature, and to a much lesser extent the judiciary, have taken steps to address the plight of the wrongly convicted in Maryland,[38] most of those wrongly convicted still face insurmountable barriers to securing meaningful consideration of an innocence claim.[39] This reality is, to some extent, an outgrowth of a judicial fixation on finality above all other concerns,[40] and it is also a function of the absence of any legal vehicle that allows for the presentation of all evidence supporting a claim of factual innocence in one unified proceeding.[41] As a result, many people in Maryland who have compelling claims of factual innocence continue to bear the burdens associated with criminal convictions, including lengthy incarceration and a myriad of other collateral consequences associated with a criminal conviction, because they are unable to overcome the endless procedural barriers to having this evidence

34. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 5 (1997) (explaining that traditionally it is proper for courts to consider the defendant's innocence when awarding habeas corpus relief).

35. *See Seward*, 102 A.3d at 805–06 (noting that the "legislative body viewed an actual innocence proceeding as a collateral civil action, separate from the underlying criminal case.").

36. *See infra* Parts III–IV and text accompanying note 71.

37. *See infra* Part V and note 298.

38. *See infra* text accompanying notes 130–34. The term "wrongly convicted" can be used to describe someone who is convicted improperly because of legal error but also to describe someone who is convicted of a crime that they did not commit. In this article the term is used to denote a conviction of a factually innocent person.

39. *See, e.g.*, Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 448–50 (2017).

40. *See* Seward v. State, 130 A.3d 478, 483 (Md. 2016); *see also* Bright, *supra* note 34.

41. *See infra* Parts III.A–D (explaining the available vehicles for postconviction relief based on factual innocence, none of which provide for a showing of all the evidence).

even considered by a court.[42] This must change if legislative and judicial officials are serious about addressing the injustice of allowing the factually innocent but legally convicted to be deprived of any realistic prospect of even presenting evidence of their innocence when it emerges long after their convictions occurred.[43]

This article is organized in four parts. Part II examines the legal landscape at the federal and state level for the consideration of post-conviction claims since 1970, when states began enacting their own habeas or collateral post-conviction statutes, and discusses how those laws treat claims of factual innocence.[44] Part III describes post-conviction law in Maryland prior to the 1993 exoneration of Kirk Bloodsworth and the subsequent changes that occurred largely in response to his highly publicized exoneration.[45] Part IV examines the interplay of the rationale animating the doctrine of finality and the problem of factual innocence.[46] Part V suggests a legislative remedy in Maryland that would provide a more efficient and workable framework for considering and adjudicating post-conviction claims of factual innocence.[47]

II. POST-CONVICTION LEGAL LANDSCAPE SINCE 1970

In a provocative law review article published in 1970 titled "Is Innocence Irrelevant?",[48] Judge Henry Friendly, then a judge on the U.S. Court of Appeals for the Second Circuit, criticized federal courts for entertaining an ever-expanding array of post-conviction habeas corpus challenges based entirely on alleged procedural defects associated with a criminal conviction.[49] In his view, the range of constitutional claims that could be raised in challenging a federal or state court conviction had rendered the question of a defendant's guilt or innocence virtually irrelevant to judicial inquiry.[50] This expansive approach to the litigation of habeas claims, according to Judge Friendly, created a threat to the institutional legitimacy of the federal courts, by failing to honor the need for finality in criminal

42. *See e.g.*, *Seward*, 130 A.3d 478, *rev'g* 102 A.3d 708 (Md. 2014).
43. *See Seward*, 130 A.3d at 485.
44. *See infra* Part II.
45. *See infra* Part III.
46. *See infra* Part IV.
47. *See infra* Part V.
48. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).
49. *See id.* at 150.
50. *See id.* at 162–63.

convictions.[51] Furthermore, federal courts had been inundated with habeas corpus claims, most of which were frivolous and constituted a poor use of judicial, prosecutorial, and societal resources.[52] Judge Friendly advocated for an overhaul of the approach to habeas corpus claims that would require federal courts to only entertain cases in which the claim was accompanied by "a colorable showing of innocence"[53] or those in which the claims were foundational to the notion of a fair trial.[54]

In 1970, Judge Friendly, with the publication of this article, called for a system of post-conviction judicial review that focused primarily on the question of the petitioner's guilt or innocence of the underlying crime[55] and the fundamental fairness of the trial rather than on any alleged procedural defects associated with the conviction.[56] Consistent with this focus on innocence and fairness, he cautioned that finality concerns should always be subordinated to the need to provide relief to those defendants who may have been convicted of crimes they did not commit.[57] The "colorable showing of innocence" standard Judge Friendly articulated was

> a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt.[58]

Since 1970, every state has adopted some version of a state habeas proceeding that allows prisoners to challenge the constitutional validity of a conviction in state court once the conviction has become

51. *Id.* at 149–50.
52. *Id.* at 144–45, 148–49.
53. *Id.* at 150, 157.
54. *See id.* at 152 (proposing that regardless of guilt or innocence, collateral attacks are appropriate in cases "where the attack concerns the very basis of the criminal process"; where the denial of constitutional rights is based on facts outside the trial record and "'their effect on the judgment was not open to consideration and review on appeal'" (quoting Waley v. Johnston, 316 U.S. 101, 104 (1942)); and "where the state has failed to provide for proper procedure for making a defense at trial and on appeal.").
55. *Id.* at 142.
56. *Id.* at 152.
57. *See id.* at 150, 157 n.81, 160, 164.
58. *Id.* at 160.

final, either by being affirmed on direct appeal or because of the entry of a guilty plea.[59]

Comity concerns required that collateral attacks on state court convictions be initiated and fully litigated in state courts prior to consideration of the constitutional claims by a federal court.[60] Decades after the publication of this article's impassioned plea for restricting the scope of cognizable habeas challenges, federal and some state post-conviction review regimens have become far more restrictive.[61] However, Judge Friendly's call for a concomitant emphasis on the importance of factual innocence has been largely ignored as courts and legislators have focused more on insulating convictions from collateral attack by erecting barriers to judicial review of convictions.[62]

By the time of the publication of Judge Friendly's article, the Supreme Court had already begun restricting the availability of federal habeas corpus to prisoners through the creation of various procedural barriers to the consideration of claims.[63] This trend continued and accelerated throughout the 1990s.[64] In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act

59. *See* DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK (2009–2010 ed. 2009) (detailing statutes, court rules adopted, and court decisions relating to postconviction relief for each U.S. state and District of Columbia).

60. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 101–07, 110 Stat. 1214, 1217–24 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266).

61. *See generally* Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J.C.R. & C.L. 55, 59–69 (2014) (summarizing the recent history of federal and state post-conviction review process changes).

62. *See id.* at 66–67, 75.

63. *See id.* at 64–65, 79–80.

64. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). On or about 1972, the Supreme Court "commenced handing down decision after decision narrowing the availability of federal habeas relief for persons convicted in a state court" by constructing procedural barriers and establishing new substantive limits on habeas corpus relief. Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. MARSHALL L.J. 415, 419–20 (2014) [hereinafter *The Great Writ Hit*]; *see also* DONALD E. WILKES, JR., INIMICUS LIBERTATIS: CHIEF JUSTICE REHNQUIST'S MAJORITY OR PLURALITY OPINIONS IN THE FIELD OF CRIMINAL PROCEDURE 2 (2017), https://digitalcommons.law.uga.edu/fac_artchop/1169 [https://perma.cc/N43R-2W7Z] (noting that eighty-eight percent of majority or plurality opinions written by Chief Justice Rehnquist regarding criminal procedure were in favor of the government, while only twelve percent were in favor of the defendant).

(AEDPA),[65] which codified the various judicially imposed restrictions on the use of habeas corpus and added even more, particularly on the ability of state prisoners who were challenging their convictions in federal court.[66] While Judge Friendly's call for greater adherence to the principle of finality has been heeded throughout the United States in both federal and state courts and legislatures,[67] his assumption that this would be accompanied by a willingness to subordinate finality concerns to the exoneration of

65. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA prohibited federal courts from granting habeas relief to petitioners convicted in state court unless the state court's decision "involved an unreasonable application of [] clearly established federal law" and provide that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief." 28 U.S.C. § 2254(d)(1), (i). The AEDPA also imposed a "1-year period of limitation" on habeas petitions by "a person in custody pursuant to the judgment of a State court," *id.* § 2244(d)(1), and placed limits on appealability in habeas proceedings, *id.* § 2253. Requiring "[a] second or successive motion" to be certified

> by a panel of the appropriate court of appeals [that] newly discovered evidence [], if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id. § 2255(h).

66. *See* Bright, *supra* note 34, at 8–9, 9 nn.45–50. Before Congress passed the AEDPA, the Supreme Court did six notable things. First, the Supreme Court adopted and strictly applied procedural default rules. *See* Wainwright v. Sykes, 433 U.S. 72, 82–83, 86–87 (1977); Coleman v. Thompson, 501 U.S. 722, 729–32 (1991); Dugger v. Adams, 489 U.S. 401, 409–10 (1989); Smith v. Murray, 477 U.S. 527, 533–35 (1986); Engle v. Isaac, 456 U.S. 107, 134–35 (1982). Second, the Supreme Court excluded Fourth Amendment claims from habeas review. *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976). Third, the Supreme Court made it more difficult for a petitioner to obtain an evidentiary hearing. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 8–9, 11–12 (1992). Fourth, the Supreme Court adopted "an extremely restrictive doctrine regarding the retroactivity of constitutional decisions." Bright, *supra* note 34, at 9; Teague v. Lane, 489 U.S. 288, 297–99 (1989). Fifth, the Supreme Court reduced the burden on states to establish harmless error when a constitutional violation occurred. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). Sixth, the Supreme Court erected barriers to filing a second habeas petition. McClesky v. Zant, 499 U.S. 467, 489–90 (1991) (superseded by 28 U.S.C. § 2244(b)). *See also* Butler v. McKellar, 494 U.S. 407, 415–16 (1990) (holding that a prisoner was not entitled to retroactive relief from a "new rule" established by the Supreme Court following his conviction).

67. *See* sources cited *supra* note 66.

innocent defendants has proved largely incorrect.[68] In particular, the willingness of courts to restrict criminal defendants from mounting collateral attacks on their convictions has not been accompanied by exceptions for those defendants who have "colorable claims of innocence" as defined by Judge Friendly.[69]

Ironically, while both courts and legislatures at the state and federal level over the last few decades imposed an ongoing series of restrictions on the ability of criminal defendants to obtain relief through federal habeas and state post-conviction proceedings,[70] the implementation of post-conviction DNA testing conclusively demonstrated that state courts were convicting innocent people with some regularity and in the most serious cases handled by criminal courts.[71] Although much of the impetus for the passage of AEDPA was judicial and prosecutorial fatigue, with lengthy appeals and collateral attacks on convictions and sentences in death penalty cases,[72] the enthusiasm for the use of the death penalty in the United States is now receding in large part because of widespread concern over the very real possibility that innocent people could be executed for crimes they did not commit.[73]

In *Herrera v. Collins*,[74] the Supreme Court reaffirmed its earlier holding in *Townsend v. Swain,*[75] that a claim of actual innocence

68. *See generally* Hartung, *supra* note 61, at 74.

69. *Id.* at 64, 67.

70. *See The Great Writ Hit*, *supra* note 64, at 419–21.

71. Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 328 (2015–2016); Estimates of percentage of wrongful convictions, if correct, mean

> there are literally thousands of innocent defendants waiting for exoneration. . . . Considering that the U.S. criminal justice system convicts more than one million people of a felony each year, an error rate of even 3% would predict no fewer than thirty thousand erroneous convictions in a single year. Even if we limit the estimate to those defendants convicted of a felony at trial, the number of erroneous convictions would be at least 1500 in a single year. Rudimentary math tells us that the number of exonerations to date is but a fraction of the defendants who might legitimately qualify for exoneration.

Id. at 362–63.

72. 142 CONG. REC. H3605–06, H3612 (1996); H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 944, 944.

73. *See Policy Issues: Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/5BVQ-HSSP] (last visited Nov. 7, 2022).

74. Herrera v. Collins, 506 U.S. 390, 400 (1993).

based on newly discovered evidence does not provide a basis for federal habeas relief, as federal habeas courts are concerned solely with imprisonment that occurs in violation of the federal constitution and not with correcting errors of fact.[76] Most states, including Maryland, have reached the same conclusion in the context of their own state habeas statutes.[77] Both state and federal courts typically view post-conviction relief as available only to address constitutional error and share the view that courts should not be in the business of functioning as error correcting bodies that review the accuracy and reliability of convictions.[78] The Supreme Court, many state Courts, and even the appellate courts of Maryland have answered Judge Friendly's questions, more than fifty years after the publication of his article, by often finding that innocence is indeed irrelevant but not in the context that he contemplated.[79]

In the absence of a viable claim of a constitutional violation associated with a conviction, a defendant with credible evidence of factual innocence in federal and most state habeas regimes has no basis for reversing a conviction solely for that reason.[80] Currently, even those defendants with credible claims of both factual innocence and constitutional violations associated with their convictions face extremely bleak prospects for obtaining relief through the post-conviction process in state courts, where only a vanishingly small number of petitions seeking new trials are granted.[81] This is a result

75. Townsend v. Sain, 372 U.S. 293, 313–17 (1963).

76. *Id.* In *Herrera*, the Supreme Court held that the petitioner's claim of actual innocence, in a capital case, did not entitle him to federal habeas relief. *Herrera*, 506 U.S. at 393. In suggesting executive pardon as the method for relief based on a claim of actual innocence, Chief Justice Rehnquist noted in his opinion that "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 417. Justice Scalia, joined by Justice Thomas, noted in concurrence: "There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id*. at 427–28 (Scalia, J., concurring).

77. *See, e.g.*, Turner v. Warden of Md. Penitentiary, 155 A.2d 69, 69 (Md. 1959); *see also* Slack v. Warden of Md. Penitentiary, 160 A.2d 924, 925–26 (Md. 1960).

78. *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, 664–65, 674 (2005).

79. *See id.* at 664–65.

80. *See id.* at 674.

81. Given the lack of statistics compiled on this issue, the author relies on both personal experience in litigating cases and on the experience of colleagues in other states who routinely report on the exceedingly small success rate of efforts to vacate convictions based on factual innocence claims in state and federal courts.

of the formidable procedural barriers to raising claims,[82] the limited discovery available to generate evidence to support the claims,[83] the stringent standards for granting relief,[84] the limited appellate relief typically available,[85] and the lack of provision for adequate counsel or any counsel at all.[86] Claims that fail in state court and are subsequently raised in federal court face a gauntlet of additional procedural hurdles to even obtain consideration on the merits[87] and

82. *See* Medwed, *supra* note 78, at 669–71.

83. *Id.* at 659.

84. *See, e.g.*, ARK. CODE ANN. § 16-112-201 (West 2022) (allowing post-conviction relief based on new scientific evidence that establishes the petitioner's actual innocence; or when such evidence "could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense."); Medwed, *supra* note 78, at 667–69.

85. *See, e.g.*, Boles v. Comm'r of Corr., 874 A.2d 820, 823 (Conn. App. Ct. 2005) (noting that to obtain appellate review of dismissal of a habeas petition, the petitioner "must demonstrate that the denial of his petition for certification constituted an abuse of discretion . . . [and] the decision of the habeas court should be reversed on its merits"); *see generally* Medwed, *supra* note 78, at 680 ("[D]enials of new trial motions are not always appealable as of right; the defendant may have to petition the appellate court for permission to appeal. Even if a state appellate court agrees to review the denial of a new trial motion, the standard of review applied to that denial is extraordinarily deferential . . . .").

86. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 557 (1987) (holding that prisoners do not have a constitutional right to counsel for post-conviction relief proceedings). States do not have an obligation to provide post-conviction relief proceedings, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer . . . ." *See* Grandison v. State, 38 A.3d 352, 365 (Md. 2012) ("The Maryland Constitution has not hitherto been interpreted to provide a right to counsel in collateral proceedings challenging a criminal conviction." (quoting Blake v. State, 909 A.2d 1020, 1033 (Md. 2006))); MD. CODE ANN., CRIM. PROC. § 7-108 (West 2022) (articulating that although the Uniform Postconviction Procedure Act states that "a person is entitled to assistance of counsel and a hearing" the law also makes exceptions to both the provision of counsel and entitlement to a hearing).

87. *See* 28 U.S.C. § 2254; Mackall v. Angelone, 131 F.3d 442, 445 (4th Cir. 1997) ("Absent cause and prejudice or a fundamental miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule."); *see also* Justin Brooks et al., *If Hindsight is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB L. REV. 1045, 1052–53 (2016); Bright, *supra* note 34, at 4.

only a tiny number of defendants ever obtain relief in the federal courts.[88]

While state and federal post-conviction proceedings may provide an avenue of relief for those innocent defendants who happen to have a viable constitutional claim, such as ineffective assistance of counsel or a serious *Brady* violation,[89] many convictions of innocent people occur in the absence of constitutional violations or attorney misconduct.[90] Even those that are marred by constitutional error must still surmount all the formidable procedural and substantive obstacles to obtaining relief that inhere in these statutes.[91] Over the last three decades, hundreds of exonerations have demonstrated that the constitutional constraints imposed on law enforcement in obtaining confession evidence, eyewitness evidence and forensic science evidence and utilizing it in criminal prosecutions, have not prevented the convictions of innocent people predicated on false confessions, mistaken eyewitness testimony and unreliable forensic evidence.[92]

88. Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 809–10 (2009).

89. Brady v. Maryland, 373 U.S. 83 (1963). *Brady* claims involve a failure of the prosecution to disclose exculpatory evidence to the defense. *Id.* at 84–86.

90. *See* Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 479 (2014). Two of the most common errors in wrongful convictions, eyewitness misidentification and false confessions are among "at least eight major sources of wrongful convictions: (1) mistaken eyewitness identification; (2) false incriminating statements or confessions; (3) tunnel vision; (4) perjured informant testimony; (5) forensic error; (6) police error; (7) prosecutorial error; and (8) inadequate defense representation." *Id.* Compilation of U.S. exonerations "confirms the majority of cases involved at least one, but often several, of the above factors." *Id. See also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 9, 18, 90, 124 (2011) (indicating that of 250 exonerations, 76% (190) were misidentified by an eyewitness, 16% confessed to crimes they did not commit, invalid forensics by 61% (93 of 153) of analysts called by the prosecution, and 21% involved informant testimony).

91. *See* Bright, *supra* note 34, at 7 (discussing procedural barriers to habeas relief following the AEDPA and noting "[t]he constitutional violations will still exist, but under the new Act, federal courts are prohibited from conducting evidentiary hearings and receiving evidence of the violations").

92. *See, e.g.*, Wells & Quinlivan, *supra* note 4, at 1, 17 (noting that "mistaken identification is the primary cause of convictions of the innocent," discussing the scientific research since the 1977 Supreme Court decision in *Manson v. Braithwaite* and noting the flaws in the *Manson* reliability criteria). Specifically, "*Manson* reliability factors come into consideration by courts under precisely the circumstances in which they are least likely to be indicators of reliability due to their having been distorted by the suggestive procedure itself." *Id.* at 17. *See also* THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/GS4Q-KLQP] (last visited Nov. 7, 2022).

Given the limited utility of habeas claims for the wrongly convicted,[93] the other potential vehicle for securing relief that can be utilized is a Motion for New Trial, a mechanism that is usually provided by a judicial rule or a statute.[94] Although a Motion for New Trial based on newly discovered evidence should seemingly provide a better vehicle for rectifying situations in which a conviction is based on an unreliable factual foundation,[95] the same preoccupation with ensuring finality that pervades habeas doctrine dominates in this realm as well.[96]

Virtually all court rules and statutes that allow for granting a new trial based on newly discovered evidence contain extremely strict requirements for establishing the threshold for consideration of the evidence as being "newly discovered."[97] Typically, a defendant must show that the evidence could not, in the exercise of due diligence, have been discovered prior to trial or shortly thereafter.[98] The lack of diligence of a defendant's trial attorney is almost always imputed to the defendant regardless of whether the defendant played any role in failing to discover and present the evidence at the time of trial.[99] Given the crisis in indigent defense funding in this country and the high proportion of criminal defendants who do not have the funds to ensure that a privately retained or publicly appointed attorney is sufficiently resourced and diligent in conducting pre-trial investigations and vigorously scrutinizing the accuracy and integrity of the prosecution's trial evidence, it is not surprising that many petitioners cannot meet this threshold requirement.[100] Additionally,

93. *See supra* notes 80–92 and accompanying text.

94. *See* Medwed, *supra* note 78, at 675.

95. *See id*. at 666–69. Newly discovered evidence claims are typically centered on the underlying factual basis for the conviction as opposed to fault-based constitutional claims and are therefore more likely to provide a basis on which to challenge the factual accuracy of the evidence supporting the conviction. *See generally id.*

96. *Id*. at 664–65.

97. *See New Trial*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 993, 994–97 (2020); *see also* Medwed, *supra* note 78, at 658–59, 665, 673–76 (discussing procedural barriers and the evolution of common law *coram nobis* and post-conviction relief based on newly discovered evidence).

98. *See* Brooks et al., *supra* note 87, at 1069–70.

99. *See, e.g.,* United States v. Napolitan, 762 F.3d 297, 306–07 (3d Cir. 2014); United States v. Noel, 905 F.3d 258, 272 (3d Cir. 2018); United States v. Jenkins, 726 Fed. Appx. 452, 459–60 (6th Cir. 2018); *see also* State v. Hunt, 116 A.3d 477, 486 (Md. 2015).

100. *See* Kovarsky, *supra* note 39, at 448 ("Roughly eighty percent of prosecutions involve indigent defendants."); *see also* David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & INEQ. 371, 372–74 (2014); *see also*

most states impose time limitations on the filing of such motions that are too limited to be of use to the majority of wrongly convicted defendants[101] who, for various reasons, are unable to find out about the existence of new evidence until a decade or more has elapsed from the time of the conviction.[102]

As forensic DNA testing evolved to allow for the development of DNA profiles from the smaller and more degraded samples that are typically encountered in post-conviction testing,[103] an ever-increasing number of people who had been convicted of murder and rape were able to demonstrate that they did not commit the crime by identifying the actual culprit through the use of DNA database searches.[104] As the number of these case increased, the lack of any viable legal mechanism to undo these convictions left these individuals at the mercy of prosecutors who could elect to ignore the legal impediments to vacating these convictions by consenting to relief and not asserting the available procedural bars to securing relief or alternatively, to simply allow the conviction to stand despite the evidence of factual innocence.[105]

Bright, *supra* note 34, at 4 (noting that prior to passing the AEDPA, Congress eliminated funding for death penalty resource centers).

101. *See* Brooks et al., *supra* note 87, at 1070. Deadlines for filing petitions for a new trial may be as soon as ten days after the entry of a final judgment. While some states provide exceptions for newly discovered DNA evidence, this is generally not the case for claims of innocence based on non-DNA evidence. *See id.* at 1071–75; *see also* Medwed, *supra* note 78, at 676–78.

102. *See* Gould & Leo, *supra* note 71, at 356 (determining the median time between conviction and exoneration of factually innocent defendant to be over 13 years, and noting inability to determine amount of time spent waiting for a third party to investigate or assist versus amount of time spent in active investigation or litigation); *see also* Kovarsky, *supra* note 39, at 448–49 ("In state postconviction litigation involving capital inmates, every jurisdiction other than Alabama and Georgia requires counsel be appointed. In noncapital postconviction cases, however, a lawyer is appointed for somewhere in the neighborhood of ten to twenty-five percent of state inmates. The remaining seventy-five to ninety percent litigate pro se.").

103. *See* Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, 18 BAYLOR U. MED. CTR. PROC. 130, 131 (2005).

104. Gould & Leo, *supra* note 71, at 332, 336–37, 340. In an empirical study of factual innocence in 260 wrongful convictions and 200 "near misses" (i.e., dismissals and acquittals) from 1980 to 2010, eighty-four percent of exonerations were for rape or murder; ninety-five percent of rape exonerations were based on DNA, fifty-six percent of murder exonerations were based on DNA. *Id.* at 340. Almost eighty percent of the defendants were exonerated through DNA testing; fifty-eight percent were able to identify the actual perpetrator; forty-two percent were able to establish innocence and identify the actual perpetrator. *Id.* at 337.

105. Regarding problems with this set up, *see* Medwed, *supra* note 78, at 679 ("Having played a vital role in the initial decision, the trial judge arguably has a vested interest

In recognition of the uneasy fit between the rationale underpinning the need for finality in criminal judgments as applied to innocent defendants, or simply in response to public discomfort with the notion of a legal system that allows the continued punishment of factually innocent defendants,[106] a minority of states have either interpreted their state habeas statutes to authorize courts to grant relief based on a freestanding claim of factual innocence or have enacted statutes that address the issue.[107]

Many of the DNA exoneration cases involved mistaken eyewitness identification, faulty forensic testing or testimony, or false confessions.[108] Convictions based on faulty evidence are not necessarily marred by constitutional error that provides a basis for habeas relief.[109] At the same time, presenting the DNA evidence as "newly discovered evidence" in a Motion for New Trial was often impossible because, in most states, time bars imposed on this remedy were too short to be of any use when the DNA evidence was generated years or even decades after the conviction occurred.[110]

in preserving that outcome and, as a matter of common sense, human beings undoubtedly struggle to some extent when asked to review their own work and examine it critically."); Gould & Leo, *supra* note 71, at 333 (noting more restrictive definition of "innocence"); *Id*. at 349–50 ("Nationally, just 9% of exonerations were owed to the substantial involvement of prosecutors."); *Id*. at 354–55 ("[A]lmost 80% of those exonerated on the basis of factual innocence have had to rely on a prosecutor's decision not to refile charges following a court's order to vacate the initial conviction."); *Id.* at 355 ("The result, then, is a criminal justice system in which no single representative of the state wishes to take primary responsibility for exonerations.").

106. *See* Brooks et al., *supra* note 87, at 1049–50.

107. *See id.* at 1078–79.

108. *See* Garrett, *supra* note 4, at 75–76.

109. Agathocleous, *supra* note 4 ("Nationally, 69% of DNA exonerations—252 out of 367 cases—have involved eyewitness misidentification, making it the leading contributing cause of these wrongful convictions. Further, the National Registry of Exonerations has identified at least 450 non-DNA-based exonerations involving eyewitness identification.").

110. *See* Brooks et al., *supra* note 87, at 1080. Motions for a new trial may be subject to time limits as short as ten days. OR. R. CIV. P. 64 (F)(1) ("A motion to set aside a judgment and for a new trial . . . shall be filed not later than 10 days after the entry of the judgment . . . ."). *See also* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes,* 38 CAL. W. L. REV. 355, 361–62 (2002). In discussing the interaction of state post-conviction relief with recently enacted statutes allowing a prisoner to request DNA testing, Swedlow notes that, for example, although the DNA testing statute in Tennessee allowed testing to be requested at any time after conviction, the three types of post-trial motions available in the state required petitions to be filed within much more restricted time limits

Faced with the prospect of continuing to incarcerate or otherwise punish people who had obtained clear evidence of their factual innocence through post-conviction DNA testing, states and the federal government began enacting post-conviction DNA testing statutes that provided a discrete class of the wrongly convicted with a remedy.[111] By 2016, every state had enacted some version of a post-conviction DNA testing statute.[112] While the enactment of post-conviction DNA testing statutes represents a step away from the grip of the finality doctrine for a small portion of the wrongly convicted population, these statutes are of limited utility to most.

Unfortunately, most people convicted of crimes they did not commit are unable, for a variety of reasons, to prove their innocence through DNA testing.[113] As of July 24, 2022, 555 DNA exonerations have occurred in the United States, and a total of 3,041 reported exonerations have been documented by the National Registry of Exonerations since 1989.[114] Only eighteen percent of the 3,041 exonerations were based on DNA evidence and that percentage is likely to decline in the coming years as more DNA testing is performed pre-trial.[115] While DNA has provided a powerful tool for exposing the broader existence of wrongful convictions[116] and ways

ranging from thirty days to one year. *Id.* Swedlow also notes that, absent accompanying constitutional error within the motion for DNA testing, a petitioner's time to file a federal habeas petition would not result in tolling of the one-year limitations period imposed by the AEDPA. *Id. See also* Brooks et al., *supra* note 87, at 1070–75 (contending that while Oregon and many other states now provide exemptions to these deadlines for newly discovered DNA evidence, motions for a new trial based on non-DNA evidence of innocence are subject to state filing deadlines in most states).

111. *See* Swedlow, *supra* note 110, at 355.

112. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://innocenceproject.org/causes/access-post-conviction-dna-testing [https://perma.cc/3FBM-BA6A] (last visited Nov. 7, 2022).

113. For example, not all crime scenes yield or are as likely to yield DNA evidence. *See, e.g.*, Gould & Leo, *supra* note 71, at 340 (noting that murder scenes are less likely to include a defendant's DNA than rape scenes and that exoneration requires non-DNA means) ("82% of exonerations for murder turned on the identification of the true perpetrator . . . ."). Additionally, if available, biological evidence cannot always be located or may have deteriorated. *See, e.g.*, State v. Seward, 102 A. 3d 798, 803 (Md. Ct. Spec. App. 2014) (noting that DNA evidence was no longer available for testing).

114. *Exonerations by Year: DNA and Non-DNA*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/65P3-AMWK] (last visited Nov. 7, 2022).

115. *Id.*

116. Gould & Leo, *supra* note 71, at 327–29 ("Prior to 1989, virtually all observers assumed that factually erroneous convictions were so rare as to be anomalous, if not

in which our criminal justice system ends up convicting the wrong people,[117] it does not provide a solution commensurate with the scope of the problem.

III. POST-CONVICTION LAW IN MARYLAND PRIOR TO THE 1993 EXONERATION OF KIRK BLOODSWORTH AND THE LEGISLATIVE RESPONSE IN THE WAKE OF HIS EXONERATION

In 1993, a Maryland trial court released Kirk Bloodsworth from custody and vacated his convictions for rape and murder shortly after DNA testing showed that he was not the source of the biological material recovered from the body of the victim.[118] Bloodsworth was convicted and sentenced to death in 1985 for the brutal sexual assault and murder of a young girl based on a combination of multiple mistaken eyewitness identifications and misleading forensic evidence.[119] The first conviction was reversed on appeal due to the post-trial discovery of a *Brady* violation,[120] and in 1987, Bloodsworth was retried and convicted again but sentenced to life imprisonment.[121] Years later, DNA testing was performed on sperm cells that were recovered from the victim's underwear, and Kirk Bloodsworth was excluded as a source of that cellular material.[122] These aspects of the case are widely known due to the intense media interest that accompanied the first exoneration by DNA evidence of a person who had been sentenced to death.[123]

What is not as widely known or appreciated is that at the time this DNA evidence first became available to Bloodsworth in 1993,

freakish, especially in serious felony and capital cases."). Post-conviction DNA testing and exonerations changed this perception. *Id.* at 329.

117. *See id.* at 329, 335–36; *see also* Garrett, *supra* note 4, at 57, 61; Wells & Quinlivan, *supra* note 4, at 1, 21.

118. Glenn Small, *Nine-Year Prison 'Nightmare' Ends as Former Convicted Killer is Released: DNA Test Leads to Exoneration,* THE BALT. SUN, June 29, 1993, at 1A.

119. Robert A. Erlandson, *Kirk Bloodsworth Gets Death Penalty in Child's Death*, THE BALT. SUN, Mar. 22, 1985, at 7A; Scott Shane, *5 Place Man with Slain Girl, 5 Say He was Home*, THE BALT. SUN, Mar. 7, 1985, at 2D.

120. Martin C. Evans, *Death Row Inmate Gets New Trial: Court Rules Police Withheld Evidence*, THE BALT. SUN, July 30, 1986, at 1D.

121 Robert A. Erlandson, *Bloodsworth Convicted Again of '84 Sex Killing*, THE BALT. SUN, Apr. 7, 1987, at 1C; Balt. Cnty. Bureau of The Sun, *Girl's Death Brings Two Life Terms*, THE BALT. SUN, June 13, 1987, at 7A.

122. Small, *supra* note 118.

123. *See, e.g.*, *id*. at 1A, 7A (the Baltimore Sun mentioned or discussed Bloodsworth and his exoneration in approximately fifteen articles during 1993 alone).

Maryland law provided no legal mechanism for vacating a conviction based solely on this newly available evidence.[124] The applicable rule for a Motion for New Trial based on newly discovered evidence required that a motion for a new trial be filed within one year from the date the conviction became final.[125] Bloodsworth did not produce the DNA evidence until 1992, although his conviction became final in 1988.[126] Consequently, the circuit court that granted him a new trial, with the consent of the prosecutor, had no jurisdiction to entertain the motion.[127] Absent the willingness of both the prosecutor and the presiding judge[128] to ignore this central legal impediment to his exoneration, Bloodsworth would not have been released from prison in 1993.[129]

Until 2001, Maryland Rule 4-331(c) and the Uniform Post Conviction Procedure Act, now codified as Maryland Code of Criminal Procedure Section 7-101 through 7-109 were the two primary means available to a wrongfully convicted individual seeking to vacate a conviction and obtain a new trial.[130] Currently, Maryland law provides four primary legal mechanisms for convicted defendants seeking to have their convictions vacated after having been upheld in the direct appeal process: (1) Maryland's post conviction procedure statute;[131] (2) Rule 4-331 motion for a new trial;[132] (3) Section 8-201(c);[133] and (4) Section 8-301 petition for writ of actual innocence.[134]

A. Uniform Post Conviction Procedure Act

In 1958, Maryland became the second state in the nation to adopt a version of the Uniform Post Conviction Procedure Act (UPCPA), a model developed by the National Conference of Commissioners on

124. *Cf.* MD. CODE ANN., CRIM. PROC. § 8-201 (West 2022) (effective Oct. 1, 2001).
125. *See* MD. R. 4-331(c).
126. Northwestern Pritzker School of Law, *First DNA Death Row Exoneration,* BLUHM LEGAL CLINIC: CTR. ON WRONGFUL CONVICTIONS, https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/md/kirk-bloodsworth.html [https://perma.cc/9ATM-GTQQ] (last visited Nov. 7, 2022).
127. Small, *supra* note 118, at 1A, 7A.
128. The work of legal and social science scholars indicated this willingness by both the prosecutor and presiding judge to be quite rare. *See* Medwed, *supra* note 78, at 670–71; GARRETT, *supra* note 90, at 10; Gould & Leo, *supra* note 71, at 346–47, 354.
129. *See* sources cited *supra* note 128.
130. *See* MD. R. 4-331(c); MD. CODE ANN., CRIM. PROC. §§ 7-101 to -109 (West 2022).
131. CRIM. PROC. §§ 7-101 to -109.
132. MD. R. 4-331(c).
133. CRIM. PROC. § 8-201(c).
134. *Id.* § 8-301.

Uniform State Laws.[135] Over the ensuing decades the UPCPA largely supplanted the common law writ of habeas corpus.[136] The statutory framework provided a right to counsel for indigent prisoners, a right to a hearing, and the ability to seek leave to appeal from an adverse ruling[137]—none of which was available in the context of a state habeas proceeding.[138] The UPCPA allows a convicted defendant who is in custody or under parole or probation supervision to collaterally attack a conviction or sentence that was imposed in violation of the Constitution of the United States, the Maryland Declaration of Rights, or the laws of Maryland.[139]

While the purpose of the UPCPA has not changed since 1958,[140] it has been revised several times to reduce the number of permissible petitions from unlimited to one.[141] The UPCPA has gone from providing no time limitation to requiring that a petition must be filed within ten years of the date of sentencing.[142] Additionally, case law establishes that a claim of factual innocence is not cognizable under the UPCPA.[143] Therefore, a court is not required to consider exculpatory evidence that was not available or presented at a defendant's trial after the ten-year filing deadline.[144] A court is only required to consider it if it is both presented within the ten-year time frame and tethered to a claim of ineffective assistance of counsel or a *Brady* violation.[145]

135. *See* Act of April 4, 1958, ch. 44, 1958 Md. Laws 178 (codified as amended at CRIM. PROC. §§ 7-101 to -301); *see also* Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 991 (2005).
136. *See* Millemann, *supra* note 135, at 991–92.
137. CRIM. PROC. §§ 7-108 to -109.
138. *See* 7A M.L.E. *Criminal Law* § 474 (2022).
139. CRIM. PROC. § 7-102.
140. *See* Millemann, *supra* note 135, at 1000–01.
141. CRIM. PROC. § 7-103.
142. *See* Act of May 9, 1995, ch. 258, 1995 Md. Laws 2091, 2091–92 (codified as amended at CRIM. PROC. §§ 7-101 to -301).
143. Turner v. Warden of Md. Penitentiary, 155 A.2d 69, 69 (Md. 1959) (per curiam); Slack v. Warden of Md. Penitentiary, 160 A.2d 924, 925–26 (Md. 1960).
144. *See* CRIM. PROC. § 7-103 (establishing a ten-year statute of limitations on petitions under the UPCPA, after which petitions may only be heard if extraordinary cause is shown); *see also* Barbee v. Warden of Md. Penitentiary, 151 A.2d 167, 168–69 (Md. 1959) (discussing that evidence not presented at trial that indicate no proof of guilt are questions of sufficiency of the evidence and are not appropriate under the Post Conviction Act).
145. Grounds for relief under the UPCPA requires that the petitioner file within the ten years of their sentence and allege that the conviction is improper based on a procedural on constitutional defect such as suppression of evidence or ineffective

The UPCPA makes no explicit provision for discovery,[146] so the petitioner must factually reinvestigate the case to uncover the existence of exculpatory information. Typically, information withheld by law enforcement officials can only be discovered by an examination of the files generated during the investigation and prosecution of the case.[147] However, because the UPCPA does not contain any mandatory discovery provisions, gaining access to portions of these files is achieved by making a request under the Maryland Public Information Act (MPIA).[148] Accessing law enforcement files under the MPIA is a highly cumbersome and incomplete way of accessing these materials.[149] First, the agency or entity in question is permitted to redact and withhold information contained in the files[150] and to charge fees for the production and copying of the files' contents.[151] Additionally, securing an appropriate response from law enforcement agencies to MPIA requests is generally time-consuming and frequently requires the initiation of a civil action to obtain compliance with the law.[152]

If evidence supporting a claim of factual innocence can be discovered, the petitioner then bears the burden of demonstrating that

assistance of counsel claim. *See* CRIM. PROC. § 7-102 (providing the grounds for a petitioner to begin a UPCPA proceeding); *Id.* § 7-103 (providing statute of limitations); Mosley v. State, 836 A.2d 678, 682–85 (Md. 2003) (noting that the UPCPA is the most appropriate way to raise ineffective counsel claims and discussing *Strickland* standard); Conyers v. State, 790 A.2d 15, 30–33, 41 (Md. 2002) (holding that a *Brady* violation satisfied the UPCPA).

146. *See* CRIM. PROC. §§ 7-101 to -109.

147. *See* MD. CODE ANN., GEN. PROVIS. § 4-344 (West 2022); Hammen v. Balt. Cnty. Police Dep't, 818 A.2d 1125, 1132–35 (Md. 2003) (holding the normal rules of discovery do not generally apply to actions under the MPIA).

148. *See* GEN. PROVIS. § 4-103(a) (permitting a general presumption in favor of disclosure); *but see id.* § 4-351 (limiting the disclosure of investigations by law enforcement).

149. *See generally* Andrew Schotz & Luciana Perez Uribe Guinassi, *Public Record Survey Highlights Unevenness of Maryland State and Local Government Tracking and Responses*, THE BALT. SUN (Mar. 15, 2021, 6:00 AM), https://www.baltimoresun.com/maryland/bs-mddc-sunshine-week-20210314-i24yr5falbem5gkqxwv2xeiprq-story.html [https://perma.cc/3BDA-FW3W] (discussing the inconsistency and difficulties surrounding PIA requests to state agencies); *see also* MD. PUB. INFO. ACT COMPLIANCE BD. & MD. OFF. OF THE PUB. ACCESS OMBUDSMAN, FINAL REPORT ON THE PUBLIC INFORMATION ACT 8–11, 14–15, 17, 26–31 (2019).

150. *See* GEN. PROVIS. § 4-343.

151. *See id.* § 4-206.

152. *See, e.g.*, Blythe v. State, 870 A.2d 1246, 1251–61 (Md. Ct. Spec. App. 2005) (illustrating the difficulties of a pro se litigant in acquiring information about their conviction under the Maryland Public Information Act).

either the information was not disclosed to the defendant by law enforcement agencies or the prosecution,[153] or by showing that defendant's trial counsel failed to make sufficient efforts to locate the evidence and in doing so was not engaging in some sort of strategic approach to the handling of the case.[154] Assuming these hurdles can be surmounted, a judge must then be persuaded that the evidence is sufficiently material to have affected the outcome of the trial.[155] With respect to evidence that was not disclosed to the defense prior to trial, post-conviction courts frequently minimize the significance of the evidence in the materiality analysis and deny relief.[156] Additionally, given the highly deferential standard that is applied by courts when assessing the conduct of trial counsel, it is difficult to obtain relief based on an ineffective assistance of counsel claim.[157] Courts are reluctant to second guess the decisions made by defense counsel as to what type of investigation to conduct or what type of defenses to pursue[158] and often excuse failures to investigate as the product of strategic judgments that are not reviewable no matter how unsound they may be.[159] Because there is no right of appeal,[160] post-conviction proceedings receive limited scrutiny from the appellate

153. *See* Tucker v. Warden of Md. Penitentiary, 220 A.2d 908, 909 (Md. 1966); Strosnider v. Warden of Md. Penitentiary, 180 A.2d 854, 856–57 (Md. 1962); Smith v. Warden of Md. Penitentiary, 243 A.2d 897, 899 (Md. Ct. Spec. App. 1968) (per curium).

154. *See* Ramirez v. State, 212 A.3d 363, 367, 380–82 (Md. 2019) (discussing ineffective assistance of council claims in a post-conviction proceeding and whether the burden to prove that claim is presumed or placed on petitioner).

155. *See* McCoy v. Warden of Md. Penitentiary, 227 A.2d 375, 380–81 (Md. Ct. Spec. App. 1967).

156. *See* Medwed, *supra* note 78, at 669–71 (discussing history of judicial view toward post-conviction claims based on newly discovered evidence and noting a general "grudging" view toward such evidence); *see also* Gould & Leo, *supra* note 71, at 342 ("Once there is a declaration of guilt—and the resulting presumption that the decision should receive deference—justice officials become suspicious of other showings of innocence.").

157. *See* Strickland v. Washington, 466 U.S. 668, 685–97 (1984), *superseded on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C § 2255); *see also* Harris v. State, 496 A.2d 1074, 1078–79 (Md. 1985) (adopting *Strickland* test).

158. *See Strickland*, 466 U.S. at 689–91.

159. *See id.*

160. Coleman v. Warden, Md. House of Corr., 212 A.2d 463, 463 (Md. 1965) (per curium); *but see* MD. CODE ANN., CRIM. PROC. § 7-109(a) (West 2022) (providing application for leave to appeal after a court passes an order under the UPCPA).

courts, and the Maryland Court of Special Appeals rarely grants applications for leave to appeal filed by criminal defendants.[161]

B. Motion for a New Trial

The second primary vehicle a wrongly convicted defendant may utilize to challenge a conviction is Maryland Rule 4-331.[162] Section (c)(1) of the Rule allows a court to consider a motion for new trial based on newly discovered evidence that could have materially affected the results of the trial.[163] This motion must be filed within one year of the date of sentencing or the date on which a mandate was issued from an appellate court upholding the conviction.[164] Newly discovered evidence is defined as evidence that could not have been discovered at the time of trial in the exercise of due diligence.[165] A failure to establish diligence either on the part of defense counsel or on the defendant bars relief.[166]

Following the Bloodsworth exoneration, the Court of Appeals approved a modification of Maryland Rule of Criminal Procedure 4-331 to add a section that allows a Motion for New Trial to be filed at any time based upon newly discovered evidence such as DNA identification, testing, or other generally accepted scientific techniques.[167] If a defendant files a Rule 4-331(c)(2) motion for a new trial based on DNA testing[168] "or other generally accepted scientific techniques," the motion may be filed outside of the one-year limitation period if the results of testing "would show that the

161. *See* MD. JUDICIARY RSCH. & ANALYSIS, 2020 MARYLAND JUDICIARY STATISTICAL ABSTRACT 11 (2020), https://mdcourts.gov/sites/default/files/import/publications/annual report/reports/2020/fy2020statisticalabstract.pdf [https://perma.cc/J2J9-5X7P] (comparing the number of applications for leave to appeal from a decision on a post-conviction and how many were granted over the past three years: in 2018, ten percent of all applications for leave to appeal from a decision on a post-conviction petition were granted; in 2019, five percent were granted; and in 2020, nine percent were granted. Many, if not a majority of cases in which applications were granted were granted to the State not to a criminal defendant).

162. *See* Campbell v. State, 821 A.2d 1, 12 (Md. 2003) ("Maryland Rule 4-331 provides for three distinct situations in which a criminal defendant may file a motion for a new trial.").

163. MD. R. 4-331(c)(1).

164. *Id.*

165. *Id.*

166. *See* Love v. State, 621 A.2d 910, 913, 916–18 (Md. Ct. Spec. App. 1993).

167. State v. Matthews, 999 A.2d 1050, 1064–65 (Md. 2010).

168. MD. R. 4-331(c)(2) (providing procedure for motions based on "DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, § 8-201 . . . ."); *See generally id.* 4-331(d) (providing procedure for motions seeking relief pursuant to MD. CODE ANN., CRIM. PROC. § 8-201 (West 2022)).

defendant is innocent of the crime of which the defendant was convicted."[169] To date, no Maryland appellate case has provided guidance as to what quantum of proof would be required to "show that the defendant is innocent" although it is clear that the Maryland Court of Appeals views this standard as more demanding than the materiality standard that applies to other types of newly discovered evidence.[170] Additionally, the Rule provides no mechanism for a convicted defendant to obtain physical evidence for testing that is in the possession of the State.[171] To date, no exonerations have been obtained by invoking this provision of the rule, largely due to the inability of convicted defendants to access the evidence needed to perform forensic testing other than DNA testing through a petition filed under Section 8-201 of the Code of Criminal Procedure.[172]

C. Post-Conviction DNA Testing Statute

In 2001, the Maryland legislature enacted a Post-Conviction DNA Testing Statute ("Section 8-201") that allowed defendants who had been convicted of murder and various sexual assaults to seek the release of evidence for DNA testing subject to certain conditions.[173] Section 8-201 has been amended five times since 2001.[174] The amendments have included (1) imposing an evidence retention requirement on law enforcement officials,[175] (2) providing remedies

169. MD. R. 4-331(c)(2).

170. *Compare Love*, 621 A.2d at 915–17 (requiring newly introduced evidence be material in order to grant post-conviction relief), *with* Arrington v. State, 983 A.2d 1071, 1078 (Md. 2009) (holding that in order to grant post-conviction relief for newly discovered DNA evidence, there must be a "substantial possibility" that the new evidence would have affected the trier of fact), *and* Jackson v. State, 86 A.3d 97, 108 (Md. Ct. Spec. App. 2014) (combining the materiality and substantial possibility standards into a two-prong approach for any type of newly discovered evidence used to grant post-conviction relief).

171. MD. R. 4-331.

172. This assertion is based on the experience of the author and colleagues who have attempted to access non-DNA forensic evidence in a post-conviction context without success in the trial court or in the appellate courts of Maryland. *But see* Smallwood v. State, 152 A.3d 776, 791–92 (Md. 2017) (addressing the "statutory gap that existed for convicted persons who could not obtain post-conviction relief because they obtained newly discovered evidence that was either non-biological or discovered after the one-year limitation in Maryland Rule 4-331.").

173. *See* Act of Oct. 1, 2001, ch. 418, 2001 Md. Laws 2494 (codified as amended at MD. CODE ANN., CRIM. PROC. § 8-201 (West 2022)).

174. CRIM. PROC. § 8-201.

175. *See* Act of Oct. 1, 2002, ch. 465, 2002 Md. Laws 3714 (codified as amended at CRIM. PROC. § 8-201).

for the willful and intentional destruction of such evidence,[176] and (3) providing remedies for defendants who receive favorable test results.[177] The statute was also amended in 2015 to expand the number of qualifying offenses that would be covered by the statute, to include convictions for any "crime of violence" as defined by Maryland law.[178]

If physical evidence that is subject to DNA testing still exists and subsequent testing yields probative results supporting an innocence claim, a defendant can request a new trial[179] or, alternately, open or reopen a post-conviction proceeding under Maryland Code of Criminal Procedure Section 7-102 (Maryland UPCPA statute) pursuant to Maryland's Post-Conviction DNA Testing statute.[180] To obtain a new trial, a petitioner must persuade the court that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial.[181]

Compared to most states, Maryland provides liberal access to DNA testing and allows a defendant who obtains favorable test results to obtain a new trial based upon a materiality standard that is less demanding than that contained in Maryland Rule 4-331(c)(2).[182] Section 8-201 also provides that a defendant can appeal the denial of a request for testing or the denial of relief directly to the Court of

176. *See* Act of Jan. 1, 2009, ch. 337, 2008 Md. Laws 3221 (codified as amended at CRIM. PROC. § 8-201).

177. *Id.*

178. *See* Act of Oct. 1, 2015, ch. 369, 2015 Md. Laws 1996 (codified as amended at CRIM. PROC. § 8-201).

179. Givens v. State, 188 A.3d 903, 909–10 (Md. 2018).

180. CRIM. PROC. §§ 7-102(b), 8-201(i)(4)(1)–(2). A petitioner must obtain a court order to test specific items of evidence and must pay for any testing that is ordered. *Id.* § 8-201(b), (h). If the testing results are "favorable to the petitioner," the petitioner can request the granting of a new trial or an order to reopen a previously closed post-conviction proceeding. *Id.* § 8-201(i)(2).

181. *Givens*, 188 A.3d at 910–11 (citing Edwards v. State, 160 A.3d 642, 655 (Md. 2017)). *But cf.* CRIM. PROC. § 8-201(i)(2)–(4) (authorizing a court to grant a new trial even if the petitioner does not meet the standard for demonstrating a reasonable possibility of a different result if the conviction resulted from a trial, and requiring a showing of factual innocence if the conviction was the result of a plea). To date no appellate cases have emerged in which relief was denied based on these standards.

182. *See* Christine E. White, *Clearly Erroneous: The Court of Appeals of Maryland's Misguided Shift to a Higher Standard for Post-Conviction DNA Relief,* 72 MD. L. REV. 886, 887 (2012) (quoting Dan Rodricks, *Long Wait for Justice with DNA Testing,* THE BALT. SUN (Sept. 12, 2010, 12:00 AM), https://www.baltimoresun.com/opinion/bs-xpm-2010-09-12-bs-ed-rodricks-dna-20100912-story.html [https://perma.cc/89AD-2L68]).

Appeals based upon favorable DNA test results.[183] This provision of the statute ensures that an appeal will be resolved expeditiously and with the issuance of a written opinion from the highest court in the state.[184] As such, for those few individuals who are fortunate enough to have the benefit of DNA evidence, Section 8-201 provides a workable framework for securing testing and obtaining a new trial if the test results are favorable.[185]

Only a small minority of defendants who have been convicted of crimes they did not commit are able to demonstrate their innocence through DNA testing, either because the physical evidence no longer exists, or because the nature of the crime is such that DNA testing is simply not a viable way of demonstrating factual innocence.[186] It is notable that of the forty-four Maryland exonerations listed in the National Registry of Exonerations as of 2022, only eight were based on the results of post-conviction DNA testing.[187] Thus, for most people serving lengthy sentences in Maryland prisons for crimes they did not commit, DNA testing is not an available option.[188] Even in some cases in which DNA testing of biological evidence may generate a DNA profile that is exculpatory, it is only when that evidence is considered in the context of other additional evidence that has come to light since the time of conviction that the defendant's innocence claim is compelling enough to support a claim of relief.[189]

183. CRIM. PROC. § 8-201(k)(6).

184. *See* Arrington v. State, 983 A.2d 1071, 1081–83 (Md. 2009) ("Section 8–201(k)(6) accords the convicted person filing a claim under Section 8–201 the right to a direct appeal to this court.").

185. CRIM. PROC. § 8-201. *See, e.g.*, Gregg v. State, 976 A.2d 999, 1000–01, 1012 (Md. 2009) (exemplifying the use of § 8-201 to secure DNA testing); *Arrington*, 983 A.2d at 1072, 1080 (exemplifying the use of § 8-201 to secure a new trial based on favorable DNA test results).

186. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1240–41 (2005) (explaining the frequency of cases with lost evidence); GARRETT, *supra* note 90, at 11–12, 225 (noting the prevalence of exoneree candidates without forensic DNA evidence).

187. THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=&FilterField1=ST&FilterValue1=MD [https://perma.cc/2X8K-7QHS] (last visited Nov. 7, 2022). Additionally, of the eight DNA exonerations, six identified "Mistaken Witness ID" as a "contributing factor." *Id.*

188. CRIM. PROC. § 8-201; Jones, *supra* note 186, at 1250; GARRETT, *supra* note 90, at 11–12, 225.

189. *See, e.g.*, Gould & Leo, *supra* note 71, at 336–37 (explaining that out of 260 wrongful conviction cases, "54% percent [sic] of cases had just one basis for exoneration, and

Aside from the few wrongly convicted defendants who could utilize DNA evidence to support a factual innocence claim, the rest could, until recently, only attempt to secure an exoneration by filing a post-conviction petition alleging some sort of constitutional defect in the way a conviction was obtained.[190] Typically claims involve allegations that defense counsel was ineffective or exculpatory evidence was withheld by agents of the State or by asserting a claim of newly discovered evidence in support of a Motion for New Trial.[191]

D. Writ of Actual Innocence

In 2009, the legislature enacted Maryland Code of Criminal Procedure Section 8-301 titled "Petitions for Writ of Actual Innocence," which allows convicted defendants to move for a new trial based on newly discovered evidence at any time.[192] Section 8-301, therefore, applies to evidence of innocence that is not limited to DNA and that is discovered more than one year after a conviction has become final.[193] However, the performance of defense counsel is a critical issue in the defendant's ability to make the threshold showing that the evidence is in fact "newly discovered."[194] To constitute "newly discovered evidence" the evidence must be such that it could not have been discovered in the exercise of due diligence prior to the

another 45% had two. . . . [T]hese sources are almost exclusively DNA testing and discovery of the true perpetrator.").

190. *See, e.g.*, David P. Kennedy, *The End of Finality*, MD. BAR J. 24, 26 (2004) (explaining pathways to exoneration in Maryland without DNA evidence in 2004).

191. *See, e.g.*, *id.* at 26–27 (noting that alleging ineffective counsel or asserting a claim of newly discovered evidence are well-worn paths for claiming innocence in lieu of DNA evidence). Kennedy also notes the significance of *Bloodsworth v. State,* an early exoneration case in Maryland that succeeded based on plaintiff's demonstration that prosecution withheld exculpatory evidence. *Id.* at 24 (referencing Bloodsworth v. State, 512 A.2d 1056 (Md. 1986)).

192. CRIM. PROC. § 8-301(a) ("A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence . . . .").

193. *Id.*

194. *See, e.g.*, Michael H. Cassel, *Coulda, Woulda, Shoulda: The Relationship Between Ineffective Assistance of Counsel, Due Diligence, and the "Could Have Been Raised Earlier" Bar in Postconviction Litigation*, 49 COLUM. J. L. SOC. PROBS. 45, 46, 49 (finding that defendants are in a bind under the "due diligence" requirement because lack of due diligence can make actual innocence claims based on "newly discovered evidence" impossible, yet it does not always mean defendants can move for a finding of ineffective counsel). The Maryland Court of Appeals found this article relevant to Maryland state law in *Hunt v. State*, 252 A.3d 946, 958 (Md. 2021).

expiration of the one-year period following the conviction becoming final.[195]

One practical problem in utilizing this statute is the reality that both retained counsel and counsel provided by the Maryland Office of the Public Defender limit the scope of trial representation to the conduct of the trial and sentencing.[196] Once sentencing has occurred, either the Appellate Division of the Office of the Public Defender or an attorney retained for the sole purpose of handling the direct appeal is tasked with reviewing the trial records for legal error and presenting arguments that are related solely to the trial record.[197] The scope of appellate representation does not include investigation of matters external to the trial record for the purpose of determining the existence of new evidence.[198] Since most defendants are not able to conduct these investigations without the assistance of counsel because they are either incarcerated or lack the funds and expertise required for such an investigation, defendants must rely on retained or assigned counsel who are neither equipped nor expected to conduct post-trial factual investigation once trial and sentencing has occurred.[199]

A finding that an attorney was *not* sufficiently diligent in securing evidence for purposes of establishing whether evidence is "newly discovered" when seeking to vacate a conviction in a Motion for New Trial does not necessarily translate into relief for a defendant in the context of a claim of ineffective assistance of counsel under Maryland Code of Criminal Procedure Section 7-103.[200] Likewise, in a Section 7-101 proceeding, a court finding that an attorney was not ineffective in failing to discover or present a particular piece of evidence does not mean that the attorney was sufficiently diligent to

195. *See* CRIM. PROC. § 8-301(a)(2).

196. *See* MD. R. 4-214 ("The representation of appointed counsel does not extend to the filing of subsequent discretionary proceedings including . . . petition for post conviction relief."); CRIM PROC. § 16-204(b) (identifying proceedings eligible for representation). *See also Appellate Division*, MD. OFF. OF THE PUB. DEF., https://www.opd.state.md.us/appellate [https://perma.cc/8B4D-MMCN] (last visited Nov. 7, 2022) (noting that a different public defense lawyer might represent defendants on appeal).

197. The author relies on her personal experience as a public defender to discuss the scope of trial and appellate litigation between retained and/or assigned counsel.

198. *Id.*

199. *Id.*

200. CRIM. PROC. § 7-103; *See, e.g.,* Love v. State, 621 A.2d 910, 918 (Md. Ct. Spec. App. 1993) ("The absence of due diligence in discovering a piece of evidence is not *ipso facto* the establishment of ineffective assistance of counsel . . . .").

surmount the "newly discovered evidence" barrier in a petition for a writ of actual innocence.[201]

Typically, cases that are selected for representation by organizations dedicated to representing those with credible claims of factual innocence involve a variety of evidence that supports the innocence claim.[202] These cases often include evidence that was not presented to the original factfinder because of a lack of diligence on the part of defense counsel or a failure to honor disclosure obligations by law enforcement officials, along with evidence that only recently became available due to developments that could not possibly have been known or foreseen at the time of the original trial.[203] Although none of these circumstances are within the control of a criminal defendant, they determine whether a court will even consider evidence supporting an innocence claim.[204]

E. The Inadequacies of Currently Available Remedies in Maryland

Although court rules have been modified and statutes enacted since Bloodsworth's exoneration in 1993,[205] there is currently no mechanism for a comprehensive and complete post-conviction examination of all evidence of innocence.[206] Each of the available statutory schemes have a different standard of proof, require presentation in a different forum, and have completely different appellate procedures.[207] As a result, despite some limited changes to the Maryland Rules of Criminal Procedure and the enactment of two separate statutes that occurred in the wake of the exoneration of Bloodsworth, other wrongfully convicted Maryland defendants who have challenged their convictions have not fared as well as Bloodsworth, even when their claims of factual innocence were supported by compelling evidence.[208]

The opinion of the Court of Special Appeals in the case of George Cameron Seward exemplifies the difficulties faced by a convicted

201. *See, e.g.*, State v. Seward, 102 A.3d 798, 808 (Md. Ct. Spec. App. 2014); *see also* Hunt v. State, 252 A.3d 946, 958 (Md. 2021).

202. Jones, *supra* note 186, at 1240–41.

203. *Id.*

204. This assertion is based on the experience of the author and her colleagues engaged in the tasks of managing intake and case selection for entities that provide representation to those claiming factual innocence of the crimes for which they have been convicted.

205. *See* discussion *supra* Sections III.A–D.

206. *See* discussion *supra* Sections III.A–D.

207. *See* MD. R. § 4-331; MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301 (West 2022); *id.* §§ 8-201, 8-301; *See also* Arrington v. State, 983 A.2d 1071, 1083–86 (Md. 2009) (describing the confusing interplay of Maryland's post-conviction remedies).

208. *See supra* note 187 and accompanying text.

defendant seeking exoneration in the Maryland courts based on non-DNA evidence.[209] Before his trial, Mr. Seward told his trial attorney that he thought he may have been working on the day this crime occurred but was not sure given that he was arrested months after the incident occurred.[210] His trial counsel contacted Mr. Seward's employer and issued a subpoena for her appearance at trial.[211] His trial counsel also interviewed her more than once and was advised that she did not have any business records relating to Mr. Seward, nor did she have any independent memory as to whether he worked on the day of the rape.[212] The State also independently but unsuccessfully sought the same information from the employer.[213] Pursuant to the subpoena defense counsel issued for her appearance at trial, the employer gave unclear testimony about the existence of employment records for Mr. Seward and was advised by the presiding trial judge to search again and submit to the court any records she located that related to Mr. Seward's employment.[214] Nothing was ever produced in response to the court's order.[215] Biological material was obtained from the victim at the hospital where she was treated and examined after the rape, but it was unavailable for post-conviction DNA testing because it could not be located.[216]

In 1996, more than ten years after Mr. Seward's conviction, post-conviction counsel was finally able to locate and retrieve from Mr. Seward's employer, employment records and testimony from her that showed Mr. Seward was at work at the time the rape occurred and that he could not have left the employment location long enough to commit the crime of which he had been convicted.[217] In 1996, Mr. Seward could not present this alibi evidence pursuant to a Rule 4-331 Motion for a New Trial because he was time-barred; therefore, his post-conviction counsel presented the evidence in the context of an ineffective assistance of counsel claim in a post-conviction proceeding.[218] In 1998, a post-conviction hearing was conducted on a

209. *See* State v. Seward, 102 A.3d 798, 804–05 (Md. Ct. Spec. App. 2014).
210. Seward v. State, No. 84 CR 3827, 1999 WL 35241901, at *4 (Md. Cir. Ct. Balt. City Jan. 25, 1999).
211. *Id.* at *3.
212. *Id.* at *4.
213. *Id.* at *3.
214. *See id.*; *see also Seward*, 102 A.3d. at 802.
215. *See Seward*, 1999 WL 35241901, at *3; *see also Seward*, 102 A.3d. at 802.
216. *See Seward*, 102 A.3d. at 803.
217. *Id.*
218. *Id.*

petition for post-conviction relief[219] alleging ineffective assistance of trial counsel in failing to secure the records,[220] which were eventually located more than ten years after Mr. Seward was convicted.[221] The State responded by asking the court to deny any relief.[222] The post-conviction court heard testimony from Mr. Seward's trial attorney, admitted various exhibits relevant to this issue, and denied post-conviction relief based on a finding that trial counsel had acted reasonably in his attempts to investigate and obtain any exculpatory employment records that may have existed.[223]

Following the enactment of Section 8-301, Mr. Seward filed a petition for a writ of actual innocence and requested a new trial based on the newly discovered employment records.[224] At a hearing conducted in November of 2011, the State conceded that the records were material[225] but argued that they were not "newly discovered" because Mr. Seward's trial attorney had not been sufficiently diligent in his efforts to produce them in 1985.[226] The court found that trial counsel had acted with sufficient diligence in attempting to obtain the employment records, thus rendering them newly discovered, and agreed with both parties that the records were material.[227] Based on these two findings, the court vacated Mr. Seward's convictions and granted him a new trial.[228] The State appealed.[229] In 2014, the Court of Special Appeals vacated the lower court ruling granting Mr. Seward a new trial based on its holding that the employment records did not constitute newly discovered evidence.[230]

Mr. Seward's trial counsel was deemed "effective" in his efforts to produce exonerating evidence by a post-conviction court in 1997, resulting in a denial of relief.[231] In 2014, the Court of Special Appeals decided Mr. Seward's trial counsel was not sufficiently "diligent" and reinstated his conviction.[232] In this published opinion,

219. *Seward*, 1999 WL 35241901, at *1.
220. *Id.* at *2.
221. *Id.* at *3.
222. *Id.* at *1.
223. *Id.* at *3–5.
224. Brief of Appellant, *supra* note 7, at 18.
225. *Id.* at 2, 18.
226. Brief and Appendix of Respondent at 14–15, Seward v. State, 130 A.3d 478 (Md. 2016) (No. 12).
227. *Seward*, 130 A.3d at 480–81.
228. *Id.*
229. *Seward* v. State, 102 A.3d 798, 803 (Md. Ct. Spec. App. 2014).
230. *Id.* at 813–14.
231. *Id.* at 803.
232. *Id.* at 813–14.

the Court of Special Appeals effectively created a new diligence standard that would apply only to petitions filed pursuant to Section 8-301.[233] The then-Chief Judge of the Court of Special Appeals wrote the opinion, holding that the previous determination of the post-conviction court that Mr. Seward's trial counsel did not render deficient performance, under the *Strickland* test for ineffective assistance of counsel by failing to obtain these records, did not mean that trial counsel met the diligence standard for purposes of rendering this evidence "newly discovered."[234] The Court found that the lower court abused its discretion in determining that trial counsel acted diligently in attempting to locate the employment records, reasoning that the failure to issue a *subpoena duces tecum* to the employer on the last day of trial constituted a failure of due diligence.[235] Despite the explicit finding of the lower court that because the employer's repeated neglect of every prior and on-going request for these records "further attempts by defense counsel to request the records would in all likelihood also fail,"[236] the Court of Special Appeals opined that had defense trial counsel issued another *subpoena duces tecum*, the records "probably would have been produced."[237]

While "due diligence" has been defined by Maryland courts to mean that "the defendant act[ed] reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances,"[238] in *Seward* the court created and applied a new diligence standard that requires an attorney to undertake every conceivable action that a reviewing court may, in hindsight, think of, regardless of whether there is even a reasonable probability that those additional steps would have resulted in a different outcome.[239] This extraordinary reworking of the diligence standard along with the general tone of the opinion in *Seward* suggests that the appellate court was outraged by the delay in locating the evidence of innocence and largely

233. *Id.* at 812.
234. *See id.* at 808–12.
235. *Id.* at 812–13.
236. Seward v. State, No. 84 CR 3827, 1999 WL 35241901, at *5 (Md. Cir. Ct. Balt. City Jan. 25, 1999).
237. *Seward*, 102 A.3d at 813.
238. Argyrou v. State, 709 A.2d 1194, 1203 (Md. 1998).
239. *See Seward*, 102 A.3d at 812–13; *But see* Faulkner v. State, 227 A.3d 584, 608 (Md. 2020) ("The second requirement ensures that petitioners exercise diligence to locate evidence of innocence. A petitioner need not 'exhaust every lead or seek to discover a needle in a haystack.'" (quoting Smith v. State, 165 A.3d 561, 586 (Md. Ct. Spec. App. 2017))).

indifferent to the prospect of an innocent man remaining incarcerated for the rest of his life.[240]

Cases in which a large quantum of evidence supports a post-trial claim of innocence often involve a combination of evidence that was withheld by the State, evidence that should have been but was not discovered by trial counsel, along with other evidence that only became available recently due to changes in scientific practices or new understandings of the limits of old forensic science practices.[241] Since there is currently no mechanism for a comprehensive and complete examination of all this evidence, some of this evidence must be presented in the context of a motion for a new trial,[242] while the rest may be only cognizable in a state habeas action or a post-conviction DNA proceeding.[243] As described previously, each statutory scheme also involves different standards of proof, forums, and appellate procedures.[244] The disjointed statutory scheme results in barriers to asserting claims of factual innocence that leave the majority of innocent but wrongly convicted defendants without a means to present the full array of evidence that supports an innocence claim and obtain an exoneration.[245]

Since the Bloodsworth case, the Maryland legislature has enacted laws intended to allow exonerations of wrongly convicted defendants through both DNA and non-DNA evidence.[246] However, for the majority of the convicted-but-innocent who do not have dispositive DNA evidence available upon which to base a post-conviction innocence claim, the prospect of obtaining an exoneration remains bleak.[247] The combination of procedural and doctrinal barriers to

240. *See Seward*, 102 A.3d at 801, 808, 812–14.

241. *See, e.g.*, *Faulkner*, 227 A.3d at 599–600 (involving a post-trial claim of innocence supported by evidence withheld by the State, evidence newly available because of new forensic practices, and evidence not discovered); *see also* Arrington v. State, 983 A.2d 1071, 1076 (Md. 2009) (involving a post-trial claim of innocence supported by evidence withheld by State and newly available DNA testing of evidence).

242. *See Arrington*, 983 A.2d at 1083–85.

243. *See generally* Medwed, *supra* note 78, at 669–75.

244. *See* discussion *supra* Part III.

245. Garrett, *supra* note 4, at 125–27.

246. MD. CODE ANN., CRIM. PROC. § 8-201 (West 2022) ("[A] person who is convicted of a crime of violence . . . may file a petition: (1) for DNA testing of scientific identification evidence that the State possesses . . . ; or (2) for a search by a law enforcement agency . . . for the purpose of identifying the source of physical evidence . . . ."); MD. R. 4-331(c)(2) ("The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence . . . on motion filed . . . based on DNA identification . . . or other generally accepted scientific techniques [that] would show that the defendant is innocent . . . .").

247. Medwed, *supra* note 78, at 675–80.

considering evidence of innocence that punish defendants for the failings of their attorneys, along with the practical difficulties in obtaining evidence that was withheld or not discovered at the time of trial, result in these cases requiring years of investigation and, if contested, years of litigation.[248]

IV. MARYLAND'S FINALITY FIXATION AND THE PROBLEM OF INNOCENCE

The procedural barriers that prevent judicial consideration of post-conviction claims of innocence emanate from the concern of ensuring finality for defendants and crime victims.[249] Justifications for the finality doctrine in criminal cases include the concern that (1) the continued ability to collaterally attack convictions is incompatible with the assumption of responsibility for the criminal behavior that is necessary for the rehabilitation process;[250] (2) allowing endless post-conviction challenges to criminal convictions erodes respect for the judicial process;[251] (3) the burden of litigating cases increases with the passage of time as memories fade and evidence disappears;[252] and (4) judicial resources will be strained by repetitive post-conviction litigation.[253]

The first two justifications do not apply to the factually innocent.[254] Rehabilitation based on assuming responsibility for a criminal act is not an option for these defendants because they are not, in fact, responsible for the criminal act at issue.[255] The continued punishment of the factually innocent does not engender respect for the judicial process among innocent defendants, their families and friends, or the public.[256] As to the other two rationales underpinning the doctrine, while it is true that litigation becomes more difficult with the passage of time,[257] it is the inability of our current legal structure to properly consider all evidence of factual innocence in one integrated proceeding that leads to ongoing and protracted litigation and the

248. Garrett, *supra* note 4, at 126–27.
249. Andrew C. Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality,"* 2013 UTAH L. REV. 561, 569 (2013).
250. *Id.* at 570–71.
251. *Id.* at 569, 573.
252. Garrett, *supra* note 4, at 126–27.
253. Kim, *supra* note 249, at 568–69.
254. *Id.* at 588–91.
255. *Id.* at 616.
256. *See generally id.* at 616–18 (highlighting the positive effects a more liberal post-conviction review agenda would have on wrongfully incarcerated individuals).
257. Garrett, *supra* note 4, at 126–27.

associated absorption of judicial resources and time.[258] Allowing a full consideration of the evidence, therefore, promotes trust in and respect for the judicial system while reducing both successive and lengthy litigation that strains judicial resources and frustrates the pursuit of truth.[259] The absence of statutes of limitations for serious crimes such as murder represent a recognition by the legal system that the difficulties of prosecuting and defending a case that is charged long after the crime occurred does not outweigh the societal interest in holding offenders accountable for serious crimes.[260] Rectifying convictions of innocent people should be accorded the same accommodation.

V. PROPOSED LEGISLATIVE SOLUTION

In recognition of the uneasy fit between the rationale underpinning the need for finality in criminal judgments as applied to defendants convicted of crimes they did not commit, or simply in response to public discomfort with the notion of a legal system that allows the continued punishment of factually innocent defendants, a minority of states have either interpreted their state habeas statutes or state constitutions to authorize courts to grant relief based on a freestanding claim of factual innocence[261] or have enacted statutes that address the issue.[262] Since the Maryland courts have already decided that factual innocence is not a cognizable claim under the UPCPA[263] and have strictly construed the "newly discovered evidence" requirement in considering petitions filed under the Writ of Actual Innocence,[264] it is the legislature that must provide a mechanism for assessing all evidence of factual innocence in a single proceeding.[265]

258. Kim, *supra* note 249, at 577 (citing Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 530–34 (1995)).

259. *See generally id.* at 589–91.

260. *See generally* Gerald D. Robin & Richard H. Anson, *Is Time Running Out on Criminal Statutes of Limitations?*, 47 CRIM. L. BULL., no. 1, 2011, at 2, 10 (providing empirical assessment of the absence of statutes of limitations for murder and other serious felonies across the fifty states).

261. 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, 1477 (2013).

262. *Id.*

263. *See* cases cited *supra* note 143.

264. *See* discussion *supra* Section III.D.

265. *See* Leventhal, *supra* note 261, at 1471–72.

Virginia,[266] the District of Columbia,[267] and Utah[268] have enacted freestanding actual innocence statutes that are not restricted to cases involving DNA evidence and, as with states that have adopted similar structures for considering factual innocence claims in the context of a habeas claim or a constitutional claim, all three jurisdictions have addressed the critical issues of what procedural barriers, if any, should be erected to bar consideration of evidence and what standard should govern the granting of relief.[269] The three existing statutes differ in the type of court that has original jurisdiction over the claim,[270] the scope of the evidence that can be considered in deciding the claim,[271] and in defining the interplay of the law with other statutes and court rules.[272] However, the most important issues that must be addressed by these laws concern eligibility for relief and the standards governing whether or not to grant relief.[273]

Virginia enacted a freestanding actual innocence statute in 2004 that required a defendant to show by clear and convincing evidence that no reasonable juror could have found guilt beyond a reasonable

266. VA. CODE ANN. § 19.2-327.10 (West 2022).

267. D.C. CODE ANN. § 22-4135 (West 2022).

268. UTAH CODE ANN. §§ 78B-9-401 to -402 (West 2022).

269. *Compare* UTAH CODE ANN. § 78B-9-404 (West 2022), *with* VA. CODE ANN. §§ 19.2-327.10 to .14 (West 2022), *and* D.C. CODE ANN. § 22-4135 (West 2022).

270. *Compare* UTAH CODE ANN. § 78B-9-402(1) (West 2022) (granting original jurisdiction to the district court in the county in which the person was convicted), *with* VA. CODE ANN. § 19.2-327.10. (West 2022) (granting original jurisdiction to the circuit court that entered the conviction or the adjudication of delinquency following issuance of writ from Court of Appeals), *and* D.C. CODE ANN. § 22-4135(a) (West 2022) (granting original jurisdiction to the Superior Court of the District of Columbia).

271. *Compare* UTAH CODE ANN. § 78B-9-404 (West 2022) (allowing the court consider evidence that was or would be suppressed at criminal trial, hearsay, the record of the original case, and any postconviction proceedings), *with* VA. CODE ANN. § 19.2-327.11.D (West 2022) (allowing the court to consider records of any trial or appellate action in addition to previously unknown or unavailable evidence presented by petitioner), *and* D.C. CODE ANN. § 22-4135(g)(1) (West 2022) (allowing the court to consider "any relevant evidence").

272. *Compare* UTAH CODE ANN. § 78B-9-402(7) (West 2022) (requiring all proceedings under this law to comply with Utah Rules of Civil Procedure), *with* VA. CODE ANN. § 19.2-327.10 (West 2022) (allowing the court to consider petitions for writs "[n]otwithstanding any other provision of law or rule of court."), *and* D.C. CODE ANN. § 22-4135 (West 2022) (allowing petitioners to file at any time regardless of other laws and to invoke discovery processes afforded under Superior Court Rules).

273. *See infra* text accompanying notes 274–86; *see also* Leventhal, *supra* note 261, at 1485 (discussing the flexibility of these standards in proposed amendments to New York's factual innocence statute).

doubt when considering the new evidence.[274] The law was subsequently changed to substitute the word "would" for "could" in 2007[275] because it had become clear that the original articulation of the standard was identical to that used to determine whether there is sufficient evidence to support a conviction.[276] Since the original conviction had already been determined at some point to have been supported by sufficient evidence, it was an impossible standard for convicted defendants to meet because there will always be some evidence of guilt, no matter how discredited, that a juror "could" rely on to convict.[277] Even with this change, to date, only four people have obtained relief under this law.[278] In 2020, the Virginia legislature modified the standard for granting to relief from "clear and convincing" to the more lenient "preponderance of the evidence" standard.[279] It remains to be seen what, if any, effect this modification will have on the ability of convicted defendants to secure relief. In those rare cases where it can be shown that new evidence could not have been obtained by a sufficiently diligent defendant or defendant's attorney at the time of trial and the evidence of innocence is so compelling that it meets the statute's high standard for granting relief, a defendant can have the conviction quashed and the record of the conviction expunged.[280]

The District of Columbia also imposes a diligence standard for consideration of new evidence of innocence and requires that evidence of innocence be "clear and convincing" for the court to

274. Act of May 21, 2004, ch. 1024, 2004 Va. Acts 2097 (codified as amended at VA. CODE ANN. § 19.2-327.13 (West 2022)).

275. Act of March 19, 2007, ch. 465, 2007 Va. Acts 638 (codified as amended at § 19.2-327.5).

276. *See* Cooper v. Commonwealth, 680 S.E.2d 361, 363 (Va. Ct. App. 2009) (holding that the same standard applies to a review of sufficiency of evidence).

277. The original standard is the same standard applied by appellate courts reviewing claims of sufficiency of the evidence to support a conviction. *See id.*; *see also* Brooks et al., *supra* note 87, at 1060–62 (discussing the challenges of this standard of evidence).

278. *See* Haynesworth v. Commonwealth, 717 S.E.2d 817, 817 (Va. Ct. App. 2011); Montgomery v. Commonwealth, 751 S.E.2d 692, 702 (Va. Ct. App. 2013); Bush v. Commonwealth, 813 S.E.2d 582, 587 (Va. Ct. App. 2018); Haas v. Commonwealth, 871 S.E.2d 257, 281 (Va. Ct. App. 2022). One of the four was a case in which the Attorney General advocated for relief for the defendant having concluded that he was factually innocent and without such a concession it is apparent the court would have upheld the conviction. *See Haynesworth*, 717 S.E.2d at 817.

279. VA. CODE ANN. § 19.2-327.5 (West 2022); *see also* S.B. 511, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

280. *See* Hunt v. State, 252 A.3d 946, 959 (Md. 2021).

vacate the conviction and dismiss the charges with prejudice.[281] The court can also vacate a conviction and allow a retrial upon a finding that it is "more likely than not that the movant is actually innocent."[282] The law imposes a diligence requirement for the consideration of new evidence with an exception for instances in which a finding of ineffective assistance of counsel has been made by a court.[283]

Utah imposes a diligence standard upon the defendant and the defendant's counsel as a pre-requisite to considering evidence as "newly discovered"[284] but does provide an exception to that requirement if there has been a previous finding of ineffective assistance of counsel for failing to discover the evidence.[285] To obtain relief, a court must be persuaded that the evidence of factual innocence is "clear and convincing."[286]

All freestanding innocence statutes must balance the competing interests of finality and accuracy.[287] They must also tackle the philosophical problem associated with proving a negative.[288] Since proof of innocence is not required or measured at the time of trial, there is no definitive way to formulate what constitutes proof of innocence.[289] The more stringent the standards adopted for evaluating the impact of evidence suggesting the defendant did not commit the crime, the smaller the number of those wrongly convicted who will be able to obtain relief. This a policy decision that lawmakers must resolve.

Maryland has already enacted a statute that allows for the presentation of newly discovered material evidence at any time,[290] and the Court of Appeals has adopted a rule implementing the law that adds additional requirements for a convicted defendant to meet

281. D.C. CODE ANN. § 22-4131 (West 2022); *Id.* § 22-4135.
282. *Id.* § 22-4135.
283. *Id.* § 22-4131; U.S. CONST. art. VI.
284. UTAH CODE ANN. § 78B-9-104 (West 2022).
285. *Id.*
286. *Id.*
287. *See* Friendly, *supra* note 48, at 150, 157 n.81, 160, 164.
288. *See* Hartung, *supra* note 61, at 63–64.
289. While this issue is beyond the scope of this article, it is relevant to note that a basic policy issue is presented by whether proof of innocence is defined to include evidence that undermines the evidence of guilt produced at trial or is restricted to affirmative evidence of innocence such as alibi evidence or evidence that the defendant was physically incapable of committing the crime. *See* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2010/2011).
290. MD. CODE ANN., CRIM. PROC. § 8-301.1 (West 2022).

in order for a court to consider a request for relief.[291] While Section 8-301 has a relatively liberal standard for granting relief,[292] the diligence requirement associated with establishing that the evidence is eligible for consideration in the first place has left many wrongly convicted defendants unable to obtain relief simply because the court determined that their attorneys failed to be sufficiently diligent in representing them at trial and in the one year period after the conviction became final.[293]

One amendment to Maryland's current Writ of Actual Innocence statute would solve the problem set forth in this article and would realize Judge Friendly's aspiration for a legal system that prioritizes substance over form and procedure.[294] By simply changing the definition of "newly discovered evidence" to include evidence that was only recently discovered or obtained and for which the defendant personally played no role in delaying the discovery or acquisition of the evidence,[295] a convicted defendant would be allowed to present all evidence that supports a claim of factual innocence that for whatever reason was not available to the original factfinder.[296] Concerns about defendants choosing not to present exculpatory evidence at trial for the purpose of sandbagging to retain the ability to use the evidence as part of a post-conviction claim or achieving some tactical advantage can be addressed by barring consideration of evidence that was not initially presented due to the conduct of the defendant as opposed to the defendant's lawyer.[297] Not only would this change stop punishing defendants for the mistakes or oversights of their lawyers, but judicial resources would not be taken up with endless litigation concerning who was responsible for not disclosing or discovering evidence.[298] Litigants could focus on the evidence

291. MD. R. 4-332.
292. *E.g.*, State v. Matthews, 999 A.2d 1050, 1057 (Md. 2010).
293. MD. R. 4-331(c); *see* Harris v. State, 496 A.2d 1074, 1098–99 (Md. 1985) (Cole, J., dissenting).
294. Friendly, *supra* note 48, at 150.
295. MD. CODE ANN., CRIM. PROC. § 8-301.1 (West 2022).
296. Friendly, *supra* note 48, at 169.
297. Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle Colloquium*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 337 (1987–1988).
298. A recent decision of the Maryland Court of Appeals epitomizes the judicial resources dedicated to litigating the question of whether trial counsel was sufficiently diligent. *See generally* Hunt v. State, 252 A.3d 946 (Md. 2021) (reversing conviction based on fraudulent representations of credentials by a firearms expert who testified in hundreds of cases). The court's determination that diligence on the part of trial counsel did not require verifying the credentials and background of a prosecution

supporting the innocence claim instead of obtaining proof about who had or did not have information, when they had it, and whether they were sufficiently diligent in their efforts to obtain it.[299] An additional benefit this change would facilitate is the public's ability to rely on the courts to correct the injustices that occur when people are convicted of crimes they did not commit and there is evidence available to demonstrate their innocence.[300]

While the current Maryland standard for granting relief is more lenient than those of Virginia, Utah, and the District of Columbia,[301] it has the advantage of clarity.[302] It is a standard that has been refined and articulated for deciding whether a new trial grant is warranted, and there is a body of case law that has utilized this standard.[303] In addition, unlike other freestanding innocence claim statutes,[304] Section 8-301 authorizes a court to provide relief in the form of granting a new trial as opposed to dismissing the charges.[305] The State is, therefore, free to utilize the original evidence presented at trial and, if able, to acquire additional evidence of guilt to pursue a conviction in a subsequent prosecution.[306] Regardless of the precise articulation of the standard, the historical record indicates judges in Maryland do not overturn convictions lightly, and, if this was to change substantially, the legislature could and likely would amend the law to deal with that improbable scenario.[307] If Maryland judges were to suddenly become inclined to vacate convictions under this law with little regard for the strength of the evidence presented to support the requested relief, prosecutors would bring this to the

expert appears to conflict with the result reached by the Court of Special Appeals in the *Seward* case. *See id.* at 958–59. Given that the Court of Appeals reversed the *Seward* decision on jurisdictional grounds, it appears that the holding in the case should have no precedential value, but both the majority and the concurrence in Hunt discuss the *Seward* holding without commenting on the status of its holding on the issue of attorney diligence as lacking in any precedential value. *See id.* at 958, 963 (Biran, J., concurring). Lower courts will continue to struggle to apply the appropriate standard for determining whether evidence constitutes "newly discovered evidence" considering these apparently conflicting decisions.

299. *Contra* State v. Seward, 102 A.3d 798, 809–12 (Md. Ct. Spec. App. 2014).
300. Friendly, *supra* note 48, at 149–50.
301. *See supra* notes 266–86, 292 and accompanying text.
302. *See infra* notes 303–06 and accompanying text.
303. *See supra* notes 192–95, 200–201, 224–40 and accompanying text.
304. *See supra* notes 266–86 and accompanying text.
305. MD. CODE ANN. CRIM PROC. § 8-301(f) (West 2022).
306. *See generally id.*
307. *See supra* note 81 and accompanying text.

attention of the legislature and exert their considerable power in the legislative process to ensure that the standard was modified.[308]

It would be useful if Maryland, like Virginia, would mandate an accounting of the number of convictions vacated annually so that debate on this issue could be based on data rather than anecdotes.[309] Even with a more liberal standard than that of Virginia, Utah, and the District of Columbia,[310] based on the experiences of this author and colleagues engaged in this work in Maryland, only five contested petitions for a writ of actual of innocence have resulted in courts awarding a new trial since the enactment of the statute, and in most of those cases, this only occurred after a lengthy appeal process.[311]

308. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 727–28 (2005).

309. *See* S.B. 333, 2004 Gen. Assemb., Reg. Sess. (Va. 2004).

310. *See generally* VA. CODE ANN. §§ 19.2-327.10 to .14 (West 2022); UTAH CODE ANN. §§ 78B-9-401 to -405 (West 2022); D.C. CODE ANN. § 22-4135 (West 2022).

311. As of March 1, 2022, fourteen joint petitions, as well as one contested petition in the case of Tonya Lucas, were granted at the trial level in Baltimore City. *See* Justin Fenton, *Killing of 6 Children – 'One of Worst Crimes in Baltimore History' - Being Re-Tried 25 Years Later*, THE BALT. SUN (June 22, 2017, 7:23 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-tonya-lucas-retrial-preview-20170622-story.html [https://perma.cc/Y76Z-RQ7N]. The fourteen joint petitions resulted in the release of Walter Lomax, Clarence Jones III, Melvin Thomas, Clarence Shipley, Jerome Johnson, Lamar Johnson, Sabein Burgess, Kenneth McPherson, Eric Simmons, and the Harlem Park Three (Alfred Chestnut, Ransom Watkins, and Andrew Stewart). *See* Maurice Possley, *Walter Lomax*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 30, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4409 [https://perma.cc/3L7K-RNTZ]; Maurice Possley, *Clarence Jones III*, THE NAT'L REGISTRY OF EXONERATIONS (Sept. 8, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6020 [https://perma.cc/SN7F-XB8D]; Maurice Possley, *Melvin Thomas*, THE NAT'L REGISTRY OF EXONERATIONS (Apr. 22, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5886 [https://perma.cc/5PBB-G44S]; Ken Otterbourg, *Clarence Shipley*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 30, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5478 [https://perma.cc/8JM5-EJD7]; Maurice Possley, *Jerome Johnson*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 30, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5352 [https://perma.cc/GH9V-D94H]; Maurice Possley, *Lamar Johnson*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 30, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5201 [https://perma.cc/M252-JQLZ]; Maurice Possley, *Sabein Burgess*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 22, 2017); https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4375 [https://perma.cc/U4B4-P9DW]; Maurice Possley, *Kenneth McPherson*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5556 [https://perma.cc/VY8H-V6Z7]; Maurice Possley, *Eric Simmons*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5557 [https://perma.cc/8CXT-L8X6]; Maurice Possley, *Alfred*

Given these facts and the demonstrated willingness of the appellate courts to foreclose relief to convicted defendants who attempted to vacate convictions on the basis of both DNA and non-DNA evidence,[312] concerns about a plethora of new trial grants occurring if defendants are allowed to present all evidence of innocence not presented at the time of the original trial are unwarranted.[313]

While the finality doctrine has a place in post-conviction litigation in Maryland, it should not serve as a barrier to providing relief to people who were convicted of crimes they did not commit when evidence that was not considered at trial through no fault of the defendant is available to demonstrate their factual innocence.[314] When Judge Friendly published his article in 1970, this was not considered an extreme proposition, and in the wake of the many exonerations that have occurred since, it should not be viewed as such today.[315] When the finality doctrine creates such a barrier, the ultimate legitimacy of the entire criminal justice system is undermined.[316] That is simply too high a price to pay—not only for the convicted but innocent but also for the citizens of Maryland asked to serve as jurors and to support the criminal justice system in various other ways. The citizens of Maryland, as well as the wrongly convicted, deserve accountability when mistakes are made in such a

Chestnut, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 27, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5641 [https://perma.cc/3B24-2DAU]; Maurice Possley, *Ransom Watkins*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 27, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5642[https://perma.cc/2F8X-NBRH]; Maurice Possley, *Andrew Stewart, Jr.*, THE NAT'L REGISTRY OF EXONERATIONS (Oct. 27, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5643[https://perma.cc/SD5S-GF2U]; in three other contested cases, Maryland appellate courts reversed the denial of relief by the lower courts: in Baltimore County, Clarence Jones III was awarded a new trial after the Court of Special Appeals reversed the trial court decision denying him relief and in Talbot County. *See* Maurice Possley, *Clarence Jones III*, THE NAT'L REGISTRY OF EXONERATIONS (Sept. 8, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6020 [https://perma.cc/J2D6-YLDW]; Jonathan Smith and his codefendant, David Faulkner, obtained new trials following the reversal of the lower courts' denial of their petitions by the Court of Appeals. *See* Faulkner v. State, 227 A.3d 584, 619–20 (Md. 2020).

312. *See supra* notes 108–17, 311 and accompanying text.

313. *See supra* note 97 and accompanying text.

314. *See supra* notes 57–58 and accompanying text.

315. *See* Friendly, *supra* note 48, at 150 (quoting Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 101 n.13 (1958)).

316. *See supra* Part IV.

critical aspect of our legal system, and devotion to finality should not stand in the way.