

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(G-1)?

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## INTRODUCTION

Should a defendant convicted of a capital offense and sentenced to death, who was not deprived of any constitutional right at trial be executed, when the defendant was actually innocent? Should any defendant who suffered no other violation of a constitutional right and received a fair trial remain incarcerated when the defendant is actually innocent? Morally we would all answer these questions in the negative. Yet in the legal realm, the answers are unclear. The Supreme Court has not recognized a convicted defendant's freestanding claim of actual innocence, and in fact has not squarely faced this issue.<sup>1</sup> The individual states have taken differing approaches to claims of actual innocence. No appellate court in New York has considered whether a freestanding claim of actual innocence exists under the state constitution. Recent legislation in New York may have impacted one's view of whether such a freestanding claim is needed. The first section of this article reviews the federal jurisprudence in this area and how the Supreme Court and the various Circuit Courts of Appeal have approached this issue. The second section discusses the various ways that the individual states consider claims of actual innocence. The last section examines how New York trial courts have treated these claims in the absence of any appellate precedent. In the final section, the question that is raised and considered is whether there is still a need for a freestanding state constitutional claim of actual innocence in light of a recent amendment to the New York State Criminal Procedure Law.

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<sup>1</sup> See *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009).

## I. ACTUAL INNOCENCE IN THE FEDERAL COURTS

Over the past few decades, actual innocence has become a highly contested issue in federal habeas review of criminal convictions.<sup>2</sup> Claims of actual innocence arise when a petitioner<sup>3</sup> asserts that he is factually innocent of the convicted crime in post-conviction litigation.<sup>4</sup> In seeking federal habeas relief,<sup>5</sup> the defendant claims not merely that the prosecution failed to *legally* prove that he committed the crime, but rather that he was not *actually* the offender<sup>6</sup> and that the state tried and convicted the wrong person. In order to successfully bring a claim of actual innocence, the petitioner must meet an “extraordinarily high” burden.<sup>7</sup> A petitioner must prove that no reasonable juror would convict, taking into consideration both newly discovered evidence not available at trial as well as all previous evidence that was introduced and led to the petitioner’s conviction.<sup>8</sup>

The U.S. Supreme Court has never held that a petitioner’s right to bring an actual innocence claim derives from the federal Constitution. It has consistently left that question open.<sup>9</sup> The Court, however, may use an opportunity in the future to define a petitioner’s rights more clearly and conclude that actual innocence is or is not a freestanding constitutional claim.

This section will first discuss the background of actual innocence claims in federal habeas corpus jurisprudence. Next, the “gateway” standard established in two U.S. Supreme Court cases, *Herrera v. Collins* and *Schlup v. Delo*, will be discussed. In both of these cases, the Supreme Court rejected the idea that actual innocence exists as

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<sup>2</sup> See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1157–58 (2011).

<sup>3</sup> For the federal analysis the movant is denominated as petitioner. For the state discussion the movant is denominated as defendant.

<sup>4</sup> Nicholas Berg, Note, *Turning a Blind Eye To Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 122 (2005).

<sup>5</sup> Habeas relief is sought under 28 U.S.C. § 2254, which requires that “the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1) (2006).

<sup>6</sup> Berg, *supra* note 4, at 122.

<sup>7</sup> *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

<sup>8</sup> *House v. Bell*, 547 U.S. 518, 536–37 (2006) (citations omitted); *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

<sup>9</sup> *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting) (citing Dist. Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 71 (2009); *Bell*, 547 U.S. at 555; *Herrera*, 506 U.S. at 400) (“[W]e have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”). If it existed, such a constitutional claim would arise under the Eighth Amendment. *McKithen v. Brown*, 626 F.3d 143, 155 (2d Cir. 2010).

a freestanding constitutionally cognizable claim.<sup>10</sup> Further, this section will address the existing policy considerations and federalism concerns surrounding freestanding claims of actual innocence. Finally, this section will discuss the possibility that a freestanding claim of actual innocence may be recognized under the federal Constitution. As Justice Antonin Scalia suggested in his dissent in *In re Davis*,<sup>11</sup> the author urges the Supreme Court to squarely address the question.<sup>12</sup>

*A. Background: Actual Innocence Claims for Federal Habeas Relief*

Federal courts have defined actual innocence in different ways. For the purposes of this section, actual innocence will be defined as a freestanding constitutional claim that does not require an underlying, independent constitutional claim for it to be heard on the merits. The Supreme Court in *Herrera* and *Schlup* defined actual innocence as a gateway or “basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits.”<sup>13</sup>

The Supreme Court has defined a claim of “actual innocence” as constituting either (1) a *substantive* argument that, as a matter of *fact*, the petitioner did not commit the acts that constitute his crime of conviction, adding that he must prove such an assertion by “truly persuasive” newly discovered evidence; or (2) a *procedural* argument that constitutional errors at trial, along with newly discovered evidence of his factual innocence, undermine the certainty of the petitioner’s conviction.<sup>14</sup>

The petitioner must be able to prove “factual innocence, not mere legal insufficiency” and “demonstrate that, ‘in light of all the evidence,’ it is more likely than not that no reasonable juror would have convicted him.”<sup>15</sup>

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<sup>10</sup> *Schlup*, 513 U.S. at 315; *see also Herrera*, 506 U.S. at 416.

<sup>11</sup> *In re Davis*, 557 U.S. at 954.

<sup>12</sup> *See id.* at 957–58.

<sup>13</sup> *Herrera*, 506 U.S. at 416; *Schlup*, 513 U.S. at 315 (citing *Herrera*, 506 U.S. at 404).

<sup>14</sup> *Henderson v. Thaler*, 626 F.3d 773, 783 (5th Cir. 2010) (Wiener, J., dissenting); *see also Nave v. Delo*, 22 F.3d 802, 810 (8th Cir. 1994) (stating that a claim of actual innocence lies when negation of intent negates an essential element of the crime), *vacated on other grounds*, 513 U.S. 1141 (1995); *Johnson v. Hargett*, 978 F.2d 855, 860 (5th Cir. 1992) (noting that one is actually innocent if “a reasonable trier could not find all the elements necessary to convict the defendant”).

<sup>15</sup> *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup*, 513 U.S. at 327, 328). *See Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *United States v. Thorn*, 659 F.3d 227,

However, the Supreme Court has never held that a freestanding claim of actual innocence is discernible under the federal Constitution.<sup>16</sup> Instead, the Court has consistently held that such claims act as “a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claim considered on the merits.”<sup>17</sup> *Herrera* and *Schlup* promulgated the standards by which habeas petitioners may pursue their claims of actual innocence.<sup>18</sup> The Court declined to hold that a federal habeas court may grant relief to a petitioner solely on the basis of an actual innocence claim.<sup>19</sup> Actual innocence, therefore, is not the substantive claim petitioner sets forth to request habeas relief. It is, instead, merely a procedural tool that a petitioner may employ to have a court hear an independent substantive claim and address such claim on its merits.<sup>20</sup> The Court in *Herrera* made clear that an actual innocence claim, standing alone, was insufficient for a constitutional claim.<sup>21</sup> The *Herrera* Court addressed the rare case of a petitioner making a substantive claim of actual innocence, rather than a purely procedural one with an underlying independent constitutional claim.<sup>22</sup> Alternatively, in *Schlup*, the Court addressed a procedural claim of actual innocence coupled with an independent constitutional claim.<sup>23</sup>

The Supreme Court in *Herrera* and *Schlup*, without finding that a constitutional claim of actual innocence exists, established a high bar in order for a petitioner to succeed in maintaining such a potential claim.<sup>24</sup> It accomplished this by never explicitly addressing the issue. In declining to directly answer whether or not actual innocence is, itself, a freestanding constitutional claim, the Court provided future courts the opportunity to answer the question and thoroughly develop federal actual innocence jurisprudence.

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234 (2d Cir. 2011); *Sweet v. Bennett*, 353 F.3d 135, 142 (2d Cir. 2003).

<sup>16</sup> *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (asserting that it has, instead, stated that the existence of such a claim remains an “open question”).

<sup>17</sup> *Schlup*, 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404). See *Cunningham v. Dist. Attorney’s Office for Escambia Cnty.*, 592 F.3d 1237, 1272 (11th Cir. 2010); *Allen v. Beck*, 179 F. App’x 548, 550–51 (10th Cir. 2006); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998).

<sup>18</sup> *Schlup*, 513 U.S. at 314–15; *Herrera*, 506 U.S. at 404.

<sup>19</sup> *Schlup*, 513 U.S. at 315; *Herrera*, 506 U.S. at 404.

<sup>20</sup> *See id.*

<sup>21</sup> *Id.* at 404–05.

<sup>22</sup> *Id.* at 405.

<sup>23</sup> *Schlup*, 513 U.S. at 314, 315, 316.

<sup>24</sup> *See Schlup*, 513 U.S. at 314–15; *Herrera*, 506 U.S. at 404–05.

1. *Herrera v. Collins*

Petitioner Leonel Torres Herrera was convicted of capital murder of Los Fresnos, Texas Police Officer Enrique Carrisalez, and sentenced to death.<sup>25</sup> Ten years following his conviction, subsequent unsuccessful appeals, and a habeas petition, Herrera filed a second habeas petition claiming “he was ‘actually innocent’ of the murder for which he was sentenced to death.”<sup>26</sup> He further claimed that his sentence would violate the Eighth and Fourteenth Amendments.<sup>27</sup> In support of his petition, Herrera submitted affidavits offering that his now-dead brother was actually the one who committed the murder, and that he was factually innocent.<sup>28</sup>

The district court dismissed Herrera’s claim but granted the stay of execution so petitioner could present his actual innocence claim.<sup>29</sup> Relying on *Townsend v. Sain*,<sup>30</sup> the Fifth Circuit vacated the stay and held that Herrera did not have a cognizable claim.<sup>31</sup> The Supreme Court granted certiorari and affirmed.<sup>32</sup> The *Herrera* Court held that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”<sup>33</sup> The Court denied him relief.<sup>34</sup>

The Court held that Herrera did not allege an independent constitutional violation; rather his asserted claim of actual innocence *was* claiming an independent constitutional violation.<sup>35</sup> Herrera “argue[d] that he [was] entitled to habeas relief because newly discovered evidence show[ed] that his conviction [was] factually incorrect.”<sup>36</sup> His claim, however, did not supplement an underlying constitutional claim.<sup>37</sup> The *Herrera* Court, in finding the petitioner’s claim not cognizable, denied the petitioner relief, but

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<sup>25</sup> *Herrera*, 506 U.S. at 393–94. Herrera was also charged with the capital murder of Texas Department of Public Safety Officer David Rucker, to which Herrera pled guilty. *Id.*

<sup>26</sup> *Id.* at 393.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 397.

<sup>30</sup> *Townsend v. Sain*, 372 U.S. 293 (1963).

<sup>31</sup> *Herrera*, 506 U.S. at 397–98.

<sup>32</sup> *Id.* at 398.

<sup>33</sup> *Id.* at 400.

<sup>34</sup> *Id.* at 418–19.

<sup>35</sup> *Id.* at 404–05.

<sup>36</sup> *Id.* at 404.

<sup>37</sup> *Id.* at 404–05.

noted that he was not without a forum to raise his claim of actual innocence.<sup>38</sup>

Though the Court stated that actual innocence claims based on newly discovered evidence required a complementary constitutional violation, it further held that, *assuming* a freestanding claim existed, the threshold for showing this “assumed right would necessarily be extraordinarily high.”<sup>39</sup> Thus, petitioner would be required to prove that no reasonable juror would convict him in light of both the newly discovered evidence and the evidence that convicted him at trial.<sup>40</sup> Given this high threshold, it would be extremely rare that a petitioner could prevail.<sup>41</sup>

Although the Court declared that a request for executive clemency was still available to petitioner,<sup>42</sup> such clemency was denied.<sup>43</sup> Herrera was subsequently executed on May 12, 1993.<sup>44</sup>

## 2. *Schlup v. Delo*

The *Schlup* Court addressed actual innocence claims in a different context than *Herrera* had done just two years earlier. Petitioner Lloyd E. Schlup, Jr., a Missouri prisoner, had been sentenced to death for the murder of a fellow inmate, Arthur Dade.<sup>45</sup> During the course of his post-conviction litigation, Schlup filed a second habeas petition<sup>46</sup> alleging that a “constitutional error deprived the jury of critical evidence that would have established his innocence.”<sup>47</sup> Relying primarily on a video taken from a camera

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<sup>38</sup> *Id.* at 411.

<sup>39</sup> *Id.* at 417.

<sup>40</sup> See *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 328 (1995)).

<sup>41</sup> Berg, *supra* note 4, at 141 (“There is only one certainty: whatever the standard employed by the court, the petitioner will almost assuredly not meet it.”).

<sup>42</sup> *Herrera*, 506 U.S. at 411 (citing TEX. CONST. art. IV, § 11 (amended 2011)) (modifying the Governor’s clemency power to include the granting of reprieves, commutations of punishment, and pardons upon “successful completion of a term of deferred adjudication community supervision”); TEX. CODE CRIM. PROC. ANN. art. 48.01 (West 1979)). Executive clemency is available as a failsafe to prevent miscarriage of justice when the judicial process has been exhausted in petitioners’ habeas claim. See *Herrera*, 506 U.S. at 415 (citing KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

<sup>43</sup> See *Herrera*, 506 U.S. at 428 (Scalia, J., concurring); Berg, *supra* note 4, at 145.

<sup>44</sup> Berg, *supra* note 4, at 145.

<sup>45</sup> *Schlup*, 513 U.S. at 301. Petitioner was one of three inmates charged with Dade’s murder. *Id.* at 301–02.

<sup>46</sup> *Id.* at 301, 307. The district court denied Schlup’s original pro se petition for habeas corpus, which the court of appeals subsequently affirmed. *Id.* at 306 (citing *Schlup v. Armontrout*, 941 F.2d 631, 642 (8th Cir. 1991), *vacated sub nom.* *Schlup v. Delo*, 513 U.S. 298 (1995)).

<sup>47</sup> *Schlup*, 513 U.S. at 301.

in the prisoners' dining room, Schlup argued that the prosecution identified the wrong man, and that he did not commit the murder.<sup>48</sup>

The video upon which Schlup relied showed Schlup as the first inmate to enter the dining room for lunch on the day of the murder and showed him in line receiving his meal.<sup>49</sup> About sixty-five seconds after Schlup entered the room, the video showed prison guards running out of the dining room in response to an emergency call from officers who had witnessed the attack on Dade.<sup>50</sup> Twenty-six seconds later, the video showed Robert O'Neal, another inmate,<sup>51</sup> running into the dining room, covered in blood.<sup>52</sup> Schlup claimed, given such a short time period between his entrance and the emergency call, he would not have been able to commit the murder and subsequently return to the dining room.<sup>53</sup>

The district court dismissed petitioner's habeas claim without a hearing and vacated the stay of execution.<sup>54</sup> Petitioner supplemented his claims with several affidavits tending to show that he was not involved in Dade's murder.<sup>55</sup> Attached to the State's response was, among other things, a statement from inmate John Green,<sup>56</sup> who stated that he "had notified [the] base of the disturbance shortly after it began."<sup>57</sup> Schlup claimed this statement corroborated his argument—that he would not have had enough time, per the timing on the video, to walk from the location of the murder back to the dining room.<sup>58</sup> The affidavit also identified another inmate, rather than Schlup, as the third assailant in Dade's murder.<sup>59</sup>

Unlike in *Herrera*, Schlup raised independent constitutional claims in addition to his actual innocence claim.<sup>60</sup> Schlup's habeas petition alleged actual innocence, ineffective assistance of trial counsel, and the State's "fail[ure] to disclose critical exculpatory

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<sup>48</sup> *Id.* at 303.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 302–03. O'Neal was identified as another one of the assailants in Dade's murder. *Id.* at 302.

<sup>52</sup> *Id.* at 303.

<sup>53</sup> *Id.* at 303–04.

<sup>54</sup> *Id.* at 309.

<sup>55</sup> *Id.* at 307.

<sup>56</sup> *Id.* at 307. Green, one of Schlup's fellow inmates, was working at the housing unit at the time of the attack on Dade. *Id.*

<sup>57</sup> *Id.* at 308.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 310.

<sup>60</sup> *Id.* at 313–15.



evidence.”<sup>61</sup> His actual innocence claim was therefore procedural rather than substantive.<sup>62</sup> The independent “constitutional claims [were] based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, and the withholding of evidence by the prosecution, denied him the full panoply of protections afforded to criminal defendants by the Constitution.”<sup>63</sup> It was in this context that the Court applied the gateway standard to the petitioner’s claim.

The Court stated that Schlup could obtain review of his constitutional claim if he established “cause and prejudice’ sufficient to excuse his failure to present his evidence in support of his first federal petition”<sup>64</sup> or, alternatively, “if he falls within the ‘narrow class of cases . . . implicating a fundamental miscarriage of justice.’”<sup>65</sup> Because Schlup did not establish cause and prejudice, his claim was addressed under the latter standard.<sup>66</sup> The *Schlup* Court further held that to determine whether there has been a fundamental miscarriage of justice, the appropriate standard was “the *Carrier* ‘probably resulted’ standard,”<sup>67</sup> *i.e.*, that it was “more likely than not that no reasonable juror would have convicted him in the light of new evidence,”<sup>68</sup> rather than the more stringent *Sawyer* standard, *i.e.*, that a petitioner “must show by *clear and convincing* evidence that, but for a constitutional error, no reasonable juror would have found the petitioner [guilty].”<sup>69</sup>

Schlup maintained error at trial as his independent constitutional claim underlying the actual innocence claim.<sup>70</sup> The Court noted:

if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.<sup>71</sup>

The Supreme Court held that both the district court and the

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<sup>61</sup> *Id.* at 307.

<sup>62</sup> *Id.* at 314.

<sup>63</sup> *Id.* (internal citations omitted).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 314–15 (quoting *McCleskey*, 499 U.S. at 494) (alteration in original).

<sup>66</sup> *Schlup*, 513 U.S. at 314–15.

<sup>67</sup> *Id.* at 326 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

<sup>68</sup> *Schlup*, 513 U.S. at 327.

<sup>69</sup> *Id.* at 323 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) (internal quotation marks omitted).

<sup>70</sup> *Schlup*, 513 U.S. at 314–15.

<sup>71</sup> *Id.* at 316.

circuit court of appeals “evaluated the record under an improper standard”<sup>72</sup> and the case was remanded for further proceedings.<sup>73</sup>

### 3. The Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996, the federal habeas statute, “borrow[s] from the court’s innocence-as-gateway doctrine . . . [and] ban[s] consideration of new claims raised in a second or successive habeas petition, but craft[s] an innocence exception.”<sup>74</sup> Typically, AEDPA limits habeas petitions in capital cases to one year following the exhaustion of all possible state-court remedies.<sup>75</sup> However, most recently the Supreme Court in *McQuiggin v. Perkins*,<sup>76</sup> held, in a 5–4 opinion authored by Justice Ginsberg, that AEDPA time limits in first time habeas petitions are not absolute where there is a claim of actual innocence, i.e., a miscarriage of justice.<sup>77</sup>

<sup>72</sup> *Id.* at 332.

<sup>73</sup> *Id.* Lloyd Schlup was granted a re-trial and, on the second day of his trial, March 23, 1999, he pled guilty to second degree murder in order “to avoid the danger of another death sentence.” *Reasonable Doubt?*, DEATH PENALTY INFO. CENTER (2013), <http://www.deathpenaltyinfo.org/additional-innocence-information>. See also Sean D. O’Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 U. MO. KAN. CITY L. REV. 1021, 1038–42 (2009) (illustrating the story of the litigation as told by Schlup’s attorney).

<sup>74</sup> Findley, *supra* note 2, at 1206; see also *Felker v. Turpin*, 518 U.S. 651, 662 (1996) (“Our authority to grant habeas relief to state prisoners is limited by § 2254 . . .”). The AEDPA, which passed largely in response to the Oklahoma City and World Trade Center bombings, “was intended to ‘curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.’” Caroline Livett, Note, 28 U.S.C. § 2254(j): *Freestanding Innocence as a Ground for Habeas Relief: Time for Congress to Answer the Court’s Embarrassing Question*, 14 LEWIS & CLARK L. REV. 1649, 1662–63 (2010) (quoting 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 112 (5th ed. 2005)).

<sup>75</sup> 28 U.S.C. § 2244(d)(1) (2006). The text of AEDPA’s statute of limitations, codified at 28 U.S.C. § 2244(d), reads as follows:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

*Id.*

<sup>76</sup> *McQuiggin v. Perkins*, 2013 U.S. LEXIS 4068 (U.S. Sup. Ct. May 28, 2013).

<sup>77</sup> *Id.* at \*7–9.

The innocence exception under § 2244(b) derives from the miscarriage-of-justice and actual-innocence standards of pre-AEDPA Supreme Court cases that addressed successive petitions. In *McCleskey v. Zant*, a pre-AEDPA case, the Supreme Court held that in general, an omission of a claim from an earlier petition may be excused only if the petitioner demonstrates objective cause for having failed to raise the claim earlier and actual prejudice attributable to her inability to raise the claim.<sup>78</sup>

A petitioner may be excused from this “cause” requirement, however, by “show[ing] that a fundamental miscarriage of justice would result from a failure to entertain the claim.”<sup>79</sup>

Though AEDPA does not codify the rule exactly as laid down in *McCleskey*, Congress essentially adopted the *McCleskey* miscarriage-of-justice exception . . . by mandating that a petitioner show both cause for failing to discover the factual basis for the claim earlier and actual innocence, not either one or the other.<sup>80</sup>

The U.S. Supreme Court later addressed this exception in *House v. Bell*, and found that the standard of review of AEDPA’s provisions “for second or successive [habeas] petitions involving no retroactively applicable new law . . . [and] for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court” were not applicable to an initial federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence.<sup>81</sup> The Second Circuit claimed that this exception

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<sup>78</sup> Jake Sussman, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 352–53 (2001) (footnotes omitted).

<sup>79</sup> *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991), *superseded by statute*, 28 U.S.C. § 2244 (2006).

<sup>80</sup> Sussman, *supra* note 78, at 353 (emphasis omitted) (footnote omitted).

<sup>81</sup> *House v. Bell*, 547 U.S. 518, 539 (2006). Despite the petitioner in *House* having managed to gather DNA and other forensic evidence that “cast considerable doubt on his guilt—doubt sufficient to satisfy [the] . . . standard for obtaining federal review despite a state procedural default,” his was “not a case of conclusive exoneration.” His showing fell “short of the threshold implied in *Herrera*.”

7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.3(e), at 188 (3d ed. 2007) (quoting *House*, 547 U.S. at 553, 555).

On remand, the district court did find that House had been denied the effective assistance of counsel and ordered the state to either release or retry him. Rather than retry the case, the prosecutor dropped the charges in May of 2009. House spent more than twenty years on death row.

LAFAVE ET AL., *supra*, § 28.3(e), at 41 n.101.1 (citation omitted).

might apply even when the petitioner pled guilty to the crime.<sup>82</sup>

#### 4. Circuit Courts Split on Existence of Freestanding Claims of Actual Innocence

The circuit courts that have addressed the question of a freestanding claim of actual innocence under the federal Constitution have answered differently on this issue.<sup>83</sup> While some have completely rejected the notion that such a claim exists,<sup>84</sup> others have avoided the issue, implying that while actual innocence might be a cognizable constitutional claim, the petitioners in those cases had failed to meet the “extraordinarily high threshold” of proving their actual innocence.<sup>85</sup> The Eighth Circuit once granted a temporary stay pending an evidentiary hearing to a petitioner claiming freestanding actual innocence, who, though lacking DNA evidence, presented a strong innocence claim.<sup>86</sup> However, the

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<sup>82</sup> *Friedman v. Rehal*, 618 F.3d 142, 152 (2d Cir. 2010) (“A claim of actual innocence could provide a basis for excusing this late filing even though petitioner pled guilty.” (citing *Doe v. Menefee*, 391 F.3d 147, 161 (2d Cir. 2004))).

<sup>83</sup> However, “[n]o federal court has explicitly provided direct relief on a capital defendant’s claim of bare innocence.” Berg, *supra* note 4, at 136.

<sup>84</sup> *See id.* at 140 (“The vast majority of courts sitting in the Fourth, Fifth, and Seventh Circuits have denied bare claims of actual innocence as not cognizable.” (citing *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003); *United States v. Evans*, 224 F.3d 670, 673–74 (7th Cir. 2000); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999))).

<sup>85</sup> *Dansby v. Norris*, 682 F.3d 711, 716–17 (8th Cir. 2012); *In re Lambrix*, 624 F.3d 1355, 1367 (11th Cir. 2010); *Cotton v. Schriro*, 360 F. App’x 779, 781 (9th Cir. 2009); *Mize v. Hall*, 532 F.3d 1184, 1198–99 (11th Cir. 2008); *Pettit v. Addison*, 150 F. App’x 923, 926–27 (10th Cir. 2005).

<sup>86</sup> *Blair v. Delo*, 999 F.2d 1219, 1220 (8th Cir.), *vacated*, 509 U.S. 823 (1993). The circuit court found, among other things that

the prosecutor knowingly introduced false testimony at trial . . . [and] Blair’s sentencing hearing . . . was compromised by the prosecutor’s inflammatory closing argument. He told the jury that they should sentence Blair to death because it was cheaper to kill him than to incarcerate him, and he emphasized to the all-white jury that they should choose between the ‘attractive’ sympathetic victim and ‘this black man.’ . . . We now have a new petition, supported by several sworn affidavits, alleging . . . that newly discovered evidence establishes beyond doubt that Blair is actually innocent of capital murder. . . . [H]is claim is considerably more persuasive than the claim made by Herrera. . . . First, . . . Herrera presented only affidavits . . . which consisted of hearsay. Blair also presents this court with affidavits, and could only present us with something else if the district court were to grant him an evidentiary hearing, but he presents five affiants who testify that Ernest Jones admitted in their presence that he had killed Kathy Jo Allen and framed Blair. These affidavits do not rely on hearsay. . . . Second, the Court faulted Herrera’s affidavits because they were filed years after his trial with ‘[n]o satisfactory explanation.’ All seven of the affiants in this case testify that Ernest Jones had committed multiple murders and that those who knew him lived in fear of him. Tina Jackson, the only affiant who testified at trial, now testifies that her trial testimony was false, that Ernest Jones told her what to say, and that she did so out of fear of him. . . . Third, the Court noted that Herrera’s affidavits contained inconsistencies that

Supreme Court quickly vacated the stay, declaring the imposition of the stay to be an abuse of discretion.<sup>87</sup> The circuit courts have also split over whether the *Schlup* actual innocence gateway extends to claims otherwise barred by section 2244(d)(1)—the one-year limitations period under AEDPA. The Second,<sup>88</sup> Sixth,<sup>89</sup> Ninth,<sup>90</sup> Tenth,<sup>91</sup> and Eleventh<sup>92</sup> Circuits have concluded that a compelling claim of actual innocence constitutes an equitable exception to the one-year limitations period. The First,<sup>93</sup> Fifth,<sup>94</sup> and Seventh Circuits,<sup>95</sup> however, disagree. The existence of such an ambiguity among and within the circuits provided cause for the Supreme Court to squarely address the issue.

Most recently, the Supreme Court resolved this issue, at least for first time habeas petitions, by holding that “actual innocence if prove[n] serves as a gateway through which a petitioner may pass” when the impediment is the “expiration of the statute of limitations.”<sup>96</sup> In *McQuiggin v. Perkins*, the petitioner presented three affidavits supporting his actual innocence gateway to presenting an ineffective assistance of counsel claim.<sup>97</sup> The last affidavit was secured six years prior to the filing of his habeas

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undermined the claim of actual innocence. On all relevant points, the affidavits presented in this case are astonishingly consistent: Larry Jackson hired Ernest Jones to kidnap Allen, Jones killed Allen, and Jones framed Blair for the crime. Berg, *supra* note 4, at 142 (quoting *Blair*, 999 F.2d at 1220, 1221 (Heaney, J., concurring) (internal citations omitted)).

<sup>87</sup> *Delo v. Blair*, 509 U.S. 823, 823 (1993) (per curiam).

<sup>88</sup> *Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012).

<sup>89</sup> *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005) (permitting equitable tolling for “a credible showing of actual innocence”).

<sup>90</sup> *Lee v. Lampert*, 653 F.3d 929, 933 (9th Cir. 2011) (holding that a compelling claim of actual innocence constitutes an equitable exception to AEDPA’s limitations period, “[b]ecause § 2244(d) is not jurisdictional, it is ‘subject to a ‘rebuttable presumption’ in favor ‘of equitable tolling’” (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010))); *see also* *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990).

<sup>91</sup> *Lopez v. Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 2010).

<sup>92</sup> *San Martin v. McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011); *see also* *Rozzelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012) (“[P]etitioner’s assertion of innocence is not itself a freestanding claim, but merely serves as a ‘gateway’ to get the federal court to consider claims that the federal court would otherwise be barred from hearing.”)

<sup>93</sup> *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003) (holding that no equitable exception to § 2244(d) exists, in dicta).

<sup>94</sup> *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (“Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” (quoting *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)) (internal quotation marks omitted)).

<sup>95</sup> *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005) (holding that no equitable exception to 28 U.S.C. § 2244(d) exists).

<sup>96</sup> *McQuiggin v. Perkins*, 2013 U.S. LEXIS 4068, at \*7 (U.S. Sup. Ct. May 28, 2013).

<sup>97</sup> *Id.* at \*11.

corpus petition relating to his first degree murder conviction.<sup>98</sup> The Supreme Court held that the length of the delay and the diligence that petitioner exercised in pursuing his or her claim are to be considered as “part of the assessment whether actual innocence has been convincingly shown” not as a discrete or per se barrier in disallowing the claim to be heard in the first instance.<sup>99</sup>

*B. Policy Considerations and Federalism Concerns Surrounding Actual Innocence Claims*

Both policy considerations and federalism concerns have provided the traditional reasons that courts have not recognized claims of actual innocence as cognizable under the federal Constitution. First, regarding policy considerations, federal courts have consistently held that the finality of criminal proceedings is fundamental to the criminal justice system.<sup>100</sup> The courts have always believed it necessary to “balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.”<sup>101</sup> Should federal habeas courts have a greater ability to overturn criminal convictions when the petitioner was afforded a fair, error-free trial, a state’s interest in finality of criminal convictions would be undermined.<sup>102</sup>

Such ability to reverse convictions is viewed as a waste of scarce judicial resources, particularly because such resources have already been employed during the petitioner’s trial.<sup>103</sup> When no constitutional error was found at the trial stage, many courts have viewed a review of that decision as unnecessarily burdensome.<sup>104</sup>

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<sup>98</sup> *Id.* at \*16.

<sup>99</sup> *Id.* at \*30. “On remand, the District Court’s appraisal of Perkins[s] petition as insufficient to meet *Schlup*’s actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation.” *Id.* at \*32.

<sup>100</sup> See *House v. Bell*, 547 U.S. 518, 536 (2006); *Schlup v. Delo*, 513 U.S. 298, 318 (1995); *Herrera v. Collins*, 506 U.S. 390, 401 (1993).

<sup>101</sup> Jonathan M. Kirshbaum, *Actual Innocence after Friedman v. Rehal: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases*, 31 PACE L. REV. 627, 655–56 (2011) (quoting Sussman, *supra* note 78, at 378) (other citations omitted) (internal quotation marks omitted).

<sup>102</sup> Kirshbaum, *supra* note 101, at 655–56.

<sup>103</sup> See, e.g., *Herrera*, 506 U.S. at 417 (noting claims of actual innocence are “disruptive” to the judicial process and place a great burden placed on a state’s judicial resources by “having to retry cases based on often stale evidence”).

<sup>104</sup> See, e.g., *id.* at 401 (noting that given the decisiveness of criminal trials, “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence”).

Courts have also noted “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality” and thus have set an “extraordinarily high” standard for petitioner to meet in order for the court to grant habeas relief.<sup>105</sup>

Nevertheless, courts have recognized that they must find a balance between judgment finality and a violation of an actually innocent person’s constitutional rights. They have noted that “federal courts in habeas cases should exercise their broad equitable powers in such a way as to ensure that innocent persons do not suffer unjust punishment.”<sup>106</sup> Such unjust punishment runs afoul of an actually innocent person’s constitutional rights. The issue has been and remains, however, the ability of an actual innocent petitioner to prove his factual innocence before a court empowered to grant him relief.

The Supreme Court has also expressed that federalism concerns have been a factor in federal courts’ hesitancy to grant habeas relief, noting that “[f]ederal courts are not forums in which to relitigate state trials.”<sup>107</sup> The individual states are to be the chief arbiters of state criminal adjudications, and when such decisions are reviewed by federal courts, federalism issues may arise as to the propriety of such review.<sup>108</sup> Should the Supreme Court find a constitutionally cognizable claim of actual innocence, federal habeas courts would have the power to review state court decisions.<sup>109</sup>

The federalism aspect of this potential problem similarly reflects the above-mentioned concerns with the finality of criminal adjudications. The federal courts may be hesitant to find that a freestanding constitutional claim of actual innocence exists. Their real policy concern is one of relitigating state cases and overburdening the federal courts.<sup>110</sup> The *Herrera* Court, embracing this concern, stated that “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”<sup>111</sup>

Notably, the Supreme Court also failed to clarify who has

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<sup>105</sup> *Id.* at 417.

<sup>106</sup> Kirshbaum, *supra* note 101, at 645.

<sup>107</sup> *Herrera*, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)) (internal quotation marks omitted).

<sup>108</sup> Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1282 (2010).

<sup>109</sup> *Id.* at 1297 (citing *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting)).

<sup>110</sup> See Mourer, *supra* note 108, at 1300–01.

<sup>111</sup> *Herrera*, 506 U.S. at 401.

standing to bring a claim of actual innocence.<sup>112</sup> The Court has only acknowledged the possibility “of a showing of innocence that would make an execution unconstitutional, suggesting that the claim is open only to defendants sentenced to death. Yet if punishment of the factually innocent is what the Constitution forbids, limiting relief to capital defendants is difficult to justify.”<sup>113</sup> Essentially, if a free standing claim of actual innocence exists, the burden of proof would be (1) “extraordinarily high,”<sup>114</sup> (2) more demanding than the actual innocence standard applied in the procedural default context,<sup>115</sup> and (3) require a demonstration “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner’ guilty.”<sup>116</sup>

*C. The Possibility of a Freestanding Constitutional Claim of Actual Innocence*

1. Justice Scalia’s Dissent in *In re Davis*

*a. In re Davis*

Troy Anthony Davis was convicted of the murder of Georgia Police Officer<sup>117</sup> Mark Allen MacPhail.<sup>118</sup> The trial court found that on the night of August 18, 1989, MacPhail witnessed a disturbance in a restaurant parking lot where Davis struck a man with a gun after a fight broke out.<sup>119</sup> Davis fled the scene and MacPhail ran over and ordered Davis to stop.<sup>120</sup> Davis then allegedly fatally shot MacPhail.<sup>121</sup> “Davis was convicted . . . of murder, obstruction of a law enforcement officer, two counts of aggravated assault, and

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<sup>112</sup> LAFAYETTE ET AL., *supra* note 81, § 28.3(e), at 188–89.

<sup>113</sup> *Id.* § 28.3(e), at 189. The Second Circuit, however, has interpreted the Supreme Court’s holding in *Calderon v. Thompson* to mean “that the gateway standard applies to claims of actual innocence of *any* crime.” *Rivas v. Fischer*, 687 F.3d 514, 541 n.35 (2d Cir. 2012) (emphasis added) (citing *Calderon v. Thompson*, 523 U.S. 538, 560 (1998) (applying the *Schlup* standard to a claim of actual innocence of noncapital rape conviction)).

<sup>114</sup> *Herrera*, 506 U.S. at 417.

<sup>115</sup> *House v. Bell*, 547 U.S. 518, 555 (2006) (citing *Herrera*, 506 U.S. at 417).

<sup>116</sup> *Schlup v. Delo*, 513 U.S. 298, 301 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)).

<sup>117</sup> *Davis v. State*, 426 S.E.2d 844, 845, 846 (Ga. 1993), *aff’d sub nom. Davis v. Turpin*, 539 S.E.2d 129 (11th Cir. 2000).

<sup>118</sup> Moni Basu, *Inmate’s Sister Insists Time Shouldn’t Run Out on the Truth*, ATLANTA J-CONST., July 16, 2007, at 1A (identifying the decedent as Mark Allen MacPhail).

<sup>119</sup> *Davis*, 426 S.E.2d at 846.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



possession of a firearm during the commission of a felony.”<sup>122</sup> Davis filed a petition for writ of habeas corpus, which reached the Supreme Court in 2009.<sup>123</sup> The Court transferred the petition to the Southern District of Georgia and granted an evidentiary hearing to determine whether newly discovered evidence established petitioner’s actual innocence claim.<sup>124</sup>

In remanding Davis’s claim, the Court “did not release the district court from the restrictions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which require[d] Davis to show that the state court adjudication was based on an ‘unreasonable application of clearly established Federal law.’”<sup>125</sup> Ultimately, the district court found Davis’s claim “vastly overstate[d] the value of his evidence of innocence” and affirmed his conviction.<sup>126</sup>

*b. Scalia Challenges the Court to Squarely Address the Actual Innocence Question*

In his dissent in *In re Davis*, Justice Scalia highlighted the fact that the Supreme Court has repeatedly left unresolved the question of whether a petitioner’s claim of actual innocence is cognizable under the federal Constitution.<sup>127</sup> The question has only indirectly reached the Court, often as a corollary to the primary issue at hand. The Court has never expressly granted relief based solely on actual innocence, and it has continued to grapple with the question of “whether a claim to actual innocence is a constitutionally cognizable claim in and of itself.”<sup>128</sup> Instead, the Court has often found that it would not address the question at that time.<sup>129</sup> As a result, there persists a hole in actual innocence jurisprudence that the Court has both the opportunity and ability to fill, should and when it finally elects to do so.

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<sup>122</sup> *Id.* at 845.

<sup>123</sup> *In re Davis*, 557 U.S. 952, 952 (2009).

<sup>124</sup> *Id.*

<sup>125</sup> Mourer, *supra* note 108, at 1279–80 (footnote omitted) (quoting 28 U.S.C. § 2254(d)(1) (2006)).

<sup>126</sup> *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*59, \*61 (S.D. Ga. Aug. 24), *certificate of appealability denied*, No. CV 409-130, 2010 WL 8961437 (S.D. Ga. Oct. 8), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1787, *and cert. denied*, 131 S. Ct. 1788 (2011). Davis was executed on September 21, 2011. Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1.

<sup>127</sup> *In re Davis*, 557 U.S. at 955 (Scalia, J., dissenting) (citing *Herrera v. Collins*, 506 U.S. 390, 416–17 (1993)).

<sup>128</sup> Mourer, *supra* note 108, at 1298.

<sup>129</sup> *In re Davis*, 557 U.S. at 955.

Justice Scalia's dissent expressed great doubt that a claim of actual innocence exists as an independent constitutional claim.<sup>130</sup> Nonetheless, he urged the Supreme Court to directly address the underlying issue.<sup>131</sup> He stated:

[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable.<sup>132</sup>

Implicit in Scalia's argument were federalism concerns that federal courts should not exercise unwarranted power over state court criminal proceedings.<sup>133</sup> Additionally, the argument implied that the highest court in the country should provide an authoritative answer to the actual innocence question to direct lower courts how to proceed when faced with such claims.<sup>134</sup>

Though Justice Scalia intimated that there may not be such a constitutionally cognizable claim of actual innocence, he nonetheless urged that the question should be squarely determined by the Court.<sup>135</sup> That the Court "express[es] considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable,"<sup>136</sup> but has never provided a definitive answer, is precisely why the Court should address the question at present.

Justice Scalia argued that bringing federal habeas claims based on actual innocence is a strain on judicial resources.<sup>137</sup> This may be particularly accurate when a petitioner fails to meet the actual innocence standard established in that court and relief is denied. However, it may, contrarily, save judicial resources if the Court were to provide a definitive answer so that cases are not shuffled between courts that may not have the power to provide relief to petitioners. As Justice Scalia noted, "[s]ending [cases] to a district court that 'might' be authorized to provide relief, but then again 'might' be reversed if it did so, is not a sensible way to proceed."<sup>138</sup>

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<sup>130</sup> *Id.* (citing *Herrera*, 506 U.S. at 400–01, 416–17).

<sup>131</sup> *In re Davis*, 557 U.S. at 955.

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 956.

<sup>134</sup> *Id.* at 955, 957.

<sup>135</sup> *Id.* at 956.

<sup>136</sup> *Id.* at 955.

<sup>137</sup> *Id.* at 956.

<sup>138</sup> *Id.* at 958.

Justice Scalia challenged the Court to address the actual innocence question, rather than continuing to skirt the issue, and establish a jurisprudential standard.<sup>139</sup> Scalia argued the Court should “set this case on our own docket so that we can (if necessary) resolve that question.”<sup>140</sup> With such a challenge posed, there is, I think, only a remote possibility that the Court will find a constitutionally cognizable freestanding claim of actual innocence rather than applying only the gateway mechanisms to petitioner’s claims of actual innocence. In that unlikely event, such a result would recognize actual innocence as an independent constitutional claim that may directly be heard on the merits and may be used to grant a petitioner habeas relief. In any event, if the Supreme Court were to determine whether a constitutional right to a free standing claim of actual innocence exists, then the various circuits would be provided with a definitive answer that now has resulted in varying approaches to the issue.

## II. CLAIMS OF ACTUAL INNOCENCE AT THE STATE LEVEL

As discussed earlier, the main avenue for federal claims of actual innocence is through the habeas-centric decisions of *Herrera*, *House*, and *Schlup*.<sup>141</sup> However, a petition for habeas corpus is just one of the means through which a defendant may assert a claim of actual innocence at the state level. States do not treat claims of actual innocence uniformly. Depending on the state of conviction, a defendant may base his or her challenge on post-conviction relief statutes or make a freestanding constitutional claim of actual innocence. Later in this article, I ask whether there is a need for the State of New York to recognize a freestanding constitutional claim of actual innocence in light of the recent amendments to its post-conviction relief statutes.<sup>142</sup> In order to do so, it is important to understand where New York law fits amongst the laws of the rest of the states. State laws allow a defendant to assert his actual innocence claim via post-conviction relief statutes based on newly discovered evidence and/or DNA evidence.<sup>143</sup> Some state statutes have incorporated an explicit actual innocence provision into their

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *House*, 547 U.S. at 537–38; *Schlup v. Delo*, 513 U.S. 298, 326–28 (1995); *Herrera*, 506 U.S. at 404.

<sup>142</sup> *See infra* Part III.

<sup>143</sup> *E.g.*, ALASKA STAT. § 12.72.010(4) (2012); DEL. CODE ANN. tit. 11, § 4504(a)–(b) (2013); N.J. R. CR R. 3:22-1.

post-conviction relief statutes.<sup>144</sup> Currently, very few states recognize freestanding state constitutional claims of actual innocence.<sup>145</sup>

### A. *Newly Discovered Evidence*

Historically, state courts have been reluctant to grant motions for new trials on the grounds of newly discovered evidence.<sup>146</sup> Courts have concerns about how claims of innocence, based on newly discovered evidence, impact the finality of judgments and are often doubtful about the validity of new evidence, especially in cases where the evidence consists of testimony of new witnesses or recantations by trial witnesses.<sup>147</sup> The American Bar Association's Model Rules of Professional Conduct state that prosecutors have a special responsibility to seek to remedy a conviction when there is "clear and convincing evidence . . . that a defendant . . . was convicted of an offense that the defendant did not commit."<sup>148</sup> However, prosecutors and courts may be skeptical and biased against claims of innocence based on newly discovered evidence due to the sheer volume of meritless motions filed by inmates.<sup>149</sup>

Nevertheless, claims of innocence based on newly discovered evidence have become a fundamental part of the criminal justice process for inmates as all states have enacted statutes which allow for motions for new trials based on newly discovered evidence.<sup>150</sup> Newly discovered evidence may also serve as grounds for post-conviction relief where an inmate asserts a claim of actual innocence. Most states impose a statute of limitations period on motions for new trials based on newly discovered evidence.<sup>151</sup> Currently, for states with statutes of limitations, the limitation

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<sup>144</sup> See, e.g., ARIZ. R. CRIM. P. 32.1(h); D.C. CODE § 22-4135(a) (2013); MD. CODE ANN., CRIM. PROC. § 8-301(a) (West 2012).

<sup>145</sup> But see *People v. Washington*, 665 N.E.2d 1330, 1336 (Ill. 1996), State *ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543-44 (Mo. 2003); *Montoya v. Ulibarri*, 163 P.3d 476, 478 (N.M. 2007).

<sup>146</sup> 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 & nn.62-64 (2005).

<sup>147</sup> *Id.* at 664-65.

<sup>148</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(h) (2013).

<sup>149</sup> Medwed, *supra* note 146, at 665 n.64 (citing Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 148-49 (2004)).

<sup>150</sup> Medwed, *supra* note 146, at 675.

<sup>151</sup> Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1671 (2007).

period ranges from twenty-one days to three years.<sup>152</sup> A brief limitation period is problematic for newly convicted defendants as they may lack the resources or time to acquire new evidence sufficient to meet the requirements.<sup>153</sup>

In some states, post-conviction relief based on newly discovered evidence is granted if a petitioner meets the state's requirements for a motion for a new trial based on newly discovered evidence.<sup>154</sup> In order to prevail on a motion for post-conviction relief in most jurisdictions, the petitioner must show (at a minimum) that the newly discovered evidence is material to the issue and not merely cumulative nor impeaching, discovered since the trial and not discoverable by reasonable diligence beforehand, and of the sort that would probably change the jury's verdict if a new trial were granted.<sup>155</sup> However, some states will only grant post-conviction relief based on newly discovered evidence when the evidence is even more influential than evidence that suffices to grant a new trial.<sup>156</sup> For example, in some states, a heightened clear and convincing standard for newly discovered evidence must establish that the defendant is innocent of the convicted offense.<sup>157</sup> Other states impose an even stricter standard requiring that no reasonable fact finder could have found guilt beyond a reasonable doubt in light of the newly discovered evidence.<sup>158</sup> On the contrary, some states do not specify a standard and/or add in an exception that relief can be granted if the "interest of justice" so demands.<sup>159</sup>

While most states do not acknowledge a freestanding claim of actual innocence, defendants may use their states' post-conviction newly discovered evidence rules as an avenue to assert a claim of actual innocence. Currently, many state courts have discussed actual innocence in the context of post-conviction relief. State courts have used the Supreme Court's definition of actual innocence

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<sup>152</sup> *Id.* (footnote omitted).

<sup>153</sup> *See id.* at 1672.

<sup>154</sup> *See, e.g.,* Schawitsch v. State, No. 11-0743, 2012 WL 1439223, at \*4 (Iowa Ct. App. Apr. 25, 2012) (citing Grissom v. State, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997)).

<sup>155</sup> *See, e.g.,* ALASKA STAT. § 12.72.020(b)(2) (2012); UTAH CODE ANN. § 78B-9-104(e) (LexisNexis 2012).

<sup>156</sup> *E.g.,* Julian v. State, 52 P.3d 1168, 1172 (Utah 2002) (citing Summerville v. Warden, 641 A.2d 1356, 1376 n.22 (Conn. 1994)).

<sup>157</sup> *See, e.g.,* ALASKA STAT. § 172.72.020(b)(2)(D); ARIZ. R. CRIM. P. 32.1(h); People v. Cole, 765 N.Y.S.2d 477, 486 (Sup. Ct. Kings County 2003).

<sup>158</sup> *See* OKLA. STAT. tit. 22, § 1089(D)(8)(b)(2) (2012).

<sup>159</sup> *E.g.,* IOWA CODE § 822.2(1)(d) (2012); MISS. CODE ANN. § 99-39-5(1)(e) (2012); N.J. R Cr R. 3:22-2 (outlining no specific standard to obtain relief).

from *Herrera v. Collins*<sup>160</sup> and *Bousley v. United States*,<sup>161</sup> noting that “[a]ctual innocence is more than uncertainty about guilt.”<sup>162</sup> “[E]stablishing actual innocence requires evidence that renders it more likely than not that no reasonable jury would convict.”<sup>163</sup> A defendant’s “claim of actual innocence depends on an evidentiary showing that would undermine the entire prosecution case and point unerringly to innocence or reduced culpability.”<sup>164</sup> Due to this high standard, petitioners are often limited to prevailing on their claims of actual innocence through the use of DNA evidence.<sup>165</sup>

### B. DNA Evidence

The evolution of technology and the role of DNA testing in criminal proceedings have changed the post-conviction landscape. After the first exoneration based on DNA evidence occurred in 1989, there was a sharp increase in claims of actual innocence at the state court level.<sup>166</sup> In “[r]espons[e] to . . . increasing political pressure and [a] lack of available remedies in . . . state or federal courts, states began [to] enact[] statutes [that grant] . . . a right to post-conviction DNA testing . . . .”<sup>167</sup> By the end of 2013, all fifty states will have statutes providing a right to post-conviction DNA testing.<sup>168</sup> To date, there have been more than three hundred post-conviction exonerations in the United States<sup>169</sup> and convicted

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<sup>160</sup> *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (citing and quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

<sup>161</sup> *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing and quoting *Schlup v. Delo*, 513 U.S. 298, 327, 328 (1995)).

<sup>162</sup> *Riley v. State*, 819 N.W.2d 162, 170 (Minn. 2012).

<sup>163</sup> *Id.* (citing *Bousley*, 523 U.S. at 623; *Herrera*, 506 U.S. at 418–19).

<sup>164</sup> *In re Bell*, 170 P.3d 153, 157 (Cal. 2007) (quoting *In re Clark*, 855 P.2d 729, 761 n.33 (Cal. 1993)) (internal quotation marks omitted). *See also* *State v. Conway*, 816 So. 2d 290, 291 (La. 2002) (asserting that an alternative defense from the one offered at trial does not meet the extraordinary high burden to overturn a conviction on collateral review).

<sup>165</sup> Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 516 (1998) (citing *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1577 (1995)). *See* Findley, *supra* note 2, at 1189.

<sup>166</sup> Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005).

<sup>167</sup> Garrett, *supra* note 151, at 1673.

<sup>168</sup> *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Access\\_To\\_PostConviction\\_DNA\\_Testing.php](http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php) (last visited Apr. 24, 2013). On May 24, 2013, Oklahoma became the last state to pass post-conviction DNA legislation, effective November 1, 2013. *See* OKLA. STAT. tit. 22, § 1373.

<sup>169</sup> *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Mar. 13, 2013).

defendants have won exonerations in thirty-six states.<sup>170</sup>

Despite the substantial progress in overturning wrongful convictions via these DNA testing statutes, the statutes have a number of limitations that impede defendants' access to DNA testing post-conviction. First, many states limit the right to post-conviction DNA testing to specific categories of crimes.<sup>171</sup> Currently, Kentucky has the most stringent post-conviction DNA testing criteria where only inmates convicted and sentenced to death for a capital offense have a right to testing.<sup>172</sup> Alabama has a similar limitation, allowing post-conviction DNA testing only where inmates have been convicted of a capital offense,<sup>173</sup> however the statute does not require that an inmate receive a death sentence in order for DNA testing to be granted.<sup>174</sup> Other states only allow testing for inmates who were convicted of murder or certain categories of felonies or provide a list of qualifying crimes.<sup>175</sup> The Vermont post-conviction DNA statute permits any felon to qualify for DNA testing, provided there are specific facts that indicate DNA evidence will provide substantial evidence of the person's innocence.<sup>176</sup> Similarly, Tennessee lists a number of qualifying offenses but allows the trial judge discretion to determine whether post-conviction DNA testing might be appropriate.<sup>177</sup> While many states require the underlying conviction to be a felony, several states allow testing to be granted regardless of the crime of conviction.<sup>178</sup> In almost all states, post-conviction DNA testing is limited to individuals who are currently incarcerated.<sup>179</sup> The states likely apply these limitations to save time and resources. However, if DNA testing can possibly exonerate an individual's conviction for

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<sup>170</sup> *Id.*

<sup>171</sup> Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Post-conviction DNA Testing Statutes and Legislative Recommendations*, 59 *DRAKE L. REV.* 799, 807 (2011).

<sup>172</sup> *Id.* (citing KY. REV. STAT. ANN. § 422.285(1) (West 2012)).

<sup>173</sup> ALA. CODE § 15-18-200(a) (2013).

<sup>174</sup> *See id.*; Brooks & Simpson, *supra* note 171, at 807.

<sup>175</sup> *E.g.*, KAN. STAT. ANN. § 21-2512(a) (2012) (murder or rape); MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2012); Brooks & Simpson, *supra* note 171, at 807 & n.52 (stating that only inmates who were convicted of murder, manslaughter, rape, or a sexual offense have a right to testing).

<sup>176</sup> VT. STAT. ANN. tit. 13, § 5561(a), (b)(2)(B) (2012).

<sup>177</sup> TENN. CODE ANN. § 40-30-303 (2012).

<sup>178</sup> *See, e.g.*, COLO. REV. STAT. § 18-1-412(1) (2012); DEL. CODE ANN. tit. 11, § 4504(a) (2013); N.H. REV. STAT. ANN. § 651-D:2(I) (2012).

<sup>179</sup> *See, e.g.*, COLO. REV. STAT. § 18-1-412(1); N.H. REV. STAT. ANN. § 651-D:2(I). *But see* DEL. CODE ANN. tit. 11, § 4504(a) (imposing no requirement that the defendant still be incarcerated so long as three years have not elapsed from the date of the final judgment of conviction).

any crime, it should be permitted. Since the rights of convicted felons are limited even after they are released from prison, there is also a great reason to permit post-conviction DNA testing for those who are not presently incarcerated.

In many jurisdictions, to obtain post-conviction DNA testing, the identity of the perpetrator must have been at issue during the trial.<sup>180</sup> Other states are more lenient and allow individuals to obtain post-conviction DNA testing if identity *should or could have been argued* at trial but was not.<sup>181</sup> However, most of the states' statutes do not mention the issue of identity.<sup>182</sup> A broad construction of these silent statutes would better ensure an opportunity for inmates to prove their innocence.

Finally, most post-conviction DNA testing statutes include a requirement that the defendant establish a proper chain of custody of any biological evidence to be tested.<sup>183</sup> This requirement holding a defendant responsible for the custody of biological evidence is illogical when the government maintains the evidence. A number of jurisdictions do have requirements that biological material secured during a criminal investigation be preserved for the period of time that anyone related to the case remains incarcerated.<sup>184</sup> Some states require the evidence be preserved for a period of time after a conviction.<sup>185</sup> A fewer number of states only require evidence to be preserved if the inmate filed a motion for DNA testing.<sup>186</sup> However, several states lack evidence-preservation statutes entirely.<sup>187</sup>

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<sup>180</sup> See, e.g., DEL. CODE ANN. tit. 11, § 4504(a)(3); ME. REV. STAT. tit. 15, § 2138(4-A)(D) (2012); MINN. STAT. § 590.01(b)(1) (2012).

<sup>181</sup> See, e.g., CAL. PENAL CODE § 1405(f)(3) (West 2013); MONT. CODE ANN. § 46-21-110(1)(a) (2012); N.H. REV. STAT. ANN. § 651-D:2(I)(a).

<sup>182</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-4240(B)-(C) (2013); D.C. CODE § 22-4133(a)-(b) (2013); see also Brooks & Simpson, *supra* note 171, at 823 (“[T]he majority of postconviction DNA testing statutes are silent on the issue of identity.”).

<sup>183</sup> See, e.g., Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1251-52 (2005) (citing ME. REV. STAT. ANN. tit. 15, § 2138(4)(C) (2004), *amended by* ME. REV. STAT. ANN. tit. 15, § 2138(4-A)(B) (2004)).

<sup>184</sup> See, e.g., ALASKA STAT. § 12.36.200(a)(2) (2012); CONN. GEN. STAT. § 54-102jj(b) (2012); R.I. GEN. LAWS § 10-9.1-11(a) (2012); see also Brooks & Simpson, *supra* note 171, at 846-48 (discussing and listing jurisdictions that require evidence to be preserved while the defendant is incarcerated).

<sup>185</sup> See, e.g., GA. CODE ANN. § 17-5-56(b) (2012); IOWA CODE § 81.10(10) (2012); see also Brooks & Simpson, *supra* note 171, at 848 (reiterating that a few states require the evidence be preserved after the conviction).

<sup>186</sup> See, e.g., IND. CODE § 35-38-7-14(1) (2012); KAN. STAT. ANN. § 21-2512(b)(2) (2012); LA. CODE CRIM. PROC. ANN. art. 926.1(H)(3) (2012); see also Brooks & Simpson, *supra* note 171, at 849 (discussing that only a small amount of states require a motion for DNA testing to be filed in order to preserve evidence).

<sup>187</sup> Brooks & Simpson, *supra* note 171, at 849 & n.344 (stating that Alabama, Delaware,



Furthermore, there are few sanctions imposed on state parties responsible for the disposal or corruption of evidence.<sup>188</sup>

One final issue is that many post-conviction DNA testing statutes exclude testing for defendants who have pled guilty or confessed to their crimes.<sup>189</sup> The reason for this is that most people believe that it is unlikely for a truly innocent person to confess to a crime.<sup>190</sup> However, there have been a number of defendants who have initially pled guilty to the offense and were later exonerated by DNA testing.<sup>191</sup>

### C. States that Recognize Freestanding Claims of Actual Innocence

Other states took a step beyond traditional post-conviction statutes and recognized freestanding claims of actual innocence in either their state constitutions via case law or post-conviction statutes.<sup>192</sup> However, the standard to assert a claim of actual innocence varies state by state.<sup>193</sup>

A few states recognize a freestanding state constitutional claim for actual innocence either through a writ of habeas corpus or the due process clause.<sup>194</sup> Still, the standard to prove actual innocence ranges from a probable evidence standard to a more demanding clear and convincing evidence standard.<sup>195</sup>

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Idaho, New Jersey, New York, North Dakota, Oregon, South Dakota, Vermont, and West Virginia do not have time preservation requirements for evidence).

<sup>188</sup> *Id.* at 850.

<sup>189</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2953.72(C)(2) (LexisNexis 2013); *see also* S.C. CODE ANN. § 17-28-30(A)–(B) (2012) (asserting that DNA testing subsequent to a guilty plea is only allowed for certain crimes and must be within seven years from date of sentencing).

<sup>190</sup> Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 196 (2005).

<sup>191</sup> Brooks & Simpson, *supra* note 171, at 820 (citing *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Apr. 24, 2013)).

<sup>192</sup> *See, e.g.*, ARIZ. R. CRIM. P. 32.1(h) (discussing freestanding state statutory claim for actual innocence); D.C. CODE § 22-4135(a), (b) (2013) (discussing freestanding state statutory claim for actual innocence); MD. CODE ANN., CRIM. PROC. § 8-301 (West 2012) (discussing freestanding state statutory claim for actual innocence); *In re Bell*, 170 P.3d 153, 157 (Cal. 2007) (discussing the evidentiary showing for actual innocence under California law); *Summerville v. Warden*, 641 A.2d 1356, 1359, 1362, 1368–69 (Conn. 1994) (claiming that habeas corpus allows a freestanding claim of actual innocence); *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (asserting that evidence of actual innocence is cognizable under the Illinois Constitution as a matter of due process).

<sup>193</sup> *See infra* Appendix.

<sup>194</sup> *Washington*, 665 N.E.2d at 1337 (discussing that evidence of actual innocence is cognizable under the Illinois Constitution as a matter of due process); *Montoya v. Ulibarri*, 163 P.3d 476, 478, 484 (N.M. 2007) (resolving that under New Mexico Constitution habeas defendants may assert claims of actual innocence).

<sup>195</sup> *Compare Washington*, 665 N.E.2d at 1337 (utilizing the probable evidence standard),

In Illinois, defendants can raise a post-conviction claim for actual innocence through the state's Post-Conviction Hearing Act.<sup>196</sup> However, the Act requires an allegation of an infringed state or federal constitutional right,<sup>197</sup> except where the death penalty has been imposed.<sup>198</sup> In *People v. Washington*, the Illinois Supreme Court recognized that a defendant could assert actual innocence through the state constitution's due process clause by bringing forth new evidence.<sup>199</sup> Thus, this constitutional right could be asserted to satisfy the Illinois statute. Earlier in *People v. Baker*,<sup>200</sup> the court required the new evidence to be of "conclusive character that it will probably change the result on retrial."<sup>201</sup> This remains the most lenient standard for a freestanding state constitutional claim of actual innocence.<sup>202</sup> If a defendant prevails on the claim, his remedy is a new trial.<sup>203</sup>

Both Missouri and New Mexico require the more demanding clear and convincing evidence standard for a defendant to prevail on a freestanding state constitutional claim of actual innocence through habeas.<sup>204</sup> The Missouri Supreme Court articulated the standard as a defendant must provide clear and convincing evidence "that undermines confidence in the correctness" of the trial.<sup>205</sup> It found this standard is satisfied when evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true."<sup>206</sup>

In Missouri, a defendant has a claim through habeas to assert his actual innocence without the accompaniment of a constitutional

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with *Montoya*, 163 P.3d at 487 (declaring the standard to be clear and convincing evidence).

<sup>196</sup> 725 ILL. COMP. STAT. 5/122-1(a)(2) (2012).

<sup>197</sup> *Id.* § 5/122-1(a)(1).

<sup>198</sup> *Id.* § 5/122-1(a)(2) ("Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that: . . . the death penalty was imposed and there is newly discovered evidence not available to the person at the time of the proceeding that resulted in his or her conviction that establishes a substantial basis to believe that the defendant was actually innocent by clear and convincing evidence.").

<sup>199</sup> *Washington*, 665 N.E.2d at 1337.

<sup>200</sup> *People v. Baker*, 158 N.E.2d 1 (Ill. 1959).

<sup>201</sup> *Id.* at 6.

<sup>202</sup> *See Montoya v. Ulibarri*, 163 P.3d 476, 486 (N.M. 2007).

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* (citing *Ex parte Elizondo*, 947 S.W.2d, 202, 209 (Tex. Crim. App. 1996)); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543-44 (Mo. 2003).

<sup>205</sup> *Roper*, 102 S.W.3d at 548 (citing *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1132 (Conn. 1997); *Ex parte Elizondo*, 947 S.W.2d at 205)).

<sup>206</sup> *Roper*, 102 S.W.3d at 548 (internal quotation marks omitted) (quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo. Ct. App. E.D. 1996)).

violation at trial.<sup>207</sup> In *State v. Roper*, a defendant convicted of murder and sentenced to death met this high burden and was exonerated from his sentence and conviction.<sup>208</sup> There, the defendant was convicted solely because of the testimony of three inmates who had since recanted their testimony.<sup>209</sup> Furthermore, there was no remaining credible evidence from trial to support the conviction because there was no physical evidence linking the defendant to the killing, a police officer identified another person as the perpetrator, and six other inmates testified that the defendant was playing cards with them at the time of the incident.<sup>210</sup>

New Mexico relied heavily on the New York Supreme Court's *People v. Cole*<sup>211</sup> decision to recognize a freestanding state constitutional claim of actual innocence.<sup>212</sup> In *Montoya v. Ulibarri*, the court articulated New Mexico's standard as defendant must prove "by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."<sup>213</sup> As this issue was one of first impression, the court looked to other jurisdictions to determine the appropriate standard for a constitutional claim of actual innocence.<sup>214</sup> It weighed the conflicting policy concerns of ensuring that actually innocent persons are not incarcerated with the public interest in the finality of criminal adjudications.<sup>215</sup> Ultimately, the court adopted the standard advocated by *Cole* because it appropriately balanced these twin interests.<sup>216</sup>

Other states codified freestanding claims of actual innocence in their post-conviction statutes.<sup>217</sup> Like New Mexico's state constitutional standard for actual innocence, Arizona also requires a defendant to demonstrate "by clear and convincing evidence . . . that no reasonable fact finder would have found [him] guilty of the offense beyond a reasonable doubt."<sup>218</sup> If defendant raises a colorable Rule 32.1(h) claim, then his relief is an evidentiary

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<sup>207</sup> *Roper*, 102 S.W.3d at 543–44, 546–47.

<sup>208</sup> *Id.* at 543, 548–49.

<sup>209</sup> *Id.* at 548.

<sup>210</sup> *Id.*

<sup>211</sup> *People v. Cole*, 765 N.Y.S.2d 477, 478 (Sup. Ct. Kings County 2003).

<sup>212</sup> *See Montoya v. Ulibarri*, 163 P.3d 476, 482, 484, 486, 487 (N.M. 2007).

<sup>213</sup> *Id.* at 486 (citing *Ex Parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)).

<sup>214</sup> *See Montoya*, 163 P.3d at 485–86.

<sup>215</sup> *See id.* at 486.

<sup>216</sup> *See id.*

<sup>217</sup> *See, e.g.*, ARIZ. R. CRIM. P. 32.1(h); D.C. CODE § 22-4135(g)(1) (2013); MD. CODE ANN., CRIM. PROC. § 8-301(a) (West 2012).

<sup>218</sup> ARIZ. R. CRIM. P. 32.1(h).

hearing to determine if he is actually innocent.<sup>219</sup> A colorable claim exists where, if the allegations are true, they might have changed the outcome of the trial.<sup>220</sup> However, a defendant's prior guilty plea made knowingly and intelligently will preclude a claim of actual innocence.<sup>221</sup>

The District of Columbia's Innocence Protection Act (IPA)<sup>222</sup> provides for alternative remedies depending on the standard of proof satisfied by the defendant.<sup>223</sup> If it is more likely than not that the defendant is actually innocent, then the court will grant a new trial.<sup>224</sup> However, if the defendant can show that he is innocent by clear and convincing evidence, the court will vacate the conviction and dismiss the count with prejudice.<sup>225</sup> The IPA requires that the defendant identify new, specific evidence, establish how the evidence demonstrates his actual innocence, and establish why the evidence is not merely cumulative or impeaching.<sup>226</sup> Courts will consider additional factors to determine whether relief should be granted, including if defendant was convicted at trial, the specific reason he asserted an inconsistent trial theory, and if the defendant pleaded guilty, the specific reason he did so despite his actual innocence.<sup>227</sup> A defendant will be granted a hearing unless a motion "conclusively" shows the defendant is not entitled to relief.<sup>228</sup>

Maryland also requires newly discovered evidence in its freestanding actual innocence statute.<sup>229</sup> A defendant is entitled to relief if newly discovered evidence "creates a substantial or significant possibility that the result may have been different" and that the evidence "could not have been discovered in time to move for a new trial."<sup>230</sup> At the pleading stage, the court must determine if the defendant's allegations would afford relief if proven at a hearing in the light most favorable to the defendant.<sup>231</sup> However,

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<sup>219</sup> See *State v. Berryman*, 875 P.2d 850, 853 (Ariz. Ct. App. 1994).

<sup>220</sup> *State v. Runningeagle*, 859 P.2d 169, 173 (Ariz. 1993) (citing *State v. Watton*, 793 P.2d 80, 85 (Ariz. 1990)).

<sup>221</sup> *State v. Westover*, No. 2 CA-CR-2011-0319-PR, 2012 WL 432633, at \*3 (Ariz. Ct. App. Feb. 10, 2012) (citing *State v. Norgard*, 376 P.2d 776, 778 (Ariz. 1962)).

<sup>222</sup> Innocence Protection Act of 2001, D.C. Act 14-222, 49 D.C. Reg. 408 (Jan. 18, 2002).

<sup>223</sup> See D.C. CODE § 22-4135(g) (2013).

<sup>224</sup> *Id.* § 22-4135(g)(2).

<sup>225</sup> *Id.* § 22-4135(g)(3).

<sup>226</sup> *Id.* § 22-4135(c)(1)-(3).

<sup>227</sup> *Id.* § 22-4135(g)(1)(D)-(E).

<sup>228</sup> *Id.* § 22-4135(e)(1).

<sup>229</sup> MD. CODE ANN., CRIM. PROC. § 8-301 (West 2012).

<sup>230</sup> *Id.* § 8-301(a)(1)-(2).

<sup>231</sup> *Douglas v. State*, 31 A.3d 250, 264 (Md. 2011).

impossibilities need not be taken as truth.<sup>232</sup> The statute gives the court discretion as to the available remedy from a finite list of options, including “set[ting] aside the verdict, resentenc[ing], grant[ing] a new trial, or correct[ing] the sentence.”<sup>233</sup> However, the court must state its reasons on the record.<sup>234</sup>

### III. CLAIMS OF ACTUAL INNOCENCE IN NEW YORK STATE

New York, like all other states, enacted post-conviction statutory provisions that afford a defendant the opportunity to vacate a judgment against him under limited grounds.<sup>235</sup> Similar to the District of Columbia and Maryland, the main procedural vehicle to assert actual innocence under this statute is its “newly discovered evidence” provision located at section 440.10(1)(g).<sup>236</sup> This section provides that a defendant may move to vacate his judgment upon the ground that:

New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial, the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence . . . .<sup>237</sup>

Often “newly discovered evidence” consists of recanted testimony or additional alibi witnesses that had not been produced at trial.<sup>238</sup> New York appellate courts consider witness recantations to be notoriously unreliable, and are often hesitant to grant relief on the basis of that evidence alone.<sup>239</sup> So, for instance, an individual

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<sup>232</sup> *Id.*

<sup>233</sup> MD. CODE ANN., CRIM. PROC. § 8-301(f)(1).

<sup>234</sup> *Id.* § 8-301(f)(2).

<sup>235</sup> *See* N.Y. CRIM. PROC. LAW § 440.10(1) (McKinney 2013).

<sup>236</sup> *Id.* § 440.10(1)(g).

<sup>237</sup> *Id.*

<sup>238</sup> *See e.g.*, *People v. Deacon*, 946 N.Y.S.2d 613, 615–16 (App. Div. 2d Dep’t 2012) (providing newly discovered evidence in the form of recanted testimony by a key witness as well as testimony indicating another person committed the murder); *People v. Jenkins*, 923 N.Y.S. 706, 709 (App. Div. 2d Dep’t 2011) (moving to vacate the judgment based upon the recantation of testimony and potential alibi witnesses who were not contacted as a result of ineffective assistance of counsel).

<sup>239</sup> *See* *People v. Salemi*, 128 N.E.2d 377, 381 (N.Y. 1955) (quoting *People v. Priori*, 58 N.E. 668, 672 (N.Y. 1900)).

convicted of a crime based largely on circumstantial evidence and the testimony of a single eyewitness may still be denied relief even if that key witness later recants. If the court should find the witness unreliable it would not “create[] a probability that had such evidence been received at the trial, the verdict would have been more favorable to the defendant.”<sup>240</sup> The hurdles a defendant must surmount under this provision may thus preclude the vacatur of a conviction that may legitimately be erroneous.

Some trial courts, recognizing the limitations of an actual innocence claim based on newly discovered evidence, have allowed a defendant to pursue exoneration via a new avenue under the state constitution. In *People v. Cole*, the Supreme Court of Kings County was the first New York court to explicitly recognize the validity of a freestanding constitutional claim of actual innocence.<sup>241</sup> The court in *Cole* held that “a person who has not committed any crime has a liberty interest in remaining free from punishment” and “the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the due process clause of the State Constitution.”<sup>242</sup> The court further held that “punishing an actually innocent person is disproportionate to the crime (or lack of crime) committed and violates the cruel and inhuman treatment clause” of the New York Constitution.<sup>243</sup> The *Cole* court found that “[i]f a court has determined by clear and convincing evidence that no reasonable juror could convict the defendant of the charged crime,” the court should sustain a freestanding claim of actual innocence and “vacate the conviction and dismiss the accusatory instrument.”<sup>244</sup> After the *Cole* decision, “virtually all of the [New York State] trial courts to explicitly address the issue have concluded” that a freestanding claim of actual innocence exists.<sup>245</sup>

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<sup>240</sup> CRIM. PROC. LAW § 440.10(5).

<sup>241</sup> *People v. Cole*, 765 N.Y.S.2d 477, 478 (Sup. Ct. Kings County 2003) (“In American jurisprudence, an acquittal of criminal charges does not signify that the acquittee did not actually commit the crime. A ‘not guilty’ verdict indicates that the government has failed to prove beyond a reasonable doubt that the defendant committed one of the elements of a crime. Conversely, a ‘guilty’ verdict only indicates that the government has proven beyond a reasonable doubt that the defendant committed each and every element of the crime, and not that the defendant actually committed the crime.” (internal citations omitted)).

<sup>242</sup> *Id.* at 485; see N.Y. CONST. art. 1, § 6.

<sup>243</sup> *Cole*, 765 N.Y.S.2d at 485; see N.Y. CONST. art. 1, § 5.

<sup>244</sup> *Cole*, 765 N.Y.S.2d at 487.

<sup>245</sup> *People v. Days*, No. 0469/01, 2009 N.Y. Misc. LEXIS 3677, at \*39 (Sup. Ct. Westchester County Dec. 31, 2009); see also *People v. Bermudez*, No. 8759/91, 2009 N.Y. Misc. LEXIS 3099, at \*62–63 (N.Y. Sup. Ct. N.Y. County Nov. 9, 2009) (finding the defendant met his burden proving actual innocence); *People v. Wheeler-Whichard*, 884 N.Y.S.2d 304, 313–14

New York Supreme Court's practice of recognizing a freestanding claim of actual innocence is significant in the effort to overturn wrongful convictions in New York State. Yet the Court of Appeals and the appellate divisions have not ruled on the issue.<sup>246</sup> Thus a finding that a freestanding claim of actual innocence exists under the New York Constitution is not binding on trial courts.<sup>247</sup> In *People v. Tankleff*,<sup>248</sup> New York's Appellate Division, Second Department, declined to make a ruling on whether the state recognized a freestanding actual innocence claim that would allow a trial court to reverse a conviction and dismiss the accusatory instrument as a matter of law.<sup>249</sup> The lower court denied defendant's motion for new trial based on new evidence because he "did not exercise due diligence in moving for a new trial."<sup>250</sup> The court reserved judgment on whether there was a constitutional right to relief based on actual innocence.<sup>251</sup> The Second Department ultimately granted a new trial based upon newly discovered evidence as a matter of discretion in the "interest of justice," writing that "[i]t is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit."<sup>252</sup> However, if the appellate division had not remitted the case for a new trial on the grounds of newly discovered evidence, Tankleff may have remained incarcerated on a procedural technicality and his wrongful conviction claim may not have been heard.

After the appellate division declined to decide the issue, legislators recently proposed a bill to establish the Actual Innocence

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(Sup. Ct. Kings County 2009) (holding the defendant's conviction should be vacated because he met his burden of demonstrating that he was wrongfully convicted, therefore proving his claim of actual innocence).

<sup>246</sup> See *Days*, 2009 N.Y. Misc. LEXIS at \*39.

<sup>247</sup> Interestingly, a criminal defendant may bring a malpractice claim against his attorney and to prevail only needs to assert his actual innocence by the civil trial standard of a preponderance of the evidence. See *Britt v. Legal Aid Soc'y*, 741 N.E.2d 109, 111–12 (N.Y. 2000); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987). Of course, "[i]n order to open the door for even a colorable claim of innocence, criminal defendants must free themselves of the conviction, for the conviction precludes those potential plaintiffs from asserting innocence in a civil suit." *Britt*, 741 N.E.2d at 112. "The criminal [defendant] bear[s] the unique burden to plead and prove that [his] conviction was due to the attorney's actions alone and not due to some consequence of his guilt." *Id.* (citing *Carmel*, 511 N.E.2d at 1128).

<sup>248</sup> *People v. Tankleff*, 848 N.Y.S.2d 286 (App. Div. 2d Dep't 2007).

<sup>249</sup> *Id.* at 303.

<sup>250</sup> *Id.* at 298.

<sup>251</sup> *Id.* at 303.

<sup>252</sup> *Id.* at 299.

Justice Act.<sup>253</sup> The bill proposed the codification of the *Cole* decision into CPL section 440.10.<sup>254</sup> Under the new subsection, labeled CPL section 440.10(1)(j), a defendant could vacate judgment if:

The defendant is actually innocent of the crime or crimes of which he or she was convicted. For purposes of this paragraph, a defendant is actually innocent where it is established by clear and convincing evidence that no trier of fact would have convicted the defendant under a reasonable doubt standard and in light of all available evidence.<sup>255</sup>

The proposed legislation would build upon the *Cole* decision by mandating that “the court must address the merits of any claim for relief when the claimant can show, in light of all available evidence, that there exists a reasonable probability that he or she is actually innocent.”<sup>256</sup> That is, under the proposed CPL section 440.10(1)(j), a sustained motion would allow the court to dismiss all accusatory instruments rather than grant a new trial.<sup>257</sup> The justification for this bill was the fact that there have been documented cases where defendants have been wrongly convicted in New York and many of these were non-DNA exonerated defendants.<sup>258</sup>

While legislators have not yet adopted this proposed Act, in August 2012, New York amended its post-conviction statutes to

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<sup>253</sup> Actual Innocence Justice Act of 2013, S.B. 49-2013, 236th Leg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S49-2013> (“Purpose: This bill would permit the Court in which a judgment of conviction was entered to grant a post conviction motion to vacate a judgment based on actual innocence.”). Actual Innocence Justice Act of 2013, A.B. 3492, 236th Leg. Sess. (N.Y. 2013) (same bill as Senate version). The bill has been referred to Senate and Assembly Codes Committees. A similar bill had been proposed twice in the recent past without passage.

<sup>254</sup> See *id.* (proposing that “actual innocence” be included as a ground for a post-conviction motion).

<sup>255</sup> *Id.* § 2.

<sup>256</sup> *Id.* § 4.

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* (“JUSTIFICATION: Over the past twenty years, 284 DNA exonerations of convicted innocents in the United States have drawn the attention of citizens and legislatures around the country to the phenomenon of wrongful convictions of the innocent. According to the data provided by the Innocence Project, twenty-six, or nearly 10%, of those 284 exonerations were in the State of New York. In addition, the New York State Bar Association’s Task Force on Wrongful Convictions recently identified and studied fifty-three ‘judicial/formal exonerations’ over the last twenty-odd years, thirty-one of them non-DNA exonerations. Thirty-nine additional non-DNA exonerations have been identified in preparing this legislation, mainly by examining the results of compensation actions pursuant to Court of Claims Act 8-b. Thus, at least ninety-five men and women have been clearly identified in New York as having spent years, sometimes decades, in prison for murders, rapes, and other serious crimes they did not commit. A significant number of other reversals and vacaturs have occurred where there was strong evidence of innocence, but for one reason or another cannot be included in a set of clear-cut ‘exonerations.’ Thus wrongful convictions are not a trivial problem in New York.”).



allow for forensic testing.<sup>259</sup> Under this amendment, a court will grant post-conviction forensic DNA testing if:

- (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was *actually innocent* of the offense of which he or she was convicted, or
- (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.<sup>260</sup>

This statute is relatively flexible compared to many of the post-conviction DNA testing statutes in other states. First, this statute does not limit post-conviction DNA testing to defendants convicted of specific categories of crimes.<sup>261</sup> Rather, it allows any defendant convicted of any felony or misdemeanor to secure DNA testing provided they meet the statute's requirements.<sup>262</sup>

Further, the amendment allows defendants to demonstrate their actual innocence through post-conviction DNA testing even when the defendant pleaded guilty to the offense.<sup>263</sup> However, the state imposes a heightened standard for those defendants who plead guilty.<sup>264</sup> Post-plea, a defendant must show a substantial probability that he was actually innocent of the convicted offense,<sup>265</sup> whereas a defendant convicted after a trial only must show a reasonable probability that the verdict would have been more favorable to the defendant.<sup>266</sup> As this statute grants convicted individuals more opportunities to prove their actual innocence, the question to be considered is whether there still remains a need for a freestanding constitutional claim of actual innocence in New York.

Despite the strides that New York's post-conviction DNA testing statute has made to overturn wrongful convictions, most crimes and claims of innocence do not rely on DNA testing.<sup>267</sup> Furthermore, the strict requirements for post-conviction relief based on newly

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<sup>259</sup> See N.Y. CRIM. PROC. LAW § 440.10(g-1) (McKinney 2013).

<sup>260</sup> *Id.* (emphasis added).

<sup>261</sup> See William C. Donnino, *Supplementary Practice Commentaries, in* N.Y. CRIM. PROC. LAW § 440.10(g-1) (McKinney 2013).

<sup>262</sup> *Id.*

<sup>263</sup> CRIM. PROC. LAW § 440.10(g-1).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See JOHN K. ROMAN ET AL, URBAN INST. JUSTICE CTR., THE DNA EXPERIMENT: COST EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES 12–13 (2008).

discovered evidence often preclude the introduction of evidence that would exonerate a defendant.<sup>268</sup> The New York State Bar Association's Task Force on Wrongful Convictions studied fifty-three cases of wrongful convictions and identified five additional root causes for wrongful conviction.<sup>269</sup> They include the use of false confessions, general errors by a government actor, misidentification of the accused by the victim and/or one or more eyewitnesses, the admission and reliance by the jury on false testimony by a jailhouse informant, and errors by defense attorneys, which usually is "a failure to fully investigate or to offer alternative theories and/or suspects."<sup>270</sup> More than half of the wrongful conviction cases reviewed by the task force did not involve a DNA exoneration.<sup>271</sup> For example, the report found false confessions contribute to almost twenty-five percent of known cases of wrongful conviction.<sup>272</sup> Thus, the need for a freestanding constitutional claim for actual innocence still has great merit.

Furthermore, a freestanding claim of actual innocence on constitutional grounds would overcome the procedural hurdles to post-conviction relief. Chief Judge Jonathan Lippman of the New York Court of Appeals wrote in a recent opinion that "[w]rongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases."<sup>273</sup> It is clear from the documented cases of wrongful convictions that this is a problem the courts and legislature need to continue to address.<sup>274</sup> A constitutional claim of actual innocence would provide

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<sup>268</sup> See, e.g., *People v. Dickson*, No. 104180, 2013 WL 627028, at \*1 (N.Y. App. Div. 3d Dep't Feb. 21, 2013); see CRIM. PROC. LAW § 440.10(g-1)(2).

<sup>269</sup> N.Y. STATE BAR ASS'N: TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 5-6 (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

<sup>270</sup> *Id.* at 6.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 104.

<sup>273</sup> *Hurrell-Harring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010).

<sup>274</sup> See *Mission Statement*, N.Y. STATE JUST. TASK FORCE (2011), <http://www.nyjusticetaskforce.com/mission.html>. Chief Judge Jonathan Lippman convened the New York State Justice Task Force, a permanent body, on May 1, 2009, with a mission "to eradicate the systemic and individual harms caused by wrongful convictions and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future." *Id.* This task force is charged with the task of not only "implementing reforms but monitoring their effectiveness as well." N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 1 (2012), available at <http://www.nyjusticetaskforce.com/ElectronicRecordingOfCustodialInterrogations.pdf>. A

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another avenue for justice and eliminate many of the procedural hurdles inmates face even when they are able to provide evidence that creates serious doubt about their guilt.

#### CONCLUSION

The Supreme Court has not determined whether there is a freestanding claim of actual innocence under the Constitution.<sup>275</sup> The Court has thus left it to the Circuit Courts of Appeal to decide this issue. Although federal habeas relief has rarely been granted to those maintaining a claim of actual innocence, some states have recognized a freestanding claim of actual innocence either under their respective state constitutions via case law or through legislative enactment. New York appellate courts, however, have not yet recognized such a claim under the state constitution while several trial courts that have considered this issue have found such a claim to have vitality. The recent amendment to the Criminal Procedural Law regarding DNA and actual innocence has not eliminated a need for a freestanding claim of actual innocence in areas such as wrongful confessions and misidentifications either through legislation or judicial interpretation of the state constitution.

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number of recommendations have already been made in areas of improving eyewitness identifications, post-conviction access to DNA testing and databank comparisons, forensics, and expansion of the New York State DNA Databank. JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2012, at 6–7 (2012), available at [http://www.nyjusticetaskforce.com/2012.02.14\\_State.of.the.Judiciary.Report.pdf](http://www.nyjusticetaskforce.com/2012.02.14_State.of.the.Judiciary.Report.pdf).

<sup>275</sup> *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting) (citations omitted).

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## APPENDIX

	Statute				
State	Code	Nature	Court Treatment	Newly Discovered Evidence	Freestanding Claim of Actual Innocence
Alabama	ALA. R. CRIM. P. 32.1 — ALA. CODE § 15-18-200(a) (2013)	<p><b>Post-Conviction Remedy:</b> R. 32.1(e)(5): The facts must establish that the defendant is innocent of the crime for which the defendant was convicted or should not have received the sentence that the defendant received.</p> <p>—</p> <p><b>DNA:</b> Relief limited to those incarcerated for capital offense to prove factual innocence.</p>	Johnson v. State, No. CR-05-1805, 2007 WL 2812232, at *8 (Ala. Crim. App. Sept. 28, 2007): A claim of “actual innocence” may be barred by raising it at trial and the appeal if decided adversely.		

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Alaska	ALASKA STAT. § 12.72.020 (2012) — ALASKA STAT. § 12.73.010 (2012)	<p><b>Newly Discovered Evidence:</b></p> <p>(b)(2)(D): Based on newly discovered evidence and establishes by clear and convincing evidence that the applicant is innocent.</p> <p>—</p> <p><b>DNA:</b> Court will grant post-conviction DNA testing if, among other things, the defendant is convicted of a felony, the defendant did not concede guilt, and the testing may produce new material evidence which would raise a reasonable probability that the applicant did not commit the offense.</p>		Osborne v. State, 110 P.3d 986, 992–95 (Alaska Ct. App. 2005): Takes a <i>Schlup</i> approach regarding <i>Grinols</i> , and finds that actual innocence claim must go through the newly discovered evidence avenue.	Grinols v. State, 10 P.3d 600, 615 (Alaska Ct. App. 2000): Indicates that under certain circumstances a defendant might be able to address actual innocence through a Due Process claim under Alaska's state constitution.
Arizona	ARIZ. R. CRIM. P. 32.1(h) — ARIZ. REV. STAT. ANN. § 13-4240 (2013)	<p><b>Actual Innocence:</b> clear and convincing evidence standard that no reasonable fact finder would find defendant guilty beyond a reasonable doubt.</p> <p>—</p> <p><b>DNA:</b> To access post-conviction DNA testing, defendant must be convicted of a felony and there is a reasonable probability that the test could prove defendant's innocence.</p>			

State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Arkansas	ARK. CODE. ANN. §§ 16-112-201 to -07 (2012)	<b>DNA:</b> Actual Innocence via habeas, limited to DNA evidence where the identity of the perpetrator must be at issue and there is a reasonable probability that the test could prove defendant's innocence.	Orndorff v. State, 132 S.W.3d 722, 724 (Ark. 2003): Petition for post-conviction DNA testing denied because perpetrator's identity was not at issue.		
California	CAL. PENAL CODE § 1405 (West 2013)	<b>Habeas:</b> Relief only available if there is newly discovered evidence. — <b>DNA:</b> Incarcerated defendant may move for post-conviction DNA testing if, among other things, convicted of a felony and the identity of the perpetrator must have been, or should have been, an issue.	<i>In re Bell</i> , 170 P.3d 153, 157 (Cal. 2007): "Petition[er]'s claim of actual innocence [through habeas] depends on an evidentiary showing that would 'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'"		
Colorado	COLO. REV. STAT. § 18-1-410(e) (2012) — COLO. REV. STAT. §§ 18-1-411 to -416 (2012)	<b>Newly Discovered Evidence:</b> Requires material facts to vacate the conviction or sentence in the interest of justice. — <b>DNA:</b> Defendant must prove his actual innocence by clear and convincing evidence that no reasonable juror would convict the defendant. If not procedurally barred, may use DNA results to apply for post-conviction relief through § 410(e).		Farrar v. People, 208 P.3d 702, 708 (Colo. 2009) (en banc): Recantation needs to provide substantially new evidence; mere impeachment or casting doubt of previous testimony is insufficient.	

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Connecticut	CONN. GEN. STAT. § 54-102kk (2012)	<b>DNA:</b> Defendant must be incarcerated and there must be a reasonable probability that defendant would not be prosecuted or conviction with the DNA evidence.	Summerville v. Warden, State Prison, 641 A.2d 1356, 1368, 1369 (Conn. 1994): Defendant may assert a freestanding state habeas corpus claim of actual innocence without <i>Schlup</i> constitutional error; remedy is a new trial.		Miller v. Comm'r of Corr., 700 A.2d 1108, 1110 (Conn. 1997): freestanding state constitutional claim of actual innocence requires a clear and convincing evidence standard.  Gould v. Comm'r of Corr., 22 A.2d 1196, 1198 (Conn. 2011): claim requires affirmative evidence; discrediting evidence is insufficient.
Delaware	DEL. CODE ANN. tit. 11, § 4504 (2013)	<b>DNA:</b> Statute combines claims of actual innocence through DNA or new evidence. Identity must have been at issue and the method to assess evidence must be a new technology.			

State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
District of Columbia	D.C. CODE § 22-4135 (2013) — D.C. CODE § 22-4133 (2013)	<b>Actual Innocence:</b> Freestanding actual innocence statute but new evidence required. — <b>DNA:</b> Defendant in custody for the conviction of a violent crime may file for post-conviction DNA testing if, among other things, he explains how the DNA evidence would help establish his actual innocence.			Bell v. United States, 871 A.2d 1199, (D.C. 2005): relief under section 4135 must meet the statutory factors, the court must discern whether the evidence prove actual innocence by clear and convincing evidence (remedy=vacate judgment) or that innocence was more likely than not (remedy=new trial).
Florida	FLA. R. CRIM. P. 3.853 — FLA. STAT. §§ 925.11, 943.3251 (2012)	<b>DNA:</b> Defendant can request post-conviction DNA testing if convicted of a felony, identity was at issue in the case, and there is a reasonable probability that the DNA test would prove innocence.		Tompkins v. State, 994 So.2d 1072, 1089 (Fla. 2008): Must use "new evidence" rule to assert claims of actual innocence.	Rutherford v. State, 940 So.2d 1112, 1117 (Fla. 2006): No freestanding claim of actual innocence.



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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Georgia	GA. CODE ANN. § 5-5-41(e) (2012)	<b>DNA:</b> Defendant can request post-conviction DNA testing if convicted of a felony, identity was or should have been at issue in the case, and there is a reasonable probability that the DNA test would prove innocence.			<b>Coram Nobis:</b> Seabrook v. State, 728 S.E.2d 322, 323 (Ga. Ct. App. 2012): writ offers no relief for claims including actual innocence if it's not accompanied by new evidence.
Hawaii	HAW. REV. STAT. §§ 844D-121 to -33 (2012)	<b>DNA:</b> Defendant may file for post-conviction DNA testing of biological evidence that is related to the prosecution which resulted in the conviction.			
Idaho	IDAHO CODE ANN. § 19-4901 (2012)	<b>DNA:</b> Defendant can demonstrate actual innocence only by the cross-referenced DNA testing statute.	Fields v. State, 253 P.3d 692, 696 (Idaho 2011): Explicitly states that when considering motions based on this statute, Idaho will not follow <i>House</i> or <i>Schlup</i> .		

State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Illinois	725 ILL. COMP. STAT. 5/122-1(a) (2012) — 725 ILL. COMP. STAT. ANN. 5/116-3 (2012)	<p><b>Post-Conviction Relief:</b> Defendant may file for post-conviction relief if the proceedings had a substantial denial of his state or federal Constitutional rights.</p> <p>—</p> <p><b>DNA:</b> Persons convicted may petition for post-conviction DNA testing if, among other things, identity was at issue at trial and the result of testing has the potential to produce new evidence materially relevant to defendant's assertion of actual innocence.</p>			<p>People v. Hickey, 792 N.E.2d 232, 244 (Ill. 2001); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996); People v. Barnslater, 869 N.E.2d 293, 299–300 (Ill. App. Ct. 2007): Defendant can assert actual innocence, but it must be through newly discovered evidence; recantation is not enough, but new eye witnesses may be.</p>
Indiana	IND. CODE § 35-38-7-8 (2012)	<p><b>DNA:</b> Defendant may apply for post-conviction DNA testing if, among other things, the evidence to be tested is material to the issue of identity and there is a reasonable probability that defendant would not have been prosecuted, convicted of, or receive as severe a sentence for the offense.</p>			

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Iowa	IOWA CODE §81.10(7) (2012) — IOWA CODE § 822.2(d) (2012)	<p><b>DNA:</b> Defendant convicted of a felony may apply for post-conviction DNA testing if, among other things, the identity was a significant issue and evidence would raise reasonable probability that defendant would not have been convicted if DNA test conducted.</p> <p>—</p> <p><b>Newly Discovered Evidence:</b> Allows vacation or modification of sentence for reasons including violation of law or newly discovered evidence that requires vacation in the interest of justice.</p>		Schawitsch v. State, No. 2-169/11-0743, 2012 Iowa App. LEXIS 304, at *11 (Iowa Ct. App. Apr. 25, 2012): “Iowa has an exception to the requirement the ‘newly discovered evidence’ exist at the time of the trial. ‘It is found in extraordinary cases when an utter failure of justice will unequivocally result if the new evidence is not considered or where it is no longer just or equitable to enforce prior judgment.”	Schawitsch v. State, No. 2-169/11-0743, 2012 Iowa App. LEXIS 304, at *12–13 (Iowa Ct. App. Apr. 25, 2012): Defendant makes claim of actual innocence but court does not address claim and rules on other grounds.

State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Kansas	KAN. STAT. ANN. § 21-2512 (2012)	<b>DNA:</b> Defendant may apply for post-conviction DNA testing if, among other things, defendant is convicted of rape or murder and the biological material to be tested is related to the prosecution that resulted in conviction.	Haddock v. State, 146 P.3d 187, 205 (Kan. 2006): Reviews the post-conviction DNA testing procedures.		
Kentucky	KY. REV. STAT. ANN. § 422.285 (West 2012) — KY. R. CRIM. P. 10.02	<b>DNA:</b> Defendant may apply for post-conviction DNA testing if, among other things, convicted of a capital crime and there is a reasonable probability that defendant would not have been prosecuted if exculpatory results obtained through DNA testing.  — <b>Motion for a New Trial:</b> Court has discretion to grant new trial if required in the interest of justice.	Moore v. Commonwealth, 357 S.W.3d 470, 487 (Ky. 2011): DNA results that indicated the presence of another person's blood were not enough to rise to "favorable" evidence to warrant relief.  — Bedingfield v. Commonwealth, 260 S.W.3d 805, 810, 815 (Ky. 2008): relies on DNA evidence and RCr 10.02 and the "interest of justice" provision to grant defendant new trial.		Bowling v. Commonwealth, 357 S.W.3d 462, 466 (Ky. 2010): Kentucky does not recognize a statutory right to claim innocence.
Louisiana	LA. CODE. CRIM. PRO. ANN. art. 926.1 (2012)	<b>DNA:</b> Defendant convicted of a felony may apply for post-conviction DNA testing if, among other things, the evidence would raise reasonable likelihood the evidence would establish the defendant's innocence.	State v. Conway, 816 So.2d 290, 291 (La. 2002): new evidence must be material, noncumulative, conclusive, and undermine the prosecution's entire case.		

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Maine	ME. REV. STAT. tit. 15, § 2138(4-A)(D), (10) (2012)	<b>DNA:</b> Defendant may apply for post-conviction DNA testing if, among other things, the identity was at issue. Further, if DNA test produce favorable results the defendant must show by clear and convincing evidence that only the perpetrator of the crime could be the source of the evidence.	State v. Donovan, 853 A.2d 772, 775–76 (Me. 2004): provides an interpretation of the DNA statute in advancing claims of actual innocence.		
Maryland	MD. CODE ANN., CRIM. PROC. § 8-301 (West 2012) — MD. CODE ANN., CRIM. PROC. § 8-201 (West 2012)	<b>Writ of Actual Innocence:</b> Although this is an explicit writ of actual innocence, it still requires new evidence. — <b>DNA Evidence:</b> Persons convicted of felonies may petition for DNA testing and court will grant if there is a reasonable probability that “DNA evidence . . . [will] produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction.”			Douglas v. State, 31 A.3d 250, 264 (Md. 2011): Pleading requirements for a statutory claim of actual innocence based on newly discovered evidence mandates trial court to find that defendant should be granted a hearing if allegations could be proven at a hearing assuming in light most favorable to a defendant.

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Massachusetts	MASS. GEN. LAWS ch. 278A, §§ 1-7 (West 2012)	<p><b>DNA Evidence:</b> Person may move for post-conviction DNA testing if he is convicted of a criminal offense in MA and incarcerated, the identity of the perpetrator is at issue and he asserts factual innocence of the crime convicted. Courts will grant motion if the defendant meets the procedural requirements and shows that DNA testing will potentially result in material evidence related to the identification of the perpetrator.</p>			
Michigan	MICH. R. CRIM. P 6.502 — MICH. COMP. LAWS § 770.16 (2012)	<p><b>Post-Conviction Relief:</b> Defendant can move to set aside or modify judgment.</p> <p>—</p> <p><b>DNA Evidence:</b> Defendant may petition for DNA testing if he is currently incarcerated and convicted of a felony. Defendant must show by clear and convincing evidence that the identity was at issue during trial to receive testing.</p>			

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Minnesota	MINN. STAT. § 590.01 (2012)	<b>DNA Evidence:</b> Statute provides that a person convicted of a crime may bring a motion for fingerprint or forensic DNA testing to demonstrate the person's "actual innocence" if, among other things, identity was at issue in trial and the evidence is in chain of custody to assure it has not been tampered.	Riley v. State, 819 N.W.2d 162, 170 (Minn. 2012): "Actual innocence is more than an uncertainty about guilt. Instead, establishing actual innocence requires evidence that renders it more likely than not that no reasonable jury would convict."		
Mississippi	MISS. CODE ANN. § 99-39-5 (2012)	<b>Post-Conviction Relief:</b> Allows vacation or modification of sentence for reasons including violation of law or newly discovered evidence (including DNA) in the interest of justice.	Brown v. State, 948 So. 2d 405, 413 (Miss. 2006): "It is clear that a [defendant] seeking post-conviction relief 'must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began.'"		

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Missouri	MO. REV. STAT. §§ 547.035, .037 (2012)	<b>DNA:</b> Defendant must be in custody, the technology for testing was not reasonably available at the time, identity was an issue at trial, and there is a reasonable probability that movant would not be convicted if exculpatory results were obtained through DNA testing.			State <i>ex rel.</i> Armine v. Roper, 102 S.W.3d 541, 546–47 (Mo. 2003): Found state constitutional claim of actual innocence through habeas independent of any constitutional violation at trial.
Montana	MONT. CODE ANN. § 46-21-110 (2012)	<b>DNA:</b> Defendant may petition for DNA testing if convicted of a felony, currently incarcerated, and result would be relevant to the defendant's assertion of actual innocence.			



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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Nebraska	<p>NEB. REV. STAT. § 29-2101 (2012)</p> <p>—</p> <p>NEB. REV. STAT. § 29-3001 (2012)</p> <p>—</p> <p>NEB. REV. STAT. § 29-4120 (2012)</p>	<p><b>Motion for New Trial:</b> Various grounds (including new evidence) for post-conviction relief including when it affects the defendant's substantial rights.</p> <p>—</p> <p><b>Post-conviction Relief:</b> Defendant may obtain post-conviction relief for instances including a violation of state or federal Constitutional rights or laws.</p> <p>—</p> <p><b>DNA:</b> Defendant may petition for post-conviction DNA testing if in custody. Court will grant if the testing may produce noncumulative, exculpatory evidence relevant to claim of wrongful conviction.</p>	<p>State v. El-Tabech, 610 N.W.2d 737, 745 (Neb. 2000) (majority opinion): Claims of "actual innocence" are really just "new evidence" claims and should be addressed under section 29-2101.</p> <p><i>Id.</i> at 749 (Gerrard, J., concurring): There should be available post-conviction relief for "actual innocence" based on section 29-3001, which is the "under the laws of the state or federal constitution" provision.</p>		

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	Code	Nature	Court Treatment		
Nevada	NEV. STAT. §§ 176.0918, .0919 (2012)	<b>DNA:</b> Defendant convicted of felony may petition for post-conviction DNA testing. Court will grant petition if there is a reasonable possibility that defendant would not have been prosecuted and convicted if exculpatory results were obtained through DNA testing.			Pellegrini v. State, 34 P.3d 519, 537 (Nev. 2001): Nevada follows the <i>Schlup</i> procedural bar for asserting claims of actual innocence which can only be overcome if it is more likely than not that no reasonable jury would convict him absent the constitutional violation; clear and convincing evidence standard to overcome ineligibility for the death penalty.

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
New Hampshire	N.H. REV. STAT. ANN. § 651-D:2 (2012)	<b>DNA:</b> Defendant may obtain post-conviction DNA testing if he proves by clear and convincing evidence that, among other things, he is currently incarcerated and identity was or should have been a trial issue.			
New Jersey	N.J. STAT. ANN. § 2A: 84A-32ab (West 2013)	<b>DNA:</b> Incarcerated defendant may move for post-conviction DNA testing provided, among other things, identity was a significant issue in the case. Court will grant motion if there is a reasonable probability that favorable DNA results would grant a motion for a new trial based on newly discovered evidence.	State v. Ways, 850 A.2d 440, 449–50 (N.J. 2004): “However difficult the process of review, the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent.”		
New Mexico	N.M. STAT. ANN. § 31-1A-2 (2012)	<b>DNA:</b> Defendant convicted of a felony may petition for post-conviction DNA testing if he shows by a preponderance of the evidence that identity was an issue in the case and there is a reasonable probability that defendant would not have pled guilty or be found guilty.			Montoya v. Ulibarri, 163 P.3d 476, 478, 484, 486 (N.M. 2007): Freestanding state constitutional claim of actual innocence; court relied heavily on People v. Cole, 765 N.Y.S.2d 477, 486 (Sup. Ct. Kings County 2003).

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
New York	N.Y. CRIM. PROC. LAW § 440.10(1)(g-1) (McKinney 2013) — Actual Innocence Justice Act of 2013, S. 49, 2013 Leg. (N.Y. 2013)	<p><b>DNA:</b> Court may vacate judgment if post-conviction DNA evidence shows (1) for a defendant who pleads guilty that there is “a substantial probability that the defendant was actually innocent” or (2) for a defendant convicted after trial, there is “a reasonable probability that the verdict would have been more favorable to the defendant.”</p> <p>—</p> <p><b>Proposed Bill:</b> Purpose is to address non-DNA wrongful convictions and remedy provides dismissal of accusatory instrument rather merely grant a new trial.</p>			New York trial courts have found claims of actual innocence including People v. Cole, 765 N.Y.S.2d 477, 486 (Sup. Ct. Kings County 2003), but no appellate court has decided this issue.
North Carolina	N.C. GEN. STAT. §§ 15A-269, - 270 (2013)	<p><b>DNA:</b> Defendant may file for post-conviction DNA testing if, among other things, evidence is material to the defendant’s defense, asserting a sworn affidavit of innocence, and there is “a reasonable probability that the verdict would have been more favorable to the defendant.”</p>			
North Dakota	N.D. CENT. CODE § 29-32.1-15 (2012)	<p><b>DNA:</b> Defendants may file for post-conviction DNA testing if, among other things, identity was at issue at trial.</p>			

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	Statute				
State	Code	Nature	Court Treatment	Newly Discovered Evidence	Freestanding Claim of Actual Innocence
Ohio	OHIO REV. CODE ANN. § 2953.21, .23, .71–.83 (LexisNexis 2013)	<b>DNA:</b> Defendants may file for post-conviction DNA testing if they are currently incarcerated or is on probation, convicted of a felony, and establish by clear and convincing evidence actual innocence of the offense.			State v. Byrd, 762 N.E.2d 1043, 1050 (Ohio Ct. App. 2001): No freestanding claim of actual innocence recognized. Defendant must bring actual innocence claims when moving for a new trial.

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Oklahoma	<p>OKLA. STAT. tit. 22, § 1080 (2012)</p> <p>—</p> <p>OKLA. STAT. tit. 22, § 1371.1–.2 (expired July 1, 2005)</p> <p>—</p> <p>OKLA. STAT. tit. 22, § 1373 (effective November 1, 2013)</p>	<p><b>Newly Discovered Evidence:</b> Defendant may obtain post-conviction relief for instances including a violation of state or federal constitutional laws and newly discovered material evidence which requires vacation in the interest of justice.</p> <p>—</p> <p><b>DNA:</b> Defendants may file for post-conviction DNA testing if they are currently incarcerated, convicted of a felony, and establish by clear and convincing evidence that no reasonable jury would have found defendant guilty beyond a reasonable doubt.</p> <p>—</p> <p>Bill allows incarcerated convicted, civilly committed, parolees, probationers or persons subject to sex offender registration to petition for post-conviction DNA testing. Standard: Court will grant petition if there is a reasonable probability that defendant would not have been convicted with favorable DNA evidence and defendant asserts actual innocence.<sup>276</sup></p>			<p>Slaughter v. State, 105 P.3d 832, 833–34, 835 (Okla. Crim. App. 2005): fully recognized innocence claims are the Post-Conviction Procedure Act's foundation and must be proven by clear and convincing showing of factual innocence.</p>

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Oregon	OR. REV. STAT. § 138.530 (2012) — OR. REV. STAT. § 138.690 (2012)	<b>Post-Conviction Relief:</b> Available for matters including a substantial denial of constitutional rights at trial. — <b>DNA:</b> Court will grant petition for post-conviction DNA testing if, among other things, currently incarcerated for certain felonies and there is a reasonable possibility that testing will produce exculpatory evidence to establish the defendant's innocence.	Anderson v Gladden, 383 P.2d 986, 991 (Or. 1963): Court "le[ft] open the question [of] whether newly discovered evidence can ever give rise to . . . common law post-conviction relief."		
Pennsylvania	42 PA. CONS. STAT. § 9543 (2012) — 42 PA. CONS. STAT § 9543.1 (2012)	<b>Newly Discovered Evidence:</b> Post-conviction relief allows for newly discovered evidence which would have changed the outcome of the trial if introduced. — <b>DNA:</b> Post-conviction DNA testing will be granted if, among other things, defendant asserts actual innocence and shows that identity was at issue.	Commonwealth v. Smith, 17 A.3d 873, 884, 885 (Pa. 2011): This is the only case where a claim of actual innocence was raised under section 9543(a)(2)(iv). The court suggested that the only DNA testing would qualify as newly discovered evidence to grant relief.		

<sup>276</sup> As noted in footnote 168, *supra*, Oklahoma is closer than ever to passing post-conviction DNA legislation. After unanimously passing in the Oklahoma House of Representatives and the Oklahoma Senate, but with amendments on April 17, 2013. However, the House rejected the Senate's amendments. The bill is currently pending with the Conference Committee on the Judiciary. See Postconviction DNA Act, H.B. 1068, 54th Legislature, (Okla. 2013) (creating an act that provides for post-conviction DNA testing).

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Rhode Island	R.I. GEN LAWS § 10-9.1-1 (2012) — R.I. GEN LAWS §§ 10-9.1-10, -12 (2012)	<b>Post-conviction relief:</b> Defendant may obtain post-conviction relief for instances including a violation of state or federal constitutional laws or newly discovered material evidence which requires vacation in the interest of justice. — <b>DNA:</b> Petition for post-conviction DNA testing will be granted if there is a reasonable probability that defendant would not have been prosecuted or convicted if exculpatory results found through DNA testing.			



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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
South Carolina	S.C. CODE ANN. § 17-27-10 to - 160 (2012) — S.C. CODE ANN. §17-28-30 (2012)	<p><b>Post-conviction relief:</b> Defendant may obtain post-conviction relief for instances including a violation of state or federal Constitutional laws or newly discovered material evidence which requires vacation in the interest of justice.</p> <p>—</p> <p><b>DNA:</b> Incarcerated defendant convicted of certain felonies may move for post-conviction DNA testing, if among other things, an assertion of actual innocence is made. For those who pled guilty or entered a nolo contendere plea, there is a seven year limitation period to make a motion from date of sentencing.</p>			
South Dakota	S.D. CODIFIED LAWS § 23A-44- 15 (2012) — S.D. CODIFIED LAWS § 23-5B-1	<p><b>“Plain Error”:</b> Allows for post-conviction correction of “plain errors” in procedure affecting a defendant’s substantial rights.</p> <p>—</p> <p><b>DNA:</b> Incarcerated defendant convicted of a felony may move for post-conviction DNA testing, if among other things, an assertion of actual innocence is made and identity of perpetrator is at issue.</p>	State v. Nelson, 587 N.W.2d 439, 443 (S.D. 1998): Court recognized that claims of actual innocence fall under the “plain error” statute.		

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Tennessee	TENN. CODE ANN. §§ 40-30-101 to -122 (2012) — TENN. CODE ANN. §§ 40-30-301 to -313 (2012)	<b>Post-Conviction Relief:</b> Defendant can assert freestanding claim of actual innocence through statute for up to one year from final judgment on appeal. — <b>DNA:</b> Post-conviction DNA testing will be granted if defendant's offense qualifies, there is a reasonable probability that defendant would not be prosecuted if exculpatory results found through DNA testing and the application is made to demonstrate innocence.			Dellinger v. State, 279 S.W.3d 282, 295 (Tenn. 2009); there is a freestanding statutory claim of actual innocence if it is accompanied by new scientific evidence.

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Texas	TEX. CODE CRIM. PROC. ANN. arts. 64.01-.05 (West 2012)	<b>DNA:</b> Court will grant petition for post-conviction DNA testing if, among other things, identity was at issue in the case and defendant proves by preponderance of the evidence that he would not be convicted if exculpatory results had been obtained by DNA test.			<p><i>Ex Parte</i> Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996): Freestanding claims of actual innocence exist through habeas proceeding; however later statute modifies standard for capital cases.</p> <p><i>Ex Parte</i> Thompson, 153 S.W.3d 416, 420 (Tex. Crim. App. 2005): To prevail, defendant must prove by clear and convincing evidence that no rational juror would have convicted him in light of newly discovered evidence.</p>

State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Utah	<p>UTAH CODE ANN. § 78B-9-104 (LexisNexis 2012)</p> <p>—</p> <p>UTAH CODE ANN. §§ 78B-9-402 to -404 (LexisNexis 2012)</p> <p>—</p> <p>UTAH CODE ANN. § 78B-9-301 (LexisNexis 2012)</p>	<p><b>Newly Discovered Evidence:</b> Defendan must show that no reasonable trier of fact could have found defendant guilty of the offense.</p> <p>—</p> <p><b>Factual Innocence:</b> Defendant convicted of a felony may prove post-conviction factual innocence if newly discovered and material evidence shows factual innocence by clear and convincing evidence.</p> <p>—</p> <p><b>DNA:</b> Defendant may move for post-conviction DNA testing if, among other things, convicted of a felony and asserts factual innocence.</p>	<p>Julian v. State, 52 P.3d 1168, 1172 (Utah 2002): for newly discovered evidence to rise to the necessary level of post-conviction relief, it must be even more influential than evidence leading to a new trial.</p>		
Vermont	<p>VT. STAT. ANN. tit. 13, § 5561 (2012)</p> <p>—</p> <p>VT. STAT. ANN. tit. 13, § 7131 (2012)</p>	<p><b>DNA:</b> A person convicted of a qualifying crime can petition for testing of DNA evidence.</p> <p>—</p> <p><b>Post-conviction relief:</b> Remedies available for fundamental, constitutional trial errors.</p>	<p><i>In re Bentley</i>, 477 A.2d 980, 982–83 (Vt. 1984): Statute is not to reassess defendant's guilt or innocence but rather correct fundamental trial errors.</p>		<p><i>In re Town</i>, 938 A.2d 1205, 1208 (Vt. 2007):</p> <p>Vermont has not adopted the federal habeas standard of actual innocence for its state habeas provision.</p>

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Virginia	VA. CODE ANN. § 19.2-327.1 (2013) — VA. CODE ANN. § 19.2-327.2 (2013)	<p><b>DNA:</b> Court will grant petition for post-conviction DNA testing if defendant proves that he is convicted of a felony, currently incarcerated, and the evidence is material so that no reasonable trier of fact could have found proof of guilt beyond a reasonable doubt.</p> <p>—</p> <p><b>Writ of Actual Innocence:</b> Original jurisdiction in the Virginia Supreme Court to hear writs of actual innocence from person who pled not guilty and convicted of a felony.</p>	Turner v. Commonwealth, 694 S.E.2d 251, 270 (Va. Ct. App. 2010), <i>aff'd</i> , 717 S.E.2d 111 (Va. 2011): clear and convincing evidentiary standard to grant writ of actual innocence.		
Washington	WASH. REV. CODE § 10.73.170 (2012)	<p><b>DNA:</b> Court will grant petition for post-conviction DNA testing if defendant is convicted of a felony, currently incarcerated, and the DNA evidence would demonstrate innocence on a more probable than not basis.</p>			<i>In re Carter</i> , 263 P.3d 1241, 1245 (Wash. 2011): Follows <i>Schlup</i> “gateway” approach to freestanding claims facing procedural bars.

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
West Virginia	W. VA. CODE § 15-2B-14 (2012)	<p><b>DNA:</b> Court will grant petition for post-conviction DNA testing if defendant is convicted of a felony, currently incarcerated, identity was or should have been a significant issue in case, and the DNA testing results would raise a reasonable probability that the sentence or verdict would be more favorable.</p>	<p>State <i>ex rel.</i> Burdette v. Zakaib, 685 S.E.2d 903, 911 (W. Va. 2009): Defendant has an absolute right to ask for DNA testing but not absolute right for DNA testing conducted.</p>		
Wisconsin	<p>WIS. STAT. § 974.06 (2012)</p> <p>—</p> <p>WIS. STAT. § 974.07 (2012)</p>	<p><b>Post-conviction statute:</b> A convicted incarcerated person or probationer may move to set aside conviction even after time to appeal or time to request certain post-conviction remedies.</p> <p>—</p> <p><b>DNA:</b> Court will grant petition for post-conviction DNA testing if there is a reasonable probability that defendant would not have been prosecuted or convicted if DNA testing was available.</p>			

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State	Statute			Newly Discovered Evidence	Freestanding Claim of Actual Innocence
	Code	Nature	Court Treatment		
Wyoming	<p>WYO. STAT. ANN. § 7-12-303 (2012)</p> <p>—</p> <p>WYO. STAT. ANN. § 7-14-101(B) (2012)</p>	<p><b>DNA:</b> A person convicted of a felony offense may file a motion for post-conviction DNA testing if the person asserts particularized facts.</p> <p>—</p> <p><b>Post-conviction relief:</b> Defendant may obtain post-conviction relief if he was convicted of a felony, currently incarcerated, and the proceedings substantially denied his constitutional rights.</p>			<p>Cutbirth v. State, 751 P.2d 1257, 1285 (Wyo. 1988): <i>Schlup</i>-like approach; actual innocence may serve as gateway to assert an otherwise procedurally barred claim.</p>