

# Appeals

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*This chapter identifies three costly and persistent problems plaguing judicial review in state criminal cases: its failure to correct wrongful convictions, the absence of supervision of lower courts' handling of certain categories of issues of particular public concern, and unnecessary delay. Suggested reforms include steps to identify and remedy errors that research has shown evade correction, provide appellate vigilance of activity in the lower courts that too often escapes oversight, and reduce delay in appellate processes.*

## INTRODUCTION

Appellate courts develop and clarify much of the law that governs the actions of police, prosecutors, defense attorneys, and judges in criminal cases. They also enforce the law, correcting error and ensuring that trial judges and other actors adhere to legislative and constitutional commands.<sup>1</sup> This chapter examines steps to improve performance of these two key functions, while more efficiently managing caseloads to save resources.<sup>2</sup>

### I. REVIEW OF CRIMINAL CASES TODAY

Any reform proposal must rest on a sound understanding of the subject of that reform, so this introductory section summarizes the key features of appellate review in criminal cases in the states. The most common structure for reviewing noncapital<sup>3</sup> criminal judgments includes an intermediate appellate

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1. See generally Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459 (2009).

2. Federal cases make up only a very small percentage of criminal cases nationwide, hence the focus on state appeals.

3. This chapter targets reforms for non-capital cases only. Judicial review for capital cases raises separate issues, and warrants more attention than this summary treatment can provide. For more on these issues, see CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 117–53, 202–05 (2016). See also Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

court in which a convicted defendant is entitled to seek direct appeal,<sup>4</sup> a court of last resort with the discretion to review decisions of the intermediate court, and one or more post-conviction remedies, usually initiated in the trial court. Generally, direct appeal is limited to claims based on the trial court record, and post-conviction review to claims that could not have been raised on direct appeal, either because they rely upon proof that was not in the record, or a new rule announced after appeal was complete.

The volume of criminal appeals is significant, making up roughly 30% to 40% of appellate caseloads,<sup>5</sup> even though only a fraction of the more than 1 million felony and more than 3 million misdemeanor convictions imposed each year in state courts are appealed.<sup>6</sup> A nationwide study of state criminal appeals decided in 2010 estimated that about 50,000 cases reach intermediate appellate courts each year, with another 19,000 filings in courts of last resort. The government sought review of the trial-court decision in about 7% of the intermediate court appeals; about 4% of court-of-last-resort cases were appeals by the government.<sup>7</sup> State criminal judgments appealed tend to be those with longer sentences; fewer than 10% are misdemeanors.<sup>8</sup> Post-conviction review, typically limited to those still in custody after direct appeal, is even more out of reach for defendants with shorter sentences.<sup>9</sup> More than half of those convicted of felonies in state courts are sentenced to probation or short jail terms; those

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4. Dozens of states created intermediate courts in the past several decades. See Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 285 (1989); Roger A. Hanson, *American State Appellate Court Technology Diffusion*, 7 J. APP. PRAC. & PROCESS 259, 262 (2005) (in 1957 only 13 states had intermediate appellate courts). Nevada opened its intermediate court in 2015. See ANNUAL REPORT OF THE NEVADA JUDICIARY, FISCAL YEAR 2016, at 26 (2016), [http://nvcourts.gov/Supreme/Reports/Annual\\_Reports/2016\\_Annual\\_Report/](http://nvcourts.gov/Supreme/Reports/Annual_Reports/2016_Annual_Report/).

5. COURT STATISTICS PROJECT, <http://www.courtstatistics.org/> (last visited Apr. 7, 2017).

6. *Id.*; SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (rev. Nov. 2010).

7. NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL APPEALS IN STATE COURTS 4–5 (2015).

8. *Id.* In many states, the only review of misdemeanor convictions is in the felony trial court. In some states that do provide a right to appellate review for misdemeanor cases, a single judge rather than a panel decides those appeals. See, e.g., NAT'L CTR. FOR STATE COURTS, REVIEW OF CASEFLOW IN THE WISCONSIN COURT OF APPEALS FINAL REPORT 3 (Oct. 2001). For a discussion of the issues raised by misdemeanors, see Alexandra Natapoff, "Misdemeanors," in Volume 1 of the present Report.

9. Thomas M. Place, *Commonwealth v. Holmes and the Rule of Deferral: Short Sentences, Long Sentences and the Illusory Nature of the Good Cause Exception*, 25 WIDENER L.J. 49, 52 n. 21 (2016); Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2449 (2013).

sentenced to prison serve an average of just over three years,<sup>10</sup> barely long enough to complete the full appeal process.

The rate of appeal is particularly low among those defendants who plead guilty. Plea agreements may include terms waiving any right to challenge the plea and sentence,<sup>11</sup> and guilty pleas generally forfeit the right to appeal a conviction based on errors preceding the plea.<sup>12</sup> Judicial review varies among states in significant ways, including which claims and cases may be appealed and when review is waived. Some states permit challenges to the validity of a plea only by motion to withdraw the plea or a post-conviction petition.<sup>13</sup> In Michigan, courts have discretion not to hear any appeal in a guilty-plea case,<sup>14</sup> while California bars appeals after guilty pleas unless the trial judge certifies there is an issue “not clearly frivolous and vexatious.”<sup>15</sup> Even when a defendant is allowed to challenge his plea-based conviction in court, negotiated resolutions are rarely reviewed. A defendant risks a worse outcome if the plea is vacated and the prosecutor refuses to offer the same concessions.<sup>16</sup> Even states that allow limited plea challenges often disallow any review of sentences negotiated by agreement. Consequently, those defendants who do seek judicial review after pleading guilty commonly contest only non-negotiated sentences. This dynamic, along with the development of new sentencing law and procedure that is enforceable on appeal, may help to explain why nearly a third of appeals-of-right include a challenge to the sentence.<sup>17</sup>

Most defendants’ criminal appeals do not receive anything close to the “full judicial treatment.”<sup>18</sup> Facing continuing caseload growth and restricted resources, unable to expand the number of judgeships or to impose economic

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10. ROSENMERKEL ET AL., *supra* note 6, at 5 tbl. 1.2.1, 6 tbl. 1.3; *see also* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, AGING OF THE STATE PRISON POPULATION, 1993-2013 (2016).

11. *See generally* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c) (4th ed. 2016).

12. *See generally id.* § 21.5(b).

13. *E.g.*, *People v. Edwards*, 197 Ill. 2d 239, 275-76 (2001) (“The defendant who pleads guilty has given up his right to appeal unless he has grounds to withdraw his plea.”); LAFAVE ET AL., *supra* note 11, § 27.1(a).

14. *Halbert v. Michigan*, 545 U.S. 605, 613 (2005).

15. CAL. PENAL CODE § 1237.5; CAL. RULES OF COURT 8.304(b).

16. LAFAVE ET AL., *supra* note 11, at § 13.7(c) (noting courts have denied vindictive charging claims raised by defendants charged with more serious crimes after an appeal when the prosecutor advances a non-vindictive basis).

17. Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 71 VAND. L. REV. (forthcoming 2017).

18. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 16 (2d ed. 1989).

deterrents to discourage meritless criminal appeals,<sup>19</sup> state courts have concluded that most criminal cases warrant less judicial time.<sup>20</sup> Cases chosen for curtailed review receive abbreviated or no oral argument, an unpublished summary decision instead of a published opinion, and adjudication primarily by staff supervised by judges rather than by judges themselves. Called “the most radical answer to caseload growth,” in 1989,<sup>21</sup> such summary consideration is now routine practice.<sup>22</sup> More than 80% of the criminal cases that are entitled to review are decided without oral argument, and more than half of all criminal appellate decisions lack a full, memorandum, or per curiam opinion.<sup>23</sup> Law clerks and staff attorneys perform much of the work,<sup>24</sup> a practice critics claim undermines the “thoughtful consideration of the merits of the case by a multi-judge panel,”<sup>25</sup> and shifts judicial responsibilities to those not appointed or elected to perform them.<sup>26</sup>

When defendants appeal, only 15% of appeals-of-right and only 2.8% of discretionary appeals resulted in any reversal, modification, or remand of a lower-court decision.<sup>27</sup> The large percentage of meritless defense appeals reflects the absence of any financial incentive for indigent criminal defendants<sup>28</sup>

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19. William F. Rylaarsdam, *The Crisis of Volume in California's Appellate Courts: A Reaction to Justice in The Balance 2020 and a Proposal to Reduce the Number of Nonmeritorious Appeals*, 32 *LOY. L.A. L. REV.* 63, 64–76 (1998).

20. See, e.g., ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, *APPELLATE COURT PERFORMANCE STANDARDS* 17–18 (1995); AM. BAR ASS'N, *STANDARDS RELATING TO APPELLATE COURTS* § 3.36(b) cmt. at 65 (1995).

21. Marvell, *supra* note 4, at 290.

22. COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, *THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE* 15 (2012) (hereinafter CCJSCA) (describing summary calendar for criminal cases in New Mexico: a single judge approves a memo with a recommended calendar assignment prepared without transcript or oral argument by a staff attorney who reviews a ‘docketing statement’ filed by counsel that outlines the facts, issues, and relevant authority).

23. Heise et al., *supra* note 17, tbl. 3; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *SURVEY OF STATE COURT CRIMINAL APPEALS, 2010: CODEBOOK* 38–39 (2015), available at <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/36465?q=36465>.

24. See generally COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, *COMPARATIVE ATTRIBUTES OF LEGAL STAFF IN INTERMEDIATE APPELLATE COURTS* (2011); CCJSCA, *supra* note 22, at 18–19 (describing per curiam dockets for criminal cases).

25. AM. BAR ASS'N, *supra* note 20, §§ 3.10, 3.19; HANSON, *supra* note 20, at 1–2.

26. STERN, *supra* note 18, at 17–18.

27. Heise et al., *supra* note 17, tbl. 3 (also reporting decisions favorable to the defense in 45% of the defense-appealed cases granted review by courts of last resort).

28. State-paid attorneys outnumber appellants with privately retained attorneys in state criminal appeals ten to one. *Id.*

to forgo bringing losing appeals.<sup>29</sup> Some portion of the low relief rate may also reflect barriers to success for what would otherwise be meritorious claims. For example, inattentive or inexperienced trial counsel too often squander a defendant's chance of appellate and post-conviction relief for valid claims of trial-court error by failing to raise those claims when the error occurs.

Appellate review also is essential to enforce the law when errors in lower-court proceedings disfavor the state. When the state is the appellant, appellate courts at both levels reverse lower-court decisions at a rate much higher than when defendants appeal.<sup>30</sup>

## II. ROOM FOR IMPROVEMENT

### A. GAPS IN ERROR CORRECTION

Until recently, it was difficult to confirm or deny arguments that appeals were not working and that prejudicial errors were evading correction by judicial review. Then came DNA analysis, exposing how badly courts performed in cases of wrongful conviction, leaving actual perpetrators unpunished and innocents locked away. Professor Brandon Garrett studied hundreds of exonerated noncapital defendants who, before securing their DNA proof, had challenged their flawed convictions in court.<sup>31</sup> He found that courts provided no help to 90% of them. Because these defendants obtained DNA proof only after courts had reviewed their convictions, their experience is similar to that of innocent defendants who have no exonerating DNA evidence to support their innocence claims.<sup>32</sup> Garrett also investigated *why* the judicial system failed to correct its own mistakes. Error-correction by reviewing courts in these cases was hindered by three conditions, two of which are not limited to cases of wrongful conviction.

First, for those who were able to file challenges to their convictions, the deferential legal standards courts used to review trial-court decisions defeated their efforts. Even if a defendant can prove an error occurred, the court may

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29. See, e.g., AM. BAR ASS'N, *supra* note 20, § 3.20 cmt. at 49 (“an indigent client, unlike one who must pay counsel, has no economic incentive to bring the litigation to rest” and “may feel unjustly treated unless all possibilities of appellate review have been pursued”).

30. Waters et al., *supra* note 7, at 5 (reporting states' attorneys succeeded in 38% of their appeals).

31. See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 178-212 (2011); see also J. B. GOULD ET AL., *PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE* 22 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf>.

32. Estimates of wrongful convictions in noncapital cases range from 1 to 5%. See, e.g., Marvin Zalman, *Measuring Wrongful Convictions*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 3047-58 (Gerben Bruinsma & David Weisburd eds., 2014).

ignore that error if it decides the error could not have affected the outcome. Relief for errors overlooked by counsel in the trial court is even more difficult to secure. Such forfeited claims may not be reviewed at all, or require the defendant to establish that but for the error he would not have been convicted. Garrett found that courts granted relief for only 7% or 8% of the challenges to faulty eyewitness testimony, false confessions, and ineffective assistance of counsel raised by the innocent defendants in his study.<sup>33</sup> Judges often recognized errors but considered them “harmless” or lacking “prejudice” when they found other evidence of guilt convincing.<sup>34</sup> Not one of these innocent defendants was able to convince a reviewing court that the evidence presented to the fact-finder was insufficient to find guilt.<sup>35</sup>

Second, many of those wrongfully convicted were unable to challenge the particular errors that occurred in their cases. The reasons why impact criminal defendants generally, not just those wrongfully convicted. The normal mechanisms for judicial review do not work well for procedural errors often associated with wrongful convictions such as claims of ineffective assistance of counsel, juror misconduct, or the state’s failure to disclose or preserve exculpatory evidence.<sup>36</sup> Evidence needed to prove these errors is rarely in the trial-court record. Without the ability to introduce new evidence on direct appeal, these “non-record” claims fail.<sup>37</sup> New trial motions do allow the introduction of new evidence, but are not adequate substitutes for appeal. Trial attorneys cannot challenge their own competency, and proof of misconduct by jurors or prosecutors usually is not available in time for such a motion. Moreover, a new trial motion requires the defendant to convince the trial judge that the evidence could not have been discovered earlier and that retrial would probably end in acquittal, a very high bar.<sup>38</sup> That leaves state and federal post-conviction review as the only routes to relief for these non-record claims. Garrett found

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33. GARRETT, *supra* note 31, at 185, 203. For further discussion of these errors, see Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report; Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report; and Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

34. GARRETT, *supra* note 31, at 200–202, 206–07.

35. *Id.* at 204.

36. For a discussion of evidentiary disclosure, see Darryl K. Brown, “Discovery,” in the present Volume.

37. See generally Jeffery C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016 (2013); Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 614 (2009).

38. Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 218 (Allison D. Redlich et al. eds., 2014).

that inaccessibility,<sup>39</sup> procedural requirements,<sup>40</sup> reluctance to appoint counsel or grant evidentiary hearings,<sup>41</sup> and daunting standards of review combined to make post-conviction review a dead end for the innocent defendants in his study.<sup>42</sup> The incapacity of judicial review to recognize or remedy valid claims of non-record error in wrongful-conviction cases suggests that the very same errors are escaping correction in other cases as well.

Judicial review also failed the innocent because some of those convicted of crimes they did not commit could point to no flaw in the proceedings that led to their convictions, even though new evidence supported their innocence. A recurring example is a defendant armed with new science showing that the forensic evidence at trial was actually unreliable, but no rule barred admission of that evidence at the time.<sup>43</sup> According to existing Supreme Court precedent, a state does not violate the Constitution by punishing a defendant convicted through legal procedures, even if later evidence proves he is innocent.<sup>44</sup> Unless and until a convincing showing of innocence itself is an independent basis for relief, judicial review will be worthless for some of those convicted for crimes they did not commit.

States have a responsibility to do more to reduce the human and financial toll of these mistaken convictions. In taxpayer dollars alone, the problem is enormous, including compensation paid to wrongfully convicted inmates, judgments or settlements from civil-rights lawsuits, as well as the cost of prison

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39. See *supra* text accompanying notes 11-12.

40. About half of the cases filed by noncapital prisoners in federal habeas proceedings, and an unknown proportion of those in state post-conviction proceedings, are dismissed without merits review. NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES AND THE FUTURE OF THE GREAT WRIT* 78 (2011) (reporting results of nationwide study of habeas litigation in district courts).

41. King, *supra* note 9, at 2442-46 (documenting low rate of counsel and hearings in state post-conviction proceedings).

42. In post-conviction review, relief rates appear to be even lower than on appeal. See King, *supra* note 9, at 2447-48 (estimating relief rates in five states ranging from 1 to 16%). While only about 5% of appeals-of-right involved a *pro se* defendant, Heise et al., *supra* note 17, tbl. 3; in many states most defendants seeking post-conviction relief have no counsel. King, *supra* note 9, at 2442-45. A state prisoner who is still in custody may seek habeas corpus relief for constitutional claims in federal court once state review is complete, but as a means to correct error in noncapital state criminal cases, federal habeas is largely irrelevant. An even smaller proportion of defendants ever file, typically those serving the most serious sentences, and of those an even smaller percentage receive merits review. The estimated relief rate for noncapital petitioners is less than 1%. KING & HOFFMANN, *supra* note 40, at 36.

43. King, *supra* note 38, at 224. See generally Erin Murphy, "Forensic Evidence," in the present Volume.

44. See generally LAFAYETTE ET AL., *supra* note 11, § 28.3(e).

housing, and prolonged trials and appeals. A study released in 2016 estimated that for 692 exonerated defendants in California, these expenses cost taxpayers \$282 million.<sup>45</sup> In Illinois, a 2011 study found that 85 wrongful convictions in that state had cost taxpayers more than \$214 million.<sup>46</sup> These cases also have a devastating impact on the families of the innocent men and women behind bars. Victims and the public pay a price, too, when the real culprits remain at large.<sup>47</sup> While the priority must be steps to prevent wrongful convictions,<sup>48</sup> better efforts to correct them are essential as well.

### B. GAPS IN LAW DEVELOPMENT

In addition to the troubling shortcomings described above, there is an increasing mismatch between the law developed and enforced by reviewing courts and the activity in the trial courts. Two areas demand more attention than they are receiving in appellate courts today.

First, the law regulating plea bargaining, “the means by which most criminal convictions are obtained,”<sup>49</sup> is presently underdeveloped.<sup>50</sup> Unsettled issues affecting bargained cases seldom reach reviewing courts. Recently, the Supreme Court has invited more judicial oversight of this most central part of the criminal justice process by recognizing that incompetent defense representation that leads to the loss of a favorable plea deal denies a defendant the constitutional right to effective assistance of counsel.<sup>51</sup> Yet in many jurisdictions, trial judges provide little supervision over bargaining; appellate courts even less.<sup>52</sup>

45. Tom Jackman, *Wrongful Convictions Cost California Taxpayers \$282 Million over 24 Years, Study Finds*, WASH. POST (March 14, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/03/14/wrongful-convictions-cost-california-taxpayers-282-million-over-24-years-study-finds/?utm\\_term=.7ee22871722c](https://www.washingtonpost.com/news/true-crime/wp/2016/03/14/wrongful-convictions-cost-california-taxpayers-282-million-over-24-years-study-finds/?utm_term=.7ee22871722c).

46. John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTERGOV.ORG (June 18, 2011), <http://www.bettergov.org/news/special-investigation-the-high-costs-of-wrongful-convictions>.

47. *Id.* (noting the real perpetrators in the studied cases committed nearly 100 felonies); Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031 (2015) (citing study of the impact of wrongful convictions on victims funded by the U.S. Department of Justice finding that crime victims in wrongful conviction cases reported feeling guilty for the additional crimes the actual offender was able to commit while free).

48. See Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

49. *Missouri v. Frye*, 566 U.S. 133, 153–55 (2012) (Scalia, J., dissenting).

50. See generally Jenia I. Turner, “Plea Bargaining,” in the present Volume.

51. *Frye*, 566 U.S. at 148–49.

52. See *supra* text accompanying notes 11–17. For a recent study of judicial involvement in plea negotiations, see Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

Second, because double jeopardy principles bar the state from prosecuting a defendant for a crime once acquitted, the government's opportunity to seek clarification of some issues on appeal can be limited.<sup>53</sup> Erroneous interpretations of the scope of an offense and faulty jury instructions, for example, are trial-court errors that may lead to acquittal. When writs of mandamus are not available to prosecutors to correct such error, the limits on government appeals create uncertainty and allow "trial courts to avoid accountability."<sup>54</sup>

### C. DELAY

Because disposition time has proven to be relatively simple for appellate courts to track, most states are actively investigating ways to get appellate delay under control.<sup>55</sup> Yet even after decades of combatting delay in the review process, one quarter of criminal appeals filed in state intermediate courts take more than a year and a half to resolve, and review in most criminal appeals accepted by courts of last resort takes even longer, with 5% of those cases taking many years.<sup>56</sup> Prolonged delay in resolving criminal appeals is unacceptable. It harms successful appellants for whom relief is postponed, risks the loss of evidence needed for retrials, and can undermine rehabilitation and deterrence.<sup>57</sup>

## III. POTENTIAL REFORMS

Because state courts differ in fundamental ways, a one-size reform agenda won't fit all. What follows are alternatives that could prove useful for states looking for ways to address some of the shortcomings catalogued above.<sup>58</sup>

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53. See generally Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1 (2008).

54. *Id.* at 8–9; see also *id.* at 51–52 (“[i]f the trial court takes action that leads to a jury acquittal or the entry of a judgment of acquittal by the court, ... [or] grants a mistrial, the government may have no recourse”; “issues arising in connection with jury instructions and pro-defendant evidence rulings are frequently beyond the reach of government appeal”).

55. JOHN P. DOERNER, NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE APPELLATE COURTS 4 (2014).

56. See generally NICOLE L. WATERS & KATHRYN J. GENTHON, NAT'L CTR. FOR STATE COURTS, CASELOAD HIGHLIGHTS: ACHIEVING TIMELY RESOLUTION FOR CRIMINAL APPEALS IN STATE COURTS (2016); Waters et al., *supra* note 7, at 7–8.

57. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

58. Other issues affecting the review of criminal cases deserve more attention than this brief overview can provide. They include the potential recognition of a federal constitutional right to appellate or post-conviction review, attacks on judicial independence, lack of diversity on the bench, the scope of interlocutory appeals, the content of harmless error, plain error, and retroactivity rules, the appropriate role of unpublished decisions, and the use of perceptions of fairness and legitimacy as performance measures.

Examined first are steps to more efficiently allocate scarce appellate resources with error correction in mind, followed by reforms to improve the review of non-record and innocence claims and provide more judicial oversight of bargaining. Ideally, any reform would include data collection so that policymakers and courts could measure whether the change is accomplishing its intended goals.

### A. INCREASING EFFICIENCY

Several states have found the following steps can free up time and resources for more effective review of convictions.

**1. Eliminating duplicate mandatory review.** Some states require the court of last resort to review certain cases already reviewed by an intermediate court, such as cases with a dissenting opinion or involving serious felonies.<sup>59</sup> These provisions are low-hanging fruit for reformers interested in reducing caseloads in courts of last resort. A single appeal-of-right plus the opportunity for the state's high court to exercise review in its discretion (or, as in Florida, the discretion of the court of appeals to certify review) is sufficient.<sup>60</sup>

**2. E-filing and e-records,** two technology-driven changes, have brought significant savings to many states. Thirty-three state appellate courts had adopted e-filing by 2014.<sup>61</sup> For a state yet to switch over, the initial outlay is well worth the cost, given the savings achieved.<sup>62</sup> The filing of the trial-court record still takes many months in most states.<sup>63</sup> To address this, several states

59. See AM. BAR ASS'N, *supra* note 20, § 3.10 cmt. at 20; STERN, *supra* note 18, at 30, 57, 142.

60. Florida's 1980 constitutional amendment requiring intermediate court certification to the Supreme Court reportedly cut the number of cases appealed to the Supreme Court in half. STERN, *supra* note 18, at 39.

61. DAVID SCHANKER & TIMOTHY A. GUDAS, E-FILING IN STATE APPELLATE COURTS: AN UPDATED APPRAISAL 2 (Sept. 2014), <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/appellate/id/1036>; *Status of State Court E-Filing January 2016*, NAT'L CTR. FOR STATE COURTS (Jan. 26, 2016), <https://courtechbulletin.blogspot.com/2016/01/status-of-state-court-e-filing-january.html>; Eric J. Magnuson & Samuel A. Thumma, *Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future*, 15 J. APP. PRAC. & PROCESS 111, 114 (2014). For federal experience, see generally Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386 (2014); and WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013).

62. CCJSCA, *supra* note 22, at 20–21.

63. Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467, 487–88 (2002) (reporting only one of six courts studied had a notice-to-record average of less than two months); MINN. JUDICIAL BRANCH, MINNESOTA COURTS PERFORMANCE MEASURES KEY RESULTS AND MEASURES, ANNUAL REPORT 31 (2014) (noting delays in criminal appeals caused by court reporters' need for more time to prepare transcripts).

have implemented automated transcript-management systems and eliminated traditional court reporters statewide.<sup>64</sup> For example, Utah's recent switch from decentralized digital transcript production to a statewide system slashed transcript delivery time from an average of 138 days to 22 days for cases on appeal, and saved approximately \$1,350,000.<sup>65</sup>

**3. Separate review for appeals challenging sentencing alone.** The proportion of cases in which prosecutors or defendants challenge sentences has grown along with rules that restrict the sentencing discretion of trial judges. One promising reform adopted already in some state appellate courts is a "sentencing calendar" to provide expedited review of these sentence-only appeals.<sup>66</sup> In these cases, legal issues are more likely to be settled, and claims "can be resolved based on a review of a limited record typically just the judgment of conviction, presentence investigation report, and sentencing hearing transcript that can be prepared on an expedited basis."<sup>67</sup> In addition to these cost-saving efficiencies, separate calendars may allow courts to achieve greater consistency in reviewing criminal sentences.<sup>68</sup> A separate track in the existing court is better than a separate court for sentence-only appeals, for many of the same reasons that have persuaded all but a handful of states to reject separate appeals courts

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64. CCJSCA, *supra* note 22, at 20. These systems often use certified transcribers to finalize official transcripts. See LEE SUSKIN, JAMES McMILLAN & DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, MAKING THE RECORD UTILIZING DIGITAL ELECTRONIC RECORDING (2013), <http://www.ncsc.org/Services-and-Experts/Court-reengineering/~media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx>; *Technology Widespread*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Technology-Widespread.aspx> (last visited Apr. 6, 2017); *Marion County (Indianapolis) Courts Launch Web-Based Transcript System*, NAT'L CTR. FOR STATE COURTS (Mar. 16, 2016), <https://courtechbulletin.blogspot.com/2016/03/this-and-that-in-court-technology-march.html> (describing transcript ordering by attorneys through a secure web portal).

65. DANIEL J. BECKER, NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2012: REENGINEERING: UTAH'S EXPERIENCE IN CENTRALIZING TRANSCRIPT MANAGEMENT 96 (2012), [http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/ReengineeringUtahsExperience\\_Becker.ashx](http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/ReengineeringUtahsExperience_Becker.ashx).

66. CCJSCA, *supra* note 22, at 18. See, e.g., *Superior Court, Appellate Division*, NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/appdiv/> (last visited Apr. 6, 2017) (describing "Sentencing Calendars"). Several federal courts of appeals route sentencing-only appeals to a non-argument track. See generally Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013).

67. CCJSCA, *supra* note 22, at 18.

68. *Id.*

for criminal cases.<sup>69</sup> Although several states have established a special forum for sentencing appeals, they have limited that review to only some sentences or sentencing challenges.<sup>70</sup> Any fair and efficient sentencing appeal mechanism should include the authority to review *all* noncapital sentences and sentencing claims raised by either party that would otherwise be subject to appellate review.

**4. Making oral argument count.** Rather than deny oral argument in even more cases, some states have compromised by modifying the oral-argument process. Informal “focus memos” or “focus letters” from the parties, answering questions from the court, provide better information for judges and litigants without the time and expense of more-formal special briefing.<sup>71</sup> Another interesting practice is to provide a tentative opinion to the parties *before* the oral-argument phase. This process reportedly improves the usefulness and efficiency of argument when requested.<sup>72</sup> One Arizona court has embraced this technique for years. After an informal conference, one judge of the panel prepares a draft decision, then provides it to the parties. The judges of this court tout its advantages, and almost all (97%) of litigants surveyed about the practice

69. Separate courts for criminal cases generally exist in only five states; two have separate courts of last resort for criminal cases, and three have separate intermediate appellate courts. For commentary, see generally Ed Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008); Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005); STEIKER & STEIKER, *COURTING DEATH*, *supra* note 3, at 132–33; STERN, *supra* note 18, at 27, 54–56 (collecting authority); AM. BAR ASS'N, *supra* note 20, at § 3.01 cmt. at 13.

70. See *State v. Rickman*, 183 P.3d 49, 51–52 (Mont. 2008) (Sentence Review Division considers the inequity and disparity of the sentence, while the Supreme Court reviews other legal challenges to the sentence or the sentencing process); *Commonwealth v. Barros*, 460 Mass. 1015, 1016 (2011) (review by appellate division of superior court is limited to review of a sentence within the range set by statute for the offense of conviction and is otherwise lawful); CONN. GEN. STAT. ANN. § 51-195 (review by the Sentence Review Division of the Superior Court limited to sentences of at least three years' incarceration). Other states have three-judge panels that may modify sentences. See *Morrison v. State*, 7 P.3d 955 (Alaska Ct. App. 2000); *Benefield v. State ex rel. Baker*, 276 Ga. 100 (2003) (review confined to death sentences or those involving a serious violent felony); *Resper v. State*, 354 Md. 611 (1999); N.H. REV. STAT. ANN. § 651:67.

71. Martin J. Siegel, *Let's Revamp the Appellate Rules Too*, 42 LITIGATION 1, 5 (2016), [http://www.americanbar.org/content/dam/aba/publications/litigation\\_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/litigation_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf) (noting use of “focus orders” in Florida and suggesting experimentation with emailed requests); Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159, 159 (2013) (discussing pre-argument focus letters as well as “oral tentative” opinions).

72. Stein, *supra* note 71; *Innovations by Stage—Preparing the Opinion/Decision*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Preparing-the-Opinion.aspx> (last visited Apr. 6, 2017) (noting that proposed decisions are generally prepared in advance of oral argument in New York Appellate Division, Second Judicial Department).

agreed that it “assists counsel’s preparation for and conduct of the argument.” Another appellate court in California does something similar—before deciding whether to request or waive oral argument, counsel receive a tentative opinion, along with information about whether the other judges concur.<sup>73</sup> In response to critics’ objections to this technique,<sup>74</sup> one judge explained that the court works to preserve collegiality and guard against confirmation bias, and that the practice created no additional work for the court, but “merely move[d] the opinion-producing work and consultation to a point earlier in the process.”<sup>75</sup> Finally, many states have turned to video conferencing<sup>76</sup> to preserve the opportunity to discuss cases with attorneys without spending the time and resources that travel to the argument would entail.

**5. Improving screening and review of conviction challenges.** Some measures that could significantly reduce the cost of reviewing criminal cases changing the right to appeal into an opportunity to apply for leave to appeal, for example can significantly undermine the goal of improving error-correction. Some have argued that discretionary review can provide all the entitlements of an appeal-of-right,<sup>77</sup> but most states have chosen appropriately not to take this step.<sup>78</sup> Almost all appeals-of-right presently receive merits review; almost all discretionary appeals do not. In Virginia, the only state where all criminal appeals are discretionary, only 15% of criminal cases appealed to the court of

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73. See generally Clark Collings, *Oral Argument Reform in Utah’s Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification*, 2013 UTAH L. REV. ONLAW 174 (2013) (describing Arizona and California practice); Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194 (2014) (noting several courts that circulate internally tentative opinions before argument, claiming that “releasing a tentative opinion at least makes the process transparent and gives the party on the losing side of the tentative ruling a fair shot of pointing out the deficiencies and the adverse implications of the preliminary decision”).

74. Susan L. Kelsey, *Improving Appellate Oral Arguments Through Tentative Opinions and Focus Orders*, 88 FLA. BAR J. 28 (2014) (listing as objections negative impact on collegiality if only one judge prepares the “tentative,” that is consumes additional judicial time, that judges would be unreceptive to changes, that an insufficiently polished draft opinion would reflect badly on the court, that judges would forget the case in the interval between drafting the opinion and oral argument).

75. *Id.*

76. In 2015, Kansas and Colorado joined a number of states already holding videoconferenced oral arguments. See *Other Appellate Court Innovations*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Other-Innovations.aspx> (last visited Apr. 6, 2017); see also Siegel, *supra* note 71, at 30.

77. Bernard G. Barrow, *The Discretionary Appeal: A Cost Effective Tool of Appellate Justice*, 11 GEORGE MASON U. L. REV. 31 (1988); see also Rylaarsdam, *supra* note 19, at 82–84 (arguing “defendants should be required to obtain a certificate of probable cause from the trial court before being permitted to file any appeal in a criminal or juvenile proceeding”).

78. Indeed, New Hampshire and West Virginia recently moved in the opposite direction, replacing discretionary review with of-right review.

appeals are reviewed on the merits.<sup>79</sup> Rather than eliminate the right to review for entire categories of cases, a better approach is to improve screening mechanisms that separate the potentially meritorious from the meritless appeals.

One alternative is defense-counsel screening, authorized by a line of cases beginning with *Anders v. California*.<sup>80</sup> Under the Court's precedent, an attorney who believes there are no meritorious issues for appeal may file a motion to withdraw from representation, and a brief discussing each potential issue. After affording the client a chance to respond, the court must make a "full examination of all the proceedings, to decide whether the case is wholly frivolous." California's version of this procedure requires the attorney to file a "*Wende* brief," but does not require the attorney to state his opinion that the issues are meritless, nor file a motion to withdraw.<sup>81</sup> Critics argue these approaches are not sufficiently protective of the defendant's right to appeal. But they are probably better than the summary staff screening that normally accompanies discretionary review. An alternative criticism is that these procedures require too much time from counsel and courts, "divert[ing] attention from meritorious appeals."<sup>82</sup> Little research has tested this. We do know that approximately 11% of state defendants' appeals-of-right in 2010 included a no-merits statement or brief, and that in these cases oral argument is rare (4% of cases compared to 21% of non-*Anders/Wende* cases).<sup>83</sup> Additional sources suggest that the "full examination" of the case is commonly assigned to staff attorneys.<sup>84</sup>

For the large proportion of criminal cases screened by staff, fostering subject-specific expertise among staff attorneys, lengthening their terms of service, and taking steps to ensure they are not discouraged from sending non-argument cases to the argument calendar, are all steps that could improve the quality of screening.<sup>85</sup> Review could also be improved if those evaluating claims learned more about wrongful convictions. Harmless error, plain error, and sufficiency review doctrines that have contributed to the futility of judicial review for the wrongfully convicted are unlikely to be modified anytime soon,

79. Statistic derived from SURVEY OF STATE COURT CRIMINAL APPEALS, *supra* note 23.

80. 386 U.S. 738, 744–45 (1967).

81. See *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

82. *Id.* at 282 n.13 (observing that "to the extent this criticism has merit, our holding today that the *Anders* procedure is not exclusive will enable States to continue to experiment with solutions to this problem").

83. Heise et al., *supra* note 17, tbl. 3A.

84. Hoffman & Mahoney, *supra* note 63, at 482 n.23; see also *Smith v. Robbins*, 528 U.S. 259, 299 (2000) (Souter, J., dissenting, joined by Stevens, Ginsberg, and Breyer, JJ.) (bemoaning the delegation of *Anders* review of issues to staff attorneys).

85. Levy, *supra* note 66, at 415–20; see also Levy, *supra* note 61, at 2410 n.128 (noting some staff attorneys could specialize in sentencing).

but perhaps courts could apply those doctrines more knowledgeably and make fewer mistakes when assessing the conclusiveness of proof.<sup>86</sup> Professor Keith Findley has urged, for example, closer review of cases with “evidence that is associated with wrongful convictions, and about which juror intuition is often wrong, such as eyewitness identifications, confessions, informant testimony, and forensic science evidence.”<sup>87</sup>

### B. STEPS TO NARROW THE ERROR CORRECTION GAP

This section reviews proposals to increase the capacity of courts to remedy those errors that research has shown repeatedly evade correction and contribute to the costs of wrongful conviction.

#### 1. Provide a more accessible forum for litigating non-record claims.

Accelerating the timing of post-conviction review of non-record claims prior to the completion of direct appeal is one way to ensure that indigent defendants sentenced to average terms of incarceration have the opportunity to raise these claims, with the assistance of counsel.<sup>88</sup> One variant of this approach is practiced in Wisconsin, where a defendant, represented by new counsel, may file a motion for post-conviction review before filing a notice of appeal.<sup>89</sup> Another variation exists

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86. Findley, *supra* note 37, at 633. See generally Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ L. REV. 639 (2009).

87. Findley, *supra* note 37, at 633; see also Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; Garrett, *supra* note 48; Leo, *supra* note 33; Murphy, *supra* note 43; Wells, *supra* note 33.

88. Proposals for “unitary review” procedures were advanced even before the Supreme Court recognized a basis for several of the non-record claims commonly reserved for post-conviction review today, including claims of ineffective assistance of trial counsel. See generally Nejelski & Emory, *Unified Appeal in State Criminal Cases*, 7 RUT.-CAM. L.J. 484 (1976). Several states have adopted unitary review for capital cases. E.g., COLO. REV. STAT. ANN. § 16-12-201 *et seq.*; Fairchild v. Trammell, 784 F.3d 702, 721 (10th Cir. 2015).

89. See *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014) (“Wisconsin law expressly allows—indeed, in most cases requires—defendants to raise claims of ineffective assistance of trial counsel as part of a consolidated and counseled direct appeal, and provides an opportunity to develop an expanded record”); NAT’L CTR. FOR STATE COURTS, *supra* note 8, fig. 2.

in Oklahoma.<sup>90</sup> In 2013, Pennsylvania courts authorized review of non-record-based claims of ineffective assistance of trial counsel along with record-based claims upon “good cause shown,” but no provision has been made to appoint counsel, and defendants waive their right to later post-conviction review.<sup>91</sup>

Professor Eve Primus has argued that review for ineffective-assistance-of-counsel claims before the completion of appeal allows more defendants to raise such claims, ensures the assistance of counsel that would likely not be provided were the claim postponed until post-conviction, and produces fewer meritless appeals.<sup>92</sup> Those opposed to moving the adjudication of ineffective assistance or other non-record claims earlier have expressed concerns that it would further strain indigent-defense resources, increase the number of post-conviction cases filed without a corresponding increase in meritorious findings, and lengthen judicial review overall.<sup>93</sup> Any claim based on evidence discovered later, or raising ineffective assistance by appellate counsel, for example, could require a second post-conviction proceeding. Very little research tests these competing predictions. Findley, a proponent of the Wisconsin approach, examined a random sample of convictions from that state and found that defendants who sought post-conviction review initially had more success than those who appealed without seeking post-conviction review, and that at least some of those who lost at the post-conviction review stage declined to file an appeal.<sup>94</sup>

**2. Establish statewide appellate offices.** Appellate attorneys from statewide offices have important advantages over more-local advocates. Statewide offices allow the development of expertise in selecting, briefing, and

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90. Oklahoma’s process has been described as follows: an application to the Court of Appeals “must be accompanied by ‘affidavits setting out those items alleged to constitute ineffective assistance of trial counsel’ [and] affidavits showing that the claims of ineffectiveness could not have been raised in the direct appeal .... [T]he application and affidavits must contain sufficient information to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective.... If the Court of Criminal Appeals determines that this burden is met, it will remand the matter to the trial court for an evidentiary hearing, and direct the trial court to make findings of fact and conclusions of law solely on the issues and evidence raised in the application ... within 30 days from the date of remand ....” 6 OKLA. PRAC.: APPELLATE PRACTICE § 25:49 (2016).

91. See generally Place, *supra* note 9 (describing process and advocating amendments).

92. See generally Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

93. E.g., Edward A. Tomlinson, *Post-Conviction in Maryland: Past, Present and Future*, 45 MD. L. REV. 927 (1986); Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho’s Flawed Process*, 2 J. APP. PRAC. & PROCESS 85 (2000).

94. Findley, *supra* note 37, at 609–17.

arguing issues on appeal and post-conviction.<sup>95</sup> At least one study suggests, for example, that appellate defenders deliver superior results on appeal compared to either appointed or retained attorneys, even though defendants who pay for their lawyers should be more selective about which cases they appeal.<sup>96</sup> Many states already delegate some authority for the state's representation on appeal to the attorney general rather than local prosecutors;<sup>97</sup> both sides should be developing this expertise in all states.

A second advantage of a statewide appellate defender office is its potential to provide conflict-free counsel for ineffective-assistance-of-counsel claims, whenever those claims are raised. Limited resources for indigent-defense services make representation for every post-conviction petitioner unrealistic, but judges could appoint more petitioners counsel in their discretion, as they already do in many states.<sup>98</sup>

**3. Provide a mechanism to review bare-innocence claims.** Some innocent defendants will have no means of seeking relief in the courts so long as new evidence is admissible only to show the process was flawed, not that the result was false. Although a “stand-alone” or “bare innocence” claim under the Constitution has yet to be recognized by the Court, nothing prevents states from recognizing such a claim as cognizable in post-conviction proceedings.

Several states have already taken steps to make post-conviction review more meaningful for the wrongfully convicted, by exempting claims supported by new evidence of innocence from filing deadlines, successive petition bars, and other procedural barriers. Many have expanded post-conviction remedies to accommodate convincing stand-alone claims of innocence based on new evidence, and there is no indication that these new actual-innocence claims have been burdensome for post-conviction courts to handle. Too many states,

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95. J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The “Ethical” Issue of Issue Selection*, 80 DENV. U. L. REV. 155, 197 (2002).

96. Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROCESS 183, 184–85 (2015) (study of Iowa criminal appeals showing “appellate defenders generally perform better than court-appointed lawyers they win more cases, have fewer procedural and technical problems, seek further review in more cases, and obtain further review more often”).

97. Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 560–61 (2011).

98. King, *supra* note 9, at 2455. Or the defenders’ office itself could screen cases. *Id.* at 2454.

however, have limited innocence claims and remedies in unjustifiable ways, barring defendants whose persuasive proof of innocence is not DNA evidence, or defendants who pleaded guilty rather than going to trial.<sup>99</sup>

Instead of adding bare-innocence claims to the list of claims that can be raised in existing post-conviction procedures, a few states have adopted special judicial remedies designed particularly for claims of actual innocence. In Virginia, for example, between 16 and 27 applications are filed each year seeking a “writ of actual innocence” from the court of appeals based on non-DNA evidence.<sup>100</sup> Utah, too, provides a new judicial remedy for prisoners with non-DNA evidence of innocence, with even fewer applications.<sup>101</sup>

A third option is to establish an independent commission like the North Carolina Innocence Inquiry Commission. Based on similar commissions in Canada and the United Kingdom, the eight-member Commission operates as a separate agency, outside the judicial branch. Its members screen approximately 200 claims received annually, rejecting most of them because the claimant has no new evidence, has no way to prove innocence, or did not claim complete factual innocence. After investigating the remaining claims, the Commission decides which to transfer to a three-judge panel for a hearing and appropriate relief. Since 2007, the Commission has exonerated nine claimants. Its activities are supported by a federal grant to assist with the costs of DNA testing in cases involving DNA.<sup>102</sup> Advocates have argued that an innocence commission is a more cost-effective and manageable alternative for addressing claims of innocence than expanding existing judicial remedies or recognizing new constitutional claims.<sup>103</sup>

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99. All states now have DNA testing statutes, but these too vary in scope, sometimes available only for certain crimes or defendants, or with time limits for applying for relief, for example. For a complete listing, see DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS* § 1.8 (2016).

100. COURT OF APPEALS OF VIRGINIA STATISTICAL REVIEW 2015, at 2 tbl.1 (2016), [http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/cav/cav\\_caseload\\_rpt\\_2015.pdf](http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/cav/cav_caseload_rpt_2015.pdf); cf. *Yonga v. State*, 446 Md. 183, 216–17 (2016) (person who has pled guilty may not later avail himself of the relief afforded by petition for a writ of actual innocence).

101. See generally Nic Caine, *Factually Innocent Without DNA? An Analysis of Utah’s Factual Innocence Statute*, 2013 UTAH L. REV. ONLAW 258; Justin Higginbottom, *Shadow of Guilt: Until the Utah Supreme Court Weighs in on Her Factual Innocence, Debra Brown Lives One Day at a Time*, SALT LAKE CITY WEEKLY (May 8, 2013), <http://www.cityweekly.net/utah/article-17508-shadow-of-guilt.html>.

102. LINDSEY GUICIE SMITH, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, 2015 ANNUAL REPORT 5 (2016).

103. King, *supra* note 38, at 229 (collecting authority).

### C. STEPS TO NARROW THE LAW DEVELOPMENT GAP

Three very specific barriers blocking needed review of bargaining in guilty pleas should be lifted in order to allow appellate courts to guide the bargaining process. Appeal waivers and guilty pleas undoubtedly shield valid claims from appellate review: “[t]he whole point of a waiver ... is the relinquishment of claims regardless of their merit.”<sup>104</sup> But terms in plea agreements waiving the right to appeal should not protect the attorneys who negotiate them from judicial scrutiny of their own conduct. Authorities in at least eight states have already interpreted ethics rules to bar defense counsel from advising a client to waive the right to bring a claim of ineffective assistance challenging that same counsel’s representation; more states should join them.<sup>105</sup> Because even unethical waivers remain enforceable in the courts, states should also consider barring enforcement of ineffectiveness waivers under state law, or “creating a presumption of invalidity, subject to rebuttal by a specified showing (such as clear benefit to the defendant or extraordinary circumstances).”<sup>106</sup>

Second, courts committed to uncovering false convictions and their causes should not enforce waivers of the right to DNA-evidence preservation or testing, nor the right to use the remedy designated for claims of actual innocence.<sup>107</sup>

In addition, the minority of states that presently do not recognize the “conditional plea” should adopt this procedure. A conditional plea permits a defendant to plead guilty while reserving the right to appeal a specified issue. Required consent to a conditional plea by the court and the prosecutor can limit claims reserved for appeal to those that present close or recurring questions that would otherwise escape review.<sup>108</sup>

Finally, to allow appellate courts to address issues of concern to the government and the public now shielded from scrutiny because they recur in cases ending in acquittal, states could ensure that judicial review of lower-court action is available through “advisory appeals.” An advisory appeal cannot disturb the defendant’s acquittal, but it does permit the appellate courts to clarify and correct misunderstandings about important legal issues for other

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104. United States v. Medina-Carrasco, 815 F.3d 457, 463 (9th Cir. 2016).

105. Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance*, 51 DUQ. L. REV. 647, 662–63 (2013); see also Susan Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015).

106. King, *supra* note 105, at 669–672.

107. See generally Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952 (2012).

108. See generally LAFAYE ET AL., *supra* note 11, § 21.6(b); Marjorie Whalena, “A Pious Fraud”: *The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480 (2012).

cases.<sup>109</sup> To ensure that this mechanism is reserved for recurring and important issues, appellate courts should have the discretion to select which prosecution requests for review they will grant.

### RECOMMENDATIONS

This chapter has outlined three sets of reforms to improve the ability of state courts to correct error and develop the law in criminal cases.

- 1. Provide more efficient review without increasing the risk that erroneous convictions will escape correction.** Suggested steps include: (1) eliminating duplicative appeals-of-right; (2) adopting e-filing and digital recording in all trial courts along with a central system for digital transcription; (3) creating separate review mechanisms for appeals that challenge only the sentence; (4) improving case screening instead of replacing mandatory with discretionary review; and (5) modifying rather than eliminating oral argument.
- 2. Address error-correction deficiencies exposed by research into cases of wrongful conviction.** Three reforms were outlined in this chapter: (1) providing a more accessible forum for litigating ineffective assistance of trial counsel and other non-record claims; (2) establishing statewide appellate defender and state's attorneys' offices to enable better advocacy on appeal and new counsel for non-record claims; and (3) recognizing a claim of actual innocence that can provide relief from conviction through post-conviction review, or a process specially designed for that purpose, such as an innocence commission.
- 3. Address gaps in appellate oversight of the plea-negotiation process and errors disfavoring the prosecution that lead to acquittal.** To give reviewing courts the information and opportunity they need to guide the development of the law, states should: (1) allow conditional pleas with the consent of the court and the state; (2) reject waivers of the rights to seek DNA testing or access the state's remedy for actual innocence; (3) refuse to enforce terms in plea agreements purporting to waive challenges to the competency of counsel; and (4) authorize the prosecution to seek "advisory appeals" of recurring error, at the discretion of the reviewing court.

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109. LAFAVE ET AL., *supra* note 11, § 27.3(a); Poulin, *supra* note 53, at 11–12.